

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

In the Matter of)	
)	
Birach Broadcasting Corporation)	File No.: EB-09-DT-0386
)	NAL/Acct. No.: 201132360005
Licensee of Station WCXI(AM))	FRN: 0003766847
Fenton, Michigan)	Facility ID #: 10475
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER

Adopted: June 1, 2012

Released: June 1, 2012

By the District Director, Detroit Office, Northeast Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture and Order (NAL), we find that Birach Broadcasting Corporation (Birach), licensee of AM Station WCXI in Fenton, Michigan (Station), apparently willfully and repeatedly violated (1) Section 73.49 of the Commission's rules (Rules)¹ by failing to enclose the Station's antenna structure within an effective locked fence; and (2) Sections 73.3526(e)(12) and 73.3526(c)(1) of the Rules by failing to maintain and make available the issues/program lists in the Station's public inspection file. We conclude that Birach is apparently liable for a forfeiture in the amount of seventeen thousand dollars (\$17,000). We further direct Birach to submit, no later than thirty (30) calendar days from the date of this NAL, a written statement signed under penalty of perjury stating that the Station is now in compliance with Sections 73.49 and 73.3526 of the Rules.

II. BACKGROUND

2. On February 18, 2010, in response to a complaint, an agent from the Enforcement Bureau's Detroit Office (Detroit Office) conducted an inspection of the Station's main studio with the Station Manager. The agent reviewed the materials in the Station's public inspection file and found that the file did not contain any quarterly issues/programs lists for the current license term, *i.e.*, it was missing 24 quarters of issues/programs lists.² The agent had planned to inspect the Station's two-tower antenna structure array on that day as well, but access to the structures was blocked by snow.

3. On March 25, 2010, the agent returned to inspect the Station's two-tower array and observed that the fence enclosing antenna structure number 1049269 (Antenna Structure) was severely damaged. Specifically, a portion of the fence had separated, resulting in a gap that allowed unrestricted access to the Antenna Structure. Based on the severity of the fence's deterioration and the amount of plant growth surrounding the fence, the agent concluded that it was a condition that had existed for a considerable period of time. The agent also observed that there was no perimeter property fence surrounding the property.

¹ 47 C.F.R. §§ 73.49 and 73.3526(e)(12).

² The current license term began when the license renewal application was granted on September 20, 2004. See File No. BR-20040525AAV.

4. On May 20, 2010, the Detroit Office issued a letter of inquiry (*LOI*) requesting information regarding, *inter alia*, the Station's missing issues/programs lists and the Antenna Structure fencing.³ On June 9, 2010, the Detroit Office received a reply to the *LOI*, which included declarations from the Station's owner, contract engineer, and manager.⁴ In the *LOI Response*, Birach did not dispute that the fencing was in need of repair and the Station's contract engineer reported that he repaired the fencing around the Antenna Structure and properly secured the gate.⁵ Birach also did not dispute that the issues/programs lists were missing. The Station's manager reported that she had never been instructed to maintain issues/programs lists in the public inspection file.⁶ The Station's manager further stated that, after receipt of the *LOI*, Birach's attorney provided her instructions on how to maintain the issues/programs lists.⁷

III. DISCUSSION

5. Section 503(b) of the Communications Act of 1934, as amended (Act),⁸ provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or willfully or repeatedly fails to comply with any of the provisions of the Act or of any rule, regulation or order issued by the Commission thereunder, shall be liable for a forfeiture penalty. Section 312(f)(1) of the Act defines willful as the "conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.⁹ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Section 312 and 503(b) of the Act¹⁰ and the Commission has so interpreted the term in the Section 503(b) context.¹¹ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.¹² The term "repeated" means the commission or omission of such act more than once or for more than one day.¹³

³ See Letter of Inquiry from James Bridgewater, District Director, Detroit Office, Northeast Region, Enforcement Bureau, to Birach Broadcasting Corporation, dated May 20, 2010.

⁴ See Letter from Lauren A. Colby, Counsel for Birach Broadcasting Corporation, to James Bridgewater, District Director, Detroit Office, Northeast Region, Enforcement Bureau, dated June 9, 2010 (*LOI Response*). The *LOI Response* contained three Declarations: (1) Declaration from Sima Birach, the President and sole shareholder of Birach (*Birach Declaration*), (2) Declaration from Ralph Haines, a contract engineer for Birach (*Haines Declaration*), and (3) Brenda Charette, the Station's manager (*Charette Declaration*).

⁵ See *Birach Declaration* at 1 and *Haines Declaration* at 2.

⁶ See *Birach Declaration* at 1 and *Charette Declaration* at 1.

⁷ *Charette Declaration* at 1.

⁸ 47 U.S.C. § 503(b).

⁹ 47 U.S.C. § 312(f)(1).

¹⁰ H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982) ("This provision [inserted in section 312] defines the terms 'willful' and 'repeated' for purposes of section 312, and for any other relevant section of the act (e.g., section 503)... As defined ... 'willful' means that the licensee knew that he was doing the act in question, regardless of whether there was an intent to violate the law. 'Repeated' means more than once, or where the act is continuous, for more than one day. Whether an act is considered to be 'continuous' would depend upon the circumstances in each case. The definitions are intended primarily to clarify the language in sections 312 and 503, and are consistent with the Commission's application of those terms ...").

¹¹ See, e.g., *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) (*Southern California Broadcasting Co.*).

¹² See, e.g., *Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362 ¶ 10 (2001) (*Callais Cablevision, Inc.*) (proposing a forfeiture for, *inter alia*, a cable television operator's repeated signal leakage).

¹³ Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), which also applies to violations for which forfeitures are assessed under section 503(b) of the Act, provides that "[t]he term 'repeated', when used with reference to the

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A. Failure to Enclose the Antenna Structure within an Effective Locked Fence

6. Section 73.49 of the Rules requires that antenna structures having radio frequency potential at the base (*e.g.*, series fed, folded unipole, and insulated base antennas) must be enclosed within effective locked fences or other enclosures.¹⁴ The agent's inspection of the series fed Antenna Structure on March 25, 2010, revealed that the gap in the fence allowed unrestricted access to the base of the Antenna Structure. Further, the severity of the fence's deterioration and the amount of plant growth surrounding the fence clearly indicated that the fence had been in this condition for quite some time. Based on the evidence before us, we find that Birach apparently willfully and repeatedly violated Section 73.49 of the Rules.

B. Failure to Maintain and Make Available Issues/Programs Lists

7. Section 73.3526(a)(2) of the Rules requires broadcast stations to maintain for public inspection a file containing materials listed in that section.¹⁵ Section 73.3526(c)(1) of the Rules specifies that the file shall be available for public inspection at any time during regular business hours,¹⁶ and Section 73.3526(e)(12) of the Rules specifically requires licensees to place in their public inspection file each calendar quarter a list of programs that have provided the station's most significant treatment of community issues during the preceding three month period (known as the issues/programs list).¹⁷ The issues/programs lists must include "a brief narrative describing what issues were given significant treatment and the programming that provided this treatment," including, but not limited to, the time, date, duration, and title of each program in which the issue was treated.¹⁸ Copies of the issues/programs list must be retained in the public inspection file until final action has been taken on the station's next license renewal application.

8. On February 18, 2010, an agent reviewed the Station's public inspection file and found that it did not have any quarterly issues/programs lists for the current license term.¹⁹ Accordingly, based on the evidence before us, we find that Birach apparently willfully and repeatedly violated Sections 73.3526(e)(12) and 73.3526(c)(1) of the Rules by failing to maintain the issues/programs lists and make them available in the Station's public inspection file.

C. Proposed Forfeiture and Reporting Requirement

9. Pursuant to the Commission's *Forfeiture Policy Statement* and Section 1.80 of the Rules, the base forfeiture amount for failure to maintain an effective AM tower fence is \$7,000 and the base forfeiture amount for violation of public inspection file rules is \$10,000.²⁰ In assessing the monetary forfeiture amount, we must also take into account the statutory factors set forth in Section 503(b)(2)(E) of

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commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day."

¹⁴ 47 C.F.R. § 73.49.

¹⁵ 47 C.F.R. § 73.3526(a)(2).

¹⁶ 47 C.F.R. § 73.3526(c)(1).

¹⁷ 47 C.F.R. § 73.3526(e)(12).

¹⁸ *Id.*

¹⁹ The license term for Station WCXI commenced on September 20, 2004, when the FCC granted WCXI's license renewal application. See File No. BR-20040525AAV.

²⁰ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997) (*Forfeiture Policy Statement*), *recons. denied*, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80.

the Act, which include the nature, circumstances, extent, and gravity of the violations, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.²¹ Applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors to the instant case, we conclude that Birach is apparently liable for a total forfeiture in the amount of \$17,000.

10. We further direct Birach to submit a statement pursuant to Section 1.16 of the Rules²² signed under penalty of perjury by an officer or director of Birach stating that (1) an effective locked fence has been installed around the Antenna Structure, (2) the radio issues/program lists have been compiled, and (3) the issues/program lists have been and are continuing to be placed in the public inspection file by the tenth day of the succeeding calendar quarter. This statement must be provided to the Detroit Office at the address listed in paragraph 13 within thirty (30) calendar days of the release date of this NAL.

IV. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.204, 0.311, 0.314 and 1.80 of the Commission's rules, Birach Broadcasting Corporation is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of seventeen thousand dollars (\$17,000) for violations of Sections 73.49, 73.3526(c)(1) and 73.3526(e)(12) of the Rules.²³

12. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Commission's rules within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order, Birach Broadcasting Corporation **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

13. **IT IS FURTHER ORDERED** that Birach Broadcasting Corporation **SHALL SUBMIT** a sworn statement, as described in paragraph 10, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order. The statement must be mailed to Federal Communications Commission, Enforcement Bureau, Northeast Region, Detroit Office, 24897 Hathaway Street, Farmington Hills, Michigan 48335-1552. Birach Broadcast Corporation also shall email the written response to NER-Response@fcc.gov.

14. Payment of the forfeiture must be made by credit card, check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the Account Number and FRN referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. Regardless of the form of payment, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer – Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.²⁴ If you have questions regarding payment procedures, please contact the Financial Operations

²¹ 47 U.S.C. § 503(b)(2)(E).

²² 47 C.F.R. 1.16.

²³ 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80, 73.49, 73.3526(c)(1), 73.3526(e)12.

²⁴ See 47 C.F.R. § 1.1914.

Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov. Birach Broadcasting Corporation shall also send electronic notification on the date said payment is made to NER-Response@fcc.gov.

15. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to Sections 1.80(f)(3) and 1.16 of the Rules.²⁵ Mail the written statement to Federal Communications Commission, Enforcement Bureau, Northeast Region, Detroit Office, 24897 Hathaway Street, Farmington Hills, Michigan 48335 and include the NAL/Acct. No. referenced in the caption. Birach Broadcasting Corporation also shall email the written response to NER-Response@fcc.gov.

16. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (GAAP); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

17. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture and Order shall be sent by both Certified Mail, Return Receipt Requested, and regular mail, to Birach Broadcasting Corporation at 21700 Northwestern Highway, Tower 14, Southfield, Michigan 48075.

FEDERAL COMMUNICATIONS COMMISSION

James A. Bridgewater
District Director
Detroit Office
Northeast Region
Enforcement Bureau

²⁵ See 47 C.F.R. §§ 1.80(f)(3), 1.16.