



**Federal Communications Commission
Washington, D.C. 20554**

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Birach Broadcasting Corporation
21700 Northwestern Highway
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Scott Powell
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In re: **AM Broadcast Auction No. 84
MX Group 84-147**

Birach Broadcasting Corporation
WCXI(AM), Fenton, Michigan
Facility ID No. 10475
File Nos. BMJP-20040126AJD
BMJP-20051026AAJ

**Applications for Major Modification to
AM Broadcast Station**

Scott Powell
Winfield, West Virginia
Facility ID No. 160946
File No. BNP-20040129AAC

**Application for New AM Station
Construction Permit**

Dear Applicants:

We have before us two mutually exclusive ("MX") AM construction permit applications. Birach Broadcasting Corporation ("Birach") proposes a major modification to the facilities of Station WCXI(AM), Fenton, Michigan, seeking to change the community of license from Fenton to Wixom, Michigan, and Scott Powell ("Powell") proposes a new AM station at Winfield, West Virginia. We also have before us a Joint Petition for Approval of Settlement Agreement ("Joint Request" or "Settlement Agreement") filed by both parties on October 27, 2005, and a Form 301 long-form application filed by Birach on October 26, 2005. For the reasons set forth below, we deny the Birach waiver request, dismiss the Birach Form 301 long-form application, deny the Joint Request, dismiss the Settlement Agreement, and retain the Powell application in pending status.

Background. Birach filed an FCC Form 175 application to change the WCXI(AM) community of license during the filing window for AM Auction 84 (“Auction 84”).¹ The application was determined to be mutually exclusive with the application filed by Scott Powell, which proposed a new AM station at Winfield, West Virginia. These two applications were designated MX Group 84-147 in Auction 84. On June 15, 2005, the Media Bureau released a *Public Notice* containing a list of 802 MX AM Auction No. 84 window-filed Form 301 tech box applications.² The *AM MX Public Notice* defined three categories of MX applications, detailed the filings required for each category, and specified a September 16, 2005, deadline for submitting the required filings to the Commission. This filing deadline was extended to October 31, 2005, because of Hurricane Katrina.³ MX Group 84-147 was listed as a Category I MX group, eligible for settlement. Category I applicants were required to file a settlement agreement, an engineering solution resolving all mutual exclusivities, or a Section 307(b) showing by the filing deadline. Accordingly, on October 27, 2005, Birach and Powell filed the Settlement Agreement. Under the terms of the Settlement Agreement, Birach is to reimburse Powell for its legitimate and prudent expenses in exchange for the dismissal of his Winfield, West Virginia, tech box application.

Along with the Settlement Agreement, on October 26, 2005, Birach filed a Form 301 long-form application, seeking to implement the community of license change for Station WCXI(AM) to Wixom, Michigan.⁴ On October 24, 2005, Birach also filed a Section 307(b) submission, addressing the implications of the proposed community change under Section 307(b) of the Communications Act of 1934, as amended (the “Act”), which directs the Commission to make a “fair, efficient, and equitable” distribution of radio service among communities in the United States.⁵ Birach first supplemented its Section 307(b) showing on March 28, 2006 (“March 28, 2006 First Section 307(b) Supplement”), and then filed a second supplement to its Section 307(b) showing on January 17, 2007 (“January 17, 2007 Second Section 307(b) Supplement”). On October 10, 2007, Birach filed a Memorandum of Law, in support of the station relocation application. Birach filed supplemental correspondence and application amendments on February 19, 2009, February 25, 2009, March 17, 2009, March 25, 2009, March 26, 2009 and April 6, 2009.

WCXI(AM) is the sole local transmission service licensed at Fenton, Michigan (2000 Census population 10,582). Birach proposes to change WCXI(AM)’s community of license to Wixom, Michigan (2000 Census population 13,267), as that community’s first local transmission service. Birach’s Section 307(b) analysis indicates that Fenton, located within the Flint, Michigan, Urbanized Area, will continue to receive protected service⁶ from at least five stations.⁷ Birach contends that Wixom is an incorporated

¹ See *AM New Station and Major Modification Auction Filing Window; Minor Modification Application Freeze*, Public Notice, 18 FCC Rcd 23016 (MB/WTB 2003).

² See *AM Auction No. 84 Mutually Exclusive Applicants Subject to Auction, Settlement Period Announced for Certain Mutually Exclusive Application Groups; September 16, 2005 Deadline Established for Section 307(b) Submissions*, Public Notice, 20 FCC Rcd 10563 (MB 2005) (“*AM MX Public Notice*”).

³ See *Auction No. 84 Settlement Period and Section 307(b) Submission Deadline Extended to October 31, 2005*, Public Notice, 20 FCC Rcd 14492 (MB 2005).

⁴ Birach’s long-form application was accepted for filing and placed on Public Notice on September 7, 2007. See *Broadcast Applications*, Public Notice, Report No. 26566 (MB Sept. 7, 2007).

⁵ 47 U.S.C. § 307(b).

⁶ 5 mV/m for AM stations and 3.16 mV/m (70 dBμ) for FM stations.

community governed by a mayor, city council and city manager, and is considerably larger than Fenton, an unincorporated census designated place. As Wixom possesses all of the indicia of a substantial, independent community, Birach maintains that the application fully complies with the objectives of Section 307(b) of the Act.

Discussion. *Section 307(b).* Our policies on allowing broadcast stations to change their communities of license are based on Section 307(b) and the goals of fair, efficient, and equitable distribution of radio service that underlie it. Our *FM Assignment Policies* delineate three core priorities: provision of first aural reception service to a community, provision of second aural reception service to a community, and provision of first local transmission service at a community.⁸ The fourth priority is “other public interest matters,” which encompasses any other factors that the Commission may take into consideration.⁹ Retention of the first local transmission service at Fenton, and the institution of first local transmission service at Wixom, implicate Priority (3) – first local transmission service. However, notwithstanding that the existing and proposed arrangement of stations both trigger the same allotment priority, the Commission prohibits the removal of an existing station representing a community’s sole local transmission service.¹⁰ This policy is subject, as are all Commission policies, to waiver under appropriate circumstances.¹¹ However, the Commission has emphasized that “the fact that a proposal would create a new local service (at the expense of an existing service) is not sufficient, by itself, to warrant a waiver.”¹² Rather, such a proposal “is presumptively contrary to the public interest.”¹³ In this regard, the Commission has stated that:

The public has a legitimate expectation that existing service will continue, and this expectation is a factor we must weigh independently against the service benefits that may result from reallocating of a channel from one community to another, regardless of whether the service removed constitutes a transmission service, a reception service, or both.

⁷ Birach states that, according to the 2005 BIA Yearbook, there are 16 other AM and FM stations licensed to the Flint Urbanized Area. March 28, 2006 First Section 307(b) Supplement at 2.

⁸ *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC2d 88, 91-93 (1982). Priorities (2) and (3) are co-equal. The FM allotment priorities are applied to Section 307(b) determinations for community change proposals for AM stations. *Allesandro Broadcasting Co.*, Decision, 99 FCC2d 1 (Rev. Bd. 1984).

⁹ *Revision of FM Assignment Policies and Procedures*, 90 FCC2d at 93.

¹⁰ *Amendment of the Commission’s Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, Report and Order, 4 FCC Rcd 4870 (1989) (“*New Community R&O*”), recon. granted in part, Memorandum Opinion and Order, 5 FCC Rcd 7094, 7097 (1990) (“*New Community MO&O*”). The Commission re-affirmed this policy in *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Report and Order, 21 FCC Rcd 14212, 14227-30 (2006) (“*Community of License R&O*”).

¹¹ *Id.* On waiver standards generally, see *Northeast Cellular Telephone Co. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“*Northeast Cellular*”) (“[A] waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest,” citing *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969) (“*WAIT Radio*”).

¹² *New Community MO&O*, 5 FCC Rcd at 7097.

¹³ *Id.*

Removal of service is warranted only if there are sufficient public interest factors to offset the expectation of continued service.¹⁴

In its March 28, 2006 First Section 307(b) Supplement, Birach requests to revise its original Section 307(b) showing, based on subsequently released staff decisions dismissing AM applications such as Birach's, that sought to remove the only local station from a community.¹⁵ Birach claims that it could not have anticipated these decisions, because they relied upon a 1989 Report and Order that was expressly confined to FM and TV stations.¹⁶ In AM cases, Birach argues, the Commission allows station location changes, even where a community would lose its only transmission service, upon a straightforward showing that the community losing local service already has an abundance of service from other stations.¹⁷

In its January 17, 2007 Second Section 307(b) Supplement, while acknowledging the general policy, and the recent Commission affirmation "that the sole operating local transmission service in a community should not be removed absent a compelling public interest showing,"¹⁸ Birach requests that it be waived in this instance, contending that the application falls within the "loss of transmitter site" circumstance discussed by the Commission, favoring waiver.¹⁹ According to Birach, the WCXI(AM) application was specifically filed because of a "threatened loss of transmitter site."²⁰ Birach also notes that it had been evicted from the transmitter site of a second station it owns in the Fenton area, WPON, Walled Lake, Michigan. It therefore searched for a new transmitter site to accommodate both stations. Birach located such a transmitter site, and made a \$7,000 deposit on a long-term lease. Birach proposes to co-locate Station WCXI(AM) with Station WPON at the new transmitter site, which is in the Detroit Urbanized Area.²¹ Birach further argues that, because of severe land shortages in the area, a site could not be found that would enable Station WCXI(AM) to remain in Fenton. Since coverage of Fenton with the

¹⁴ *Id.*

¹⁵ See, e.g., *Kovas Communications of Indiana, Inc.*, Letter, 21 FCC Rcd 2196 (MB 2006); *Fort Bend Broadcasting Company*, Letter, 21 FCC Rcd 2953 (MB 2006).

¹⁶ Birach is referring to the *New Community R&O* and *New Community MO&O*.

¹⁷ Birach cites *Elijah Broadcasting Corporation*, Letter, 16 FCC Rcd 21561 (MB 2001) ("*Elijah*") for this proposition.

¹⁸ *Community of License R&O*, 21 FCC Rcd at 14229.

¹⁹ "An AM licensee that has lost its transmitter site, and due to terrain or lack of available land cannot find a substitute site that would provide adequate community coverage, might also be able to present a compelling case for waiver." *Community of License R&O*, 21 FCC Rcd at 14229-14230.

²⁰ January 17, 2007 Second Section 307(b) Supplement at 2. Birach anticipates "that the pressures resulting from urban sprawl and increased population density will eventually lead to our expulsion or eviction from the current WCXI transmitter site." Birach Declaration to January 17, 2007 Second Section 307(b) Supplement at 2 ("Birach Declaration").

²¹ On November 4, 2004, Birach filed a construction permit application for Station WPON to move to that new site (File No. BP-20041102ALD), and the application was granted on March 8, 2005. This permit was cancelled at the applicant's request on March 4, 2008. Birach filed another modification application at the same site on February 29, 2008 (File No. BP-20080229AAI), which was granted on February 23, 2009.

requisite city-grade signal is impossible from the new transmitter site, Birach has proposed to change the station location to the new community of Wixom.

When an applicant seeks waiver of a rule, its burden is to plead with particularity the facts and circumstances that warrant such action.²² Thus, an applicant for waiver “faces a high hurdle even at the starting gate.”²³ While the Commission must consider carefully all waiver requests, such requests must be supported by a compelling showing in order to be granted.²⁴ “A waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.”²⁵ We reject Birach’s arguments that the dealings surrounding the community of license change constitute special circumstances, and that deviation from the policy prohibiting removal of a sole local transmission service will serve the public interest, offsetting the expectation of continued transmission service at Fenton, and therefore, deny its request for waiver.

We initially find unconvincing the foundation of Birach’s argument - the necessity of relocating Station WCXI(AM). Birach submits that it has an oral, month-to-month lease at its present Fenton transmitter site. Because it has no long term lease, Birach maintains that it is particularly susceptible to losing the transmitter site. However, Birach’s situation is unexceptional, and its alleged vulnerability is of its own making. The premise of this application - that one of the more distressed areas of the country is experiencing sharply rising land prices and not a single land owner in Fenton is willing to enter into a long term lease for the construction of a radio station - is implausible. In addition, Birach’s position is based on circumstances that have yet to occur. This situation falls short of the circumstances described by the Commission in which it would consider waiver.²⁶

We also disagree with Birach’s assessment of the potential relocation area for the Fenton transmitter site. Birach argues that the site relocation area is limited by the Nighttime Interference Free (“NIF”) contour (23 mV/m) of Station WXCI(AM) and the requirement to cover 100 percent of Fenton with this signal. Based on these restrictions, Birach concluded that it is a very small area of only 26 square miles to the west of Fenton in which it could provide the required NIF community of license coverage. We initially note that Birach has failed to specify the methodology it used to define the potential relocation area. While we agree that the NIF contour is a primary limiting factor in identifying a suitable transmitter site, Section 73.24(i) of the Rules requires only 80 percent coverage of the community of license. Birach’s assumption, therefore, is unnecessarily restrictive, as an 80 percent coverage requirement would appreciably expand the potential relocation area. In fact, applying an 80 percent coverage standard, the staff has identified a substantially larger area suitable for relocation.²⁷ In addition,

²² See *Columbia Communications Corp. v. FCC*, 832 F.2d 189, 192 (D.C. Cir. 1987) (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 644, 666 (D.C. Cir. 1968)).

²³ *WAIT Radio*, 418 F.2d at 1157.

²⁴ *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090 (1999) (citing *Stoner Broadcasting System, Inc.*, Memorandum Opinion and Order, 49 FCC 2d 1011, 1012 (1974)).

²⁵ *Northwest Cellular*, 897 F.2d at 1166.

²⁶ See *supra* note 22.

²⁷ Indeed, because the staff has routinely waived the 80 percent coverage requirement when a station loses its transmitter site, the potential relocation area could be even larger. This waiver policy is grounded on the facts

Birach fails to give good reason for limiting its site search to land parcels of at least 11 acres. Birach claims that an 11 acre parcel is necessary to support the facilities and ground system proposed in the application. Station WCXI(AM) currently operates with a two tower array for daytime and nighttime operations. Contrary to Birach's assertion, we anticipate that, at most, a rectangular parcel of 6.2 acres would be required. The proposed three-tower daytime, two-tower nighttime facility is not required if the station remains at Fenton.

Moreover, Birach has failed to demonstrate that it diligently undertook an exhaustive search for alternative sites. The Commission has always required detailed documentation whenever a "lack of suitable site" argument is raised.²⁸ The Commission recently reiterated this standard in *Community of License R&O* when it confirmed that:

We also remind applicants that our waiver standard requires a detailed recitation of facts and circumstances, including documentary or testimonial evidence where appropriate, demonstrating special circumstances that warrant deviation from the policy, and showing that such deviation serves the public interest. For example, the bare assertion that a station has lost its site, absent evidence showing an exhaustive but fruitless search for sites from which a sole local transmission service could comply with our technical rules, would not suffice to justify grant of a waiver to allow the station to move to another community.²⁹

It is not sufficient to ask a real estate broker to run a search in the Multiple Listing Service for 11-acre parcels that are zoned for industrial use.³⁰ Quite probably, the search restrictions imposed on the broker by Birach unnecessarily hindered her efforts. Even so, we are not persuaded that the effort represented a comprehensive or in-depth search.

Furthermore, Birach fails to appreciate that the Commission has generally barred the relocation of a community's sole local transmission service since 1990.³¹ Birach reiterates that the Commission newly

presented here – a small NIF contour that makes it difficult to identify sites that would provide NIF service to at least 80 percent of the community of license.

²⁸ See, e.g., *R&S Media*, Memorandum Opinion and Order and Order to Show Cause, 19 FCC Rcd 6300 (MB 2004); *Greater Media Company*, Memorandum Opinion and Order, 15 FCC Rcd 7090 (1999). In the *R&S Media* case, for example, the applicant detailed its extensive six month search, including its collaboration with BLM officials, in evaluating other potentially available sites. We are not persuaded by Birach's attempt to distinguish *R&S Media* because it involved the potential siting for an FM station, which requires less land. Birach states that 11 acres is a far larger parcel than is required for an FM station and thus it was a "rather simple matter for [its] real estate broker to demonstrate from the use of MLS listings that no such site existed which was available for lease or sale." Birach March 25, 2009 Supplement at 2. Birach misapprehends the relevance of *R&S Media*.

²⁹ *Community of License R&O*, 21 FCC Rcd at 14230. (first citation omitted). See also *Pacific Broadcasting of Missouri, LLC*, Memorandum Opinion and Order, 18 FCC Rcd (2003) (Applicant sought removal of condition requiring replacement service at original community before commencing operations at new community; Commission found that applicant failed "to demonstrate that it has exhausted all possibilities for temporary operation" at current community).

³⁰ Declaration of Christy Brown-Ambrose, State of Michigan, County of Genesee, October 9, 2008. (Attachment 19 to Form 301 long form application BNP-20051026AAJ).

³¹ Moreover, the Commission has also held that the fact that a licensee proposes to remove a station to a larger community does not by itself justify the removal of a smaller community's sole local broadcast service. See, e.g.,

expanded the prohibition on removal of sole local service to include AM in the 2006 *Community of License R&O*, arguing that the Commission looked only to overall service levels when considering the move-out of an AM station that was a community's sole local service, citing *Elijah*.³² We reject Birach's claim that it is entitled to equitable relief based on the suggestion that the Commission expanded this prohibition to include AM stations, only after it had acquired the shared transmitter site. Nothing in the *New Community MO&O* limits the policy to removal of sole local FM and TV services. The Commission has always treated the AM and FM services as "joint components of a single aural medium."³³ Moreover, Birach's argument was specifically rejected on reconsideration in the *Teresa Prieto* decision.³⁴ While *Elijah* does not specifically endorse Birach's argument, we recognize that the case did, however, permit the removal of an AM station that was the sole local station in the community. The decision neither mentions the *New Community MO&O*, nor tries to harmonize the action with the general prohibition of such moves. Accordingly, on this issue, it appears to be an erroneous staff action taken without consideration of Commission policy as set forth in *New Community R&O* and *New Community MO&O*, and will be given no precedential weight.³⁵

Having carefully considered all of the arguments and evidence presented, we cannot find, on the existing record in this case, that there are sufficient public interest factors to offset the expectation of continued local service at Fenton, Michigan. Accordingly, we cannot find that the public interest, convenience, and necessity will be served by Birach's proposal. Therefore, the waiver request of Birach Broadcasting Corporation IS DENIED. The tech box application (File Nos. BMJP-20040126AJD) and the Form 301 long form application (BNP-20051026AAJ) filed by Birach Broadcasting Corporation for major modification to change the community of license of Station WCXI(AM), Fenton, Michigan, ARE DISMISSED.

Settlement Agreement. We also deny the Joint Request between Birach and Powell. Approval of this Settlement Agreement would not serve the public interest primarily because a principal component of the Settlement Agreement requests that we grant the Birach Form 301 long form application. In light of the public interest determinations made with respect to Birach's application, and our finding that the Birach proposal fails to advance the public interest, we dismiss the Settlement Agreement. Furthermore, given this finding, the instant Settlement Agreement cannot be fully implemented and consequently, Powell's application should not be dismissed at this time. Therefore, in light of the above discussion, the Joint Petition for Approval of Settlement Agreement Request filed by Birach and Powell on October 27, 2005, IS DENIED and the parties' Settlement Agreement IS DISMISSED. The tech box application filed

Potts Camp and Saltillo, Mississippi, Memorandum Opinion and Order, 16 FCC Rcd 16116 (2001) (denying relocation of sole local service at a town of 483 to a town of 1,782).

³² See *supra* note 20.

³³ *New Community MO&O*, 5 FCC Rcd at 7097.

³⁴ *Teresa Prieto*, Letter, 23 FCC Rcd 5100 (MB 2008).

³⁵ See *North Texas Media, Inc. v. FCC*, 778 F.2d 28, 33 (D.C. Cir. 1985) (initial improvident grant of a waiver, now described as an error, does not deprive the agency of authority to require future applicants to meet certain standards, in order to obtain such a waiver); *GMD Microcable Partnership*, Order on Reconsideration, 13 FCC Rcd 8479 (MMB 1998) (erroneous and unexplained staff action is not precedent); *Family Entertainment Network, Inc.*, Order on Reconsideration, 9 FCC Rcd 566 (CCB 1994) (to the extent staff deviated from articulated Commission precedent, the action was erroneous and not controlling).

by Scott Powell (File No. BNP-20040129AAC) for a new AM station at Winfield, West Virginia, IS
RETAINED in pending status for further processing.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Lauren A. Colby, Esq.