



Federal Communications Commission
Washington, D.C. 20554

October 29, 2008

DA 08-2392

In Reply Refer to:
1800B3-KD

Released: October 29, 2008

Barry Friedman, Esq.
Thompson Hine, LLP
1920 N Street, N.W., Suite 800
Washington, DC 20036

Birach Broadcasting Corp.
c/o Lauren A. Colby, Esq.
Law Office of Lauren A. Colby
10 E. Fourth St.
P.O. Box 113
Frederick, MD 21705-0113

In re: WAGE(AM), Leesburg, VA
Facility ID No. 54876
Potomac Radio, LLC
File No. BP-20070118AEM

Informal Objection

Dear Counsel:

We have before us: (1) the referenced application (“Application”) of Potomac Radio, LLC (“Potomac”) for minor change in the licensed facilities of Station WAGE(AM), Leesburg, Virginia (“Station”); (2) an Informal Objection to the Application, filed by Birach Broadcasting Corp. (“Birach”) on February 12, 2007; and (3) related responsive pleadings.¹ The Application is accompanied by an Interference Reduction Agreement (“IRA”), entered into by and between Potomac and Nations Radio, LLC (“Nations Radio”), licensee of Station WBIS(AM), Annapolis, Maryland, as well as an environmental assessment (“EA”). For the reasons set forth herein, we: (1) approve the IRA; (2) find that no further environmental processing is warranted; (3) deny the Informal Objection filed by Birach; and (4) grant the Application, as amended, subject to the condition set forth in its construction permit.

I. Background

The Station is currently licensed to operate on 1200 kHz with a power of 5.0 kW daytime and 1.0 kW nighttime, employing a directional antenna system. In the Application, Potomac proposes to change the Station’s frequency to 1190 kHz and increase daytime power to 50 kW using a three-tower directional antenna array at a new site. Potomac also plans to increase the Station’s nighttime power to 3.0 kW using

¹ Potomac filed an opposition (“Opposition”) on February 23, 2007, to which Birach replied on March 5, 2007 (“Reply”).

a four-tower directional antenna array at the presently licensed site.² Potomac submitted an IRA with its Application, pursuant to which Nations Radio will surrender its license for WBIS(AM). The parties contend that approval of the IRA and grant of the Application will eliminate existing prohibited overlap to a substantial area and population and will leave no area receiving fewer than ten aural broadcast services. Because the Station is located in a flood plain, Potomac also submitted an EA.

On February 12, 2007, Birach filed an Informal Objection to the Application, asserting that Potomac and/or its principals engaged in improper, anticompetitive tactics “designed to mislead administrative agencies” in an effort to defeat applications filed by Birach.³ As such, Birach requests that the Application be designated for hearing on issues relating to the character qualifications of Potomac.

II. Discussion

A. Interference Reduction Agreement

In recent years the Commission has acted to revitalize and improve the AM service.⁴ As part of this effort, we permit licensees to reach agreements to reduce power or cancel their licenses in order to permit other licensees to improve service, and to reduce overall interference.⁵ In amending Section 73.3517 of the Rules⁶ to permit contingent applications that would “reduce interference to one or more AM stations or . . . otherwise decrease the area of interference,” the Commission removed regulatory barriers that had previously prevented or discouraged individual AM licensees from entering into private agreements to decrease inter-station interference and improve the overall quality of AM service.⁷

When such contingent agreements are proposed that would involve the deletion or modification of existing AM stations, we must engage in a case-by-case public interest determination. In particular, the parties must demonstrate that a “local service floor” would remain in the community losing a local transmission service as a result of the proposed agreement.⁸ The Commission did not choose to “establish a quantifiable service floor that can uniformly be applied with respect to the replacement of deleted facilities,” opting instead for the case-by-case approach. However, the Commission did determine that, at a minimum, an agreement that resulted in the deletion of a station could not create a “white” or “gray” area.⁹

When undertaking the case-by-case analysis, we generally consider four factors: the amount of AM interference that would be eliminated in relation to the number of AM and FM services remaining

² Potomac indicates that it will file a separate application for the nighttime portion of the proposal. *See* Application, Section III-A, Item 11.

³ Objection at 4.

⁴ *See, e.g., Review of the Technical Assignment Criteria for the AM Broadcast Service*, Report and Order, 6 FCC Rcd 6273 (1991), *recon. granted in part and denied in part*, 8 FCC Rcd 3250 (1993).

⁵ *Policies to Encourage Interference Reduction between AM Broadcast Stations*, Report and Order, 5 FCC Rcd 4492 (1990) (“*Interference Reduction*”).

⁶ 47 C.F.R. § 73.3517.

⁷ *Interference Reduction*, 5 FCC Rcd at 4492.

⁸ *Id.* at 4494.

⁹ *Id.* A “white” area is one that receives no full-time aural service; a “gray” area receives only one full-time aural service. 47 C.F.R. § 73.14; *Interference Reduction*, 5 FCC Rcd at 4494 n.14.

available to the areas that would lose service; the areas and populations that would gain service as a result of the proposed change; whether the proposal would create any white or gray areas; and the availability of AM and FM service in the area that will experience a reduction in service due to the proposed contingent facilities changes.¹⁰ We will therefore examine the parties' IRA here in light of these four factors.

Reduction in Interference. The IRA states that the licensed facilities of WBIS are predicted to cause interference to the licensed operations of WFYL(AM), King of Prussia, Pennsylvania. It demonstrates that the WBIS(AM), Annapolis, Maryland, interfering contour overlaps a portion of the WFYL 0.5 mV/m coverage contour. Removal of WBIS will permit interference-free service by WFYL to 113,749 people (2000 US Census data) over an area of 419 square kilometers.

Increased Service. The IRA indicates that the Station's proposed power increase will result in the 0.5 mV/m contour covering 6,283,850 people in an 18,060 square kilometer area. This is 5,090,414 persons and 12,222 square kilometers greater than the Station's currently licensed 0.5 mV/m contour coverage.¹¹ No additional interference is predicted when WBIS is excluded from the analysis.

Local Service Floor/White or Gray Area. The parties indicate that, even after surrender of the WBIS license, the entire WBIS 0.5 mV/m coverage area will continue to receive primary service from 10 stations, and that this action would not create any white or gray areas.¹² They further indicate that four stations licensed to Annapolis, Maryland will continue to provide local service to that community. Our analysis corroborates these claims. Thus, there is a sufficient local service floor, notwithstanding removal of the WBIS signal, to warrant grant of the application.

B. Environmental Assessment

Because the Station's proposed daytime antenna location is in a 100-year flood plain and in an area that has been delineated a wetland, Potomac submitted an EA required by Section 1.1307 of the Rules on July 28, 2008.¹³ Public Notice of the EA was issued on August 26, 2008.¹⁴ The Commission received no comments in response to the Notice.

Upon examination of the EA, we find that the information supplied satisfies the requirements specified in Section 1.1311 of the Rules.¹⁵ Accordingly, pursuant to Section 1.1308 of the Rules,¹⁶ we find that the Station's proposed daytime antenna system will have no significant environmental impact on the quality of the human environment, and no further environmental processing is warranted.

¹⁰ *Interference Reduction*, 5 FCC Rcd at 4494.

¹¹ The Station's licensed daytime coverage is 1,193,436 persons according to the 2000 US Census over a land area of 5,838 kilometers.

¹² *Interference Reduction Agreement* at 1.

¹³ See FCC File No. BP-20070118AEM, as amended.

¹⁴ See *Public Notice*, "Environmental Assessment Accepted for Filing/Environmental Action," Report No. MB/AD-08-01 (August 26, 2008) ("Notice").

¹⁵ See 47 C.F.R. § 1.1311.

¹⁶ See 47 C.F.R. § 1.1308.

C. Birach Informal Objection

Birach asserts that Potomac and its principals, James Weitzman and Edwin Tornberg, have “developed an unhealthy obsession with competition” and have engaged in tactics meant to mislead state and federal agencies and thwart competition. As evidence of such behavior, Birach points to a recent zoning hearing before the Montgomery County Board of Zoning Appeals pertaining to Birach’s interest in erecting four AM towers on a parcel of property in Damascus, Maryland. Birach asserts that Potomac’s attorney, Barry Friedman, attended the meeting but failed to disclose that he was appearing on behalf of the principals, instead stating that he was appearing on behalf of the Damascus Residents for Responsible Tower Siting, Inc. (“DRRTS”).¹⁷ Birach further notes that Mr. Friedman was listed as the attorney of record in an informal objection filed by DRRTS against an application filed by Birach for a minor modification of the facilities of Station WDMV(AM), Walkersville, MD, but alleges that Potomac was in fact the entity behind the objection.¹⁸ In sum, Birach maintains that DRRTS is essentially an alter ego for Potomac’s principals, and asserts that Mr. Friedman’s representation of both Potomac and DRRTS demonstrates the relationship between these two entities. Given such tactics, Birach argues that the Application should be designated for an evidentiary hearing regarding Potomac’s character qualifications.

In Opposition, Potomac argues that the Objection is little more than a strike pleading, noting that Birach fails to reference the Application or claim that the Application is in violation of any Rules or regulations.¹⁹ It further states that neither Potomac nor its principals nor any entity in which they have an ownership interest, is a member, director or officer of, or possess any control over, DRRTS.²⁰ As evidence of DRRTS’s existence as an entity distinct from Potomac, Potomac points to the fact that Mr. Friedman is not the sole attorney representing DRRTS and provides examples of activities conducted by members of DRRTS at numerous Montgomery County hearings.²¹

Informal objections must, pursuant to Section 309(e) of the Communications Act of 1934, as amended (“Act”),²² provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the Application would be *prima facie* inconsistent with Section 309(a) of the Act,²³ which governs our evaluation of minor change applications.

¹⁷ *Id.* at 4-5.

¹⁸ *See* Objection at 6.

¹⁹ *See* Opposition at 2. Potomac also asserts that Birach lacks standing to bring the Objection. However, since standing is not a prerequisite to the filing of an informal objection, Potomac’s contention that Birach does not have standing is misplaced. *See Nextel License Holdings 4, Inc.*, Order, 17 FCC Rcd 7028, 7033 (WTB 2002) (noting “there is no standing requirement to file an informal objection pursuant to [47 C.F.R. § 1.41.]”); *see also* 47 C.F.R. § 73.3587.

²⁰ *Id.* at 4.

²¹ *Id.* at 5. For example, Potomac notes that DRRTS has also been represented by David W. Brown, Esq., of the law firm of Knopf & Brown. *See* Opposition, Exhibit A. Indeed, Mr. Brown submitted a pre-hearing statement in the very zoning hearing with which Birach takes issue. *See id.* Potomac also submits the minutes of the Montgomery County Department of Technology Services Transmission Facility Coordinating Group meeting, held on July 12, 2007, in which the record reflects the participation of 12 DRRTS members. *See* Opposition, Exhibit D.

²² 47 U.S.C. § 309(e).

²³ 47 U.S.C. § 309(a). *See, e.g., WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990), *aff’d sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *rehearing denied* (Sept. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986)

Specifically, Section 309(a) provides that we are to grant an application if, upon consideration of the application and pleadings and other such matters of which we may officially take notice, we find that the public interest, convenience, and necessity will be served by the granting of such application. If, however, the applicant fails to meet that standard, the Commission may deny the application after notice and opportunity for a hearing under Section 309(e) of the Act.

Upon review of all the pleadings in this case, we conclude that Birach has failed to raise a substantial and material question of fact as to whether Potomac has intentionally misled either the Commission or any other government agencies for its own competitive gain. It is an abuse of process to file an application with the Commission in the name of a surrogate and thereby deny the Commission and the public the opportunity to review the qualifications of the real party.²⁴ However, DRRTS has not filed an application, but instead has objected to certain Birach applications at the Commission and at zoning boards. Even if DRRTS were a surrogate for Potomac, Birach has not shown that any of the DRRTS objections presented an abuse of process.²⁵ Submitting truthful information about a pending application, even when done anonymously or through a surrogate, is helpful rather than harmful to the agency reviewing the application.²⁶ In any event, however, Birach has not presented evidence that Potomac and/or its principals have an undisclosed ownership interest in DRRTS, that Potomac controls DRRTS, or that DRRTS is otherwise acting as a surrogate for Potomac. The fact that Potomac and DRRTS share the same attorney is insufficient evidence of a surrogate relationship.²⁷ Moreover, we find that Potomac has submitted persuasive evidence that DRRTS and Potomac are separate entities, thus negating the argument that Potomac has attempted to mislead the Commission by filing pleadings through a surrogate entity.²⁸ Thus, after consideration of the totality of the evidence before us, we find that Birach has failed to raise a substantial and material question of fact calling into question Potomac's character or its basic qualifications as a licensee as to require an evidentiary hearing. Accordingly, we deny Birach's objections and grant the Application

(informal objections, like petitions to deny, must contain adequate and specific factual allegations sufficient to warrant the relief requested).

²⁴ See *State of Oregon by and through the State Board of Higher Education for the Benefit of Southern Oregon University*, Letter, 22 FCC Rcd 17633, 17665 (MB 2007).

²⁵ For example, Birach does not claim that DRRTS objections constitute "strike pleadings." See, e.g., *3 Daughters Media, Inc.*, Letter, 22 FCC Rcd 9047, 9052 (MB 2007). To successfully raise such an issue, the "requesting party must make a threshold showing that the primary and substantial purpose behind the filer's action is delay." *Id.* Birach has made no such showing.

²⁶ See *1998 Biennial Regulatory Review*, Report and Order, 13 FCC Rcd 23056, 23064-65 (1998) (noting that "the Commission relies on members of the public to act as private attorneys general to assist in overseeing the conduct of applicants and licensees and in fulfilling our statutory functions.").

²⁷ See, e.g., *Sevier Valley Broadcasting, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 9795, 9798 (1995) (rejecting the argument that shared counsel between two entities is evidence requiring a finding of common control); *Nexstar Broadcasting, Inc. and Mission Broadcasting, Inc.*, Letter, 23 FCC Rcd 3528 (MB 2008) (same).

²⁸ With regard to the issue of whether Potomac made misrepresentations to other government agencies, including the Montgomery County Board of Zoning Appeals, the Commission has previously determined that, in deciding character issues, it will consider certain forms of adjudicated, non-FCC related misconduct that includes: (1) fraudulent statements to government agencies; (2) felony convictions; and (3) mass media-related violations of anti-competitive and antitrust statutes. See *Policy Regarding Character Qualifications in Broadcast Licensing*, Policy Statement and Order, 5 FCC Rcd 3252, 3252-53 (1990) ("*Character Policy Statement*"), modified, 6 FCC Rcd 3448 (1991), and 7 FCC Rcd 6564 (1992). Civil misrepresentations may also be considered on a case-by-case basis. See *Character Policy Statement*, 6 FCC Rcd at 3448. Birach, however, makes no claim that its allegations ever have been adjudicated by any court or other legal or administrative tribunal.

III. Conclusion and Ordering Clauses

Based on the above, we find that Birach has failed to raise a substantial and material question of fact warranting further inquiry. We further find grant of the Application is consistent with the public interest, convenience and necessity.

Accordingly, IT IS ORDERED that the Informal Objection filed by Birach Broadcasting Corporation IS DENIED.

IT IS FURTHER ORDERED that the application filed by Potomac Radio LLC for modification of the facilities of Station WAGE(AM), Leesburg, VA (File No. BP-20070118AEM) IS GRANTED, conditioned as follows:

This action shall be conditioned upon the surrender of the license of WBIS(AM), Annapolis, Maryland (Facility ID No. 2297), to the Commission for cancellation prior to the commencement of program test authority by the WAGE(AM) facility authorized by the subject construction permit, pursuant to the discontinuance of operation provisions of 47 C.F.R. Section 73.1750.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Potomac Radio, LLC