



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

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DA 14-585

In Reply Refer to:
1800B3-SS

John C. Trent, Esq.
Putbrese Hunsaker & Trent, P.C.
200 S. Church Street
Woodstock, VA 22661

Paul Dean Ford, President
Word Power, Inc.
18889 N. 2350 Street
Dennison, IL 62423

Mr. Robert Michael Ditto
8300 Wabash Avenue
Terre Haute, IN 47803

Mr. Fred J. Nation
2312 N. Trent Street
Terre Haute, IN 47804

Ms. Anna White
768 N. State Road #46
Terre Haute, IN 47803

Re: New AM, Terre Haute, Indiana
Facility ID No. 136069
File No. BMP-20120813ABI

Petition to Deny

Informal Objections

Dear Counsel, Messrs. Ford, Ditto, Nation, and Ms. White:

This letter refers to the long-form application (the "Application"), as amended, of Birach Broadcasting Corporation ("Birach"), winning bidder in Auction 88 for a minor change of a new, unbuilt AM facility (640 kHz). The Application proposes to change transmitter sites, construct a new four-tower array, and change the community of license from Terre Haute, Indiana, to Peotone, Illinois (the "Station"),¹ and includes an Interference Reduction Agreement ("IRA")² proposing, *inter alia*, the surrender of the license of Birach's Station WMFN(AM), Zeeland, Michigan.³ We also have before us a

¹ See Application at Exhibit 13; see also *Closed Auction of Broadcast Construction Permits Closes, Winning Bidders Announced For Auction 88*, Public Notice, 25 FCC Rcd 10071 (2010).

² See Application, amended March 3, 2014, at Exhibit 1, Attachment 1.

³ To facilitate Birach's proposed change in community of license, and pursuant to 47 C.F.R. § 73.3517, the Application is contingent, on the return of the WMFN(AM) license to the Commission. Birach requests that the (continued . . .)

Petition to Deny the Application filed on September 20, 2012, by Word Power, Inc. (“WPI”), a former auction applicant for the 640 kHz frequency (the “WPI Objection”); an Informal Objection, filed on September 14, 2012, by Robert Michael Ditto (the “Ditto Objection”);⁴ and Informal Objections filed on October 15, 2012, by Anna White (“White”); and October 22, 2012, by Fred J. Nation (“Nation”) (collectively, the “Objections”), as well as various related pleadings.⁵ For the reasons discussed below we: (1) dismiss WPI’s Petition to Deny and deny it when treated as an informal objection; (2) deny the Ditto Objection; (3) deny the Objections; (4) approve the IRA; and (5) grant the Application.

Background. The Application was filed pursuant to Sections 73.3573(a)(1)(i) and (g) of the Commission’s Rules (the “Rules”),⁶ which permit a winning auction bidder to file a minor amendment to its proposal to specify a new community of license without affording other parties an opportunity to file competing expressions of interest. In support of the Application, Birach alleges that the proposal satisfies the requirements for changing a station’s community of license because: (1) the proposed use of the 640 kHz frequency at Peotone will provide that community with its first local, full-time, aural service; (2) nine stations will remain licensed to Terre Haute; and (3) the provision of a first licensed local service to the smaller community of Peotone (population 3,385) under FM Priority (3)⁷ will result in a preferential arrangement of allotments over the initiation of a tenth local service at the larger community of Terre Haute (population 119,637).⁸ Birach further contends that the proposed reallocation would not violate the Commission’s *Rural 2d R&O*⁹ policies that restrict the relocation of radio stations from smaller communities to larger Urbanized Areas (“UA”) and submits a *Tuck* showing¹⁰ demonstrating Peotone’s independence from the Chicago, Illinois, UA.¹¹

Additionally, Birach proposes to increase the Station’s daytime power from 0.25 kW to 4.5 kW¹² and to surrender its WMFN(AM) license. In the IRA, Birach contends that grant of the proposal will

(Continued from previous page)

surrendering of the WMFN(AM) license be required at the time it files a FCC Form 302-AM application for license at Peotone, Illinois. See Application at Exhibit 13.

⁴ WPI styled its pleading as a “Petition to Deny,” but there is no indication in the Petition that it was properly served on Birach. Accordingly, the Petition does not meet the procedural requirements for petitions to deny set forth in Section 309(d) of the Communications Act of 1934, as amended (the “Act”). It will therefore be treated as an informal objection pursuant to 47 C.F.R. § 73.3587.

⁵ These pleadings include: (1) Birach’s September 25, 2012, Opposition to the WPI Objection (“WPI Opposition”); (2) Birach’s September 25, 2012, Opposition to the Ditto Objection (“Ditto Opposition”); and (3) Ditto’s October 9, 2012, Letter to Correct Opposition (“Reply”).

⁶ 47 C.F.R. § 73.3573(a)(i)-(ii).

⁷ The FM allotment priorities are (1) first fulltime aural service; (2) second fulltime aural service; (3) first local service; and (4) other public interest matters. Co-equal weight is given to Priorities (2) and (3). See *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88, 91 (1982) (“*FM Priorities*”). Note that under *Alessandro Broadcasting Co.*, Decision, 99 FCC 2d 1 (1984), the four priorities set forth in *FM Priorities* may also be applied to §307(b) determinations involving AM stations; see also *Kidd Communications*, Letter, 15 FCC Rcd 22901, 22903 (MB 2000).

⁸ See Application at Exhibits 20.1-20.5.

⁹ See *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rule Making, 26 FCC Rcd 2556 (2011) (subsequent history omitted) (“*Rural 2d R&O*”).

¹⁰ See *Faye and Richard Tuck, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 5374, 5378 (1978) (“*Tuck*”) (establishing eight factors to determine whether a suburban community is independent of a nearby central city).

¹¹ See Application, Exhibit 21, *Tuck* showing at 1-3.

¹² See Application at Section III, Item 4a.

increase service from the Station, eliminate existing prohibited overlap to a substantial area and population,¹³ and will leave no area receiving fewer than five aural broadcast services.¹⁴

The WPI Objection. WPI alleges that the Application should be dismissed because: (1) the Chicago UA already has a plethora of existing services; (2) the previous 640 kHz operation at Terre Haute gave the community and a very large surrounding area in rural Indiana and Illinois superior daytime and nighttime coverage; and (3) the construction permit was auctioned for Terre Haute; thus, the 640 kHz frequency should be re-opened for auction.¹⁵

In its Opposition, Birach argues that the WPI Objection should be dismissed because: (1) it is procedurally defective for failure to provide service upon Birach's counsel pursuant to Section 1.47 of the Rules;¹⁶ (2) it is a "frivolous pleading" pursuant to Section 1.52 of the Rules,¹⁷ as WPI has not provided any legal or technical argument as to why Birach should not be allowed to modify its construction permit to specify a new community of license; and (3) WPI offers no legal basis for its position that Birach's Station authorization should be rescinded in favor of a new station in Terre Haute.¹⁸

The Ditto Objection. Ditto argues that the Application should be dismissed because: (1) loss of the Station will result in a less competitive environment in Terre Haute as there are only two owners of all the licensed stations in the community -- Emmis Communications, Inc. ("Emmis") and Midwest Communications, Inc. ("Midwest"); (2) there will be less local programming in Terre Haute as many programs on the other stations are "voice tracked from corporate headquarters"; (3) Terre Haute will lose the lowest frequency (640 kHz) in the state of Indiana and a station capable of providing wide-area service; and (4) Birach, which already owns a station -- WNWI(AM) -- in Chicago, should not be allowed to abandon Terre Haute.¹⁹

In its Ditto Opposition, Birach argues that there are nine stations licensed to Terre Haute and that all are not owned by either Emmis or Midwest.²⁰ In addition, Birach argues that since the community is "well served" with five or more full-time reception services pursuant to the Rules and because the Station "is an unbuilt construction permit," and thus, considered only a "potential service," it can, if deemed fit by the Commission, move the Station to a new community of license.²¹ Finally, Birach contends that the relocation of the Station to Peotone will result in the preferential use of the spectrum pursuant to Section 307(b) of the Act.²² Specifically, Birach argues that the proposed facilities will provide a "first local

¹³ See Application at Exhibit 13, Attachment 13 and at Exhibit 13.7; see also Opposition to Ditto at 2.

¹⁴ See *id.* at Exhibit 1, Attachment 1.

¹⁵ WPI Objection at 1-2.

¹⁶ 47 C.F.R. § 1.47; see also Opposition at 2.

¹⁷ 47 C.F.R. § 1.52.

¹⁸ Opposition at 1-2.

¹⁹ Ditto Objection at 1.

²⁰ Our records indicate that, at Terre Haute, station WTHI-FM is licensed to Emmis, and stations WMGI(FM), WDWQ(FM), and WIBQ(AM) are licensed to Midwest. The other Terre Haute stations are licensed to the following entities: WCRT-FM (Illinois Bible Institute); WISU(FM) (Indiana State University); WHOJ(FM) (Covenant Network); WPFR(AM) (WPI); and WMHD-FM (Rose-Hulman Institute of Technology).

²¹ Ditto Opposition at 2.

²² *Id.*; see also 47 U.S.C. § 307(b), which mandates a "fair, efficient, and equitable" distribution of radio service.

service to Peotone” in accordance with Priority (3)²³ of Section 307(b) and because this is an unbuilt facility, Terre Haute will not be losing a station.²⁴

In his Reply, Ditto asserts that Emmis and Midwest are the licensees of the four commercial stations in Terre Haute and licensees of six of the 14 station signals available to Terre Haute; thus, loss of the Station will present a less competitive environment in Terre Haute. Next, Ditto contends that Terre Haute is not “well served” by five or more services, as Birach contends, because only four are commercial. In addition, Ditto argues that the Station is not unbuilt, as Birach maintains, because Birach “planned” on using the existing transmission facilities of Contemporary Media, Inc., which operated at 640 kHz in Terre Haute for many years. Ditto also asserts that Birach’s request in the Application to construct a four-tower array and increase in power to “4,000 watts” are indications that Birach intends to serve Chicago and not the village of Peotone, Illinois. Finally, Ditto claims that Birach “did not enter into the auction [for the Terre Haute permit] in good faith” because its true motive was to serve Chicago and not Terre Haute.²⁵

The White and Nation Objections. White and Nation in their identical Objections argue that the Station should remain licensed to Terre Haute because of the lack of diversity and local content in the programming currently serving the Terre Haute area. They also assert that if the Station were to be built in Terre Haute, rather than in Peotone, it would serve a large underserved rural area with a clear daytime and nighttime signal.²⁶

Discussion. Pursuant to Section 309(e) of the Act,²⁷ informal objections must provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact calling for further inquiry regarding whether grant of the Application would be *prima facie* inconsistent with Section 309(a) of the Act.²⁸ This section 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. Objectors have not met this burden.

Section 307(b) Analysis. Initially, we consider whether the Application complies with our Section 307(b) processing policies. In *Rural 2d R&O*,²⁹ the Commission established a rebuttable presumption that a proposed station located within an urbanized area, or one that would or could serve 50 percent or more of an urbanized area, should be treated as serving the entire urbanized area for purposes of applying our Section 307(b) FM allotment priorities. In this regard, the community of Terre Haute is located within the Terre Haute UA, and the predicted five millivolts per meter (“5 mV/m”) contour covers 100 percent of the Terre Haute UA. The community of Peotone is not part of any urbanized area, but the proposed 5 mV/m contour would cover 100 percent of the Kankakee, Illinois, UA, and 50.3 percent of the Chicago UA. We

²³ See n.7, *supra*.

²⁴ Ditto Opposition at 3.

²⁵ Reply at 1-2.

²⁶ Objections at 1.

²⁷ 47 U.S.C. § 309(e).

²⁸ *Id.* § 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) (informal objections, like petitions to deny, must contain adequate and specific factual allegations sufficient to warrant the relief requested).

²⁹ *Rural 2d R&O*, 26 FCC Rcd at 2572.

find that the *Rural 2d R&O* policy regarding moves from one urbanized area to another urbanized area applies here. Furthermore, here, as in *Goleta* and *Gearhart*, “a first local service preference is not being used as a basis to enter the market.”³⁰ Therefore, we will treat the Application as serving the Kankakee and Chicago UAs, and consider the proposal under Priority (4), other public interest matters.³¹

We disagree with Ditto’s claim that the Application does not result in a preferential arrangement of allotments and his specific claim that loss of the frequency will leave Terre Haute “in a less competitive environment.”³² In that regard, our engineering analysis determines that the proposed change of community of license would result in a substantial net gain of 9,892,810 persons, and that the authorized and proposed Birach facilities would provide an additional radio signal to areas now receiving five or more services.³³

With regard to the Application’s impact on competition, we recognize the strong support that the formerly-operating 640 kHz frequency once enjoyed in Terre Haute, and we agree with the objectors that our Section 307(b) policies take into account the fact that listeners in a community have an expectation that service will continue. However, in this case, the 640 kHz frequency at Terre Haute has been vacant since September of 1998,³⁴ and Birach is proposing to remove an unbuilt construction permit for a station that has never served Terre Haute. The Commission has stated that an unbuilt station is “not a service on which the public has come to rely,” and thus, its removal “does not represent the same concerns with loss of service that removal of an operating station would represent.”³⁵ Therefore, we find that the significantly greater population that will receive service from moving the 640 kHz frequency to Peotone outweighs the loss of service resulting from relocating the unbuilt station from the Terre Haute UA. In so deciding, we are mindful that, with the nine licensed local transmission services³⁶ that remain in Terre Haute, listeners in that area will continue to have abundant programming choices.³⁷ Accordingly, we find that the proposed Station relocation to Peotone, Illinois, would serve the public interest; thus, we will deny the Ditto Objection.

³⁰ See *Goleta, California*, Letter, 26 FCC Rcd 12496, 12498 (MB 2011) (“*Goleta*”) (deciding post-*Rural 2d R&O* that relocation of a station from one UA to another UA is analyzed under Priority (4)) and *Gearhart, Oregon*, Report and Order, 26 FCC Rcd 10259, 10263 (MB 2011) (“*Gearhart*”) (same).

³¹ *Id.*

³² Ditto Objection at 1.

³³ The Commission deems five or more reception services “abundant.” See *Family Broadcasting Group*, Decision, 93 FCC 2d 771 (Rev. Bd. 1983), *rev. denied* FCC 83-559 (Nov. 29, 1995); see also *LaGrange and Rollingwood, Texas*, Memorandum Opinion and Order, 10 FCC Rcd 3337 (1995); *Louisburg and Hillsborough North Carolina*, Report and Order, 21 FCC Rcd 5062, 5063 (2006) (area “well-served with 5 or more full-time reception services”); *Minnesota Christian Broadcasters, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 614, 618 (2003) (Commission considers NCE stations in determining the level of service provided to a community in order to implement Section 307(b)).

³⁴ See *Contemporary Media Inc., Contemporary Broadcasting, Inc., Lake Broadcasting, Inc.*, Decision, 13 FCC Rcd 14437, 14461 (1998) (licensee authorized to continue operation of station WBOW(AM), Terre Haute, until 12:01 a.m. on the ninety-first day following the release date (Jun. 25, 1998) of this Decision to enable it to conclude station’s affairs), *aff’d*, *Contemporary Media, Inc. v. FCC*, 214 F.3d 187 (D.C. Cir. 2000), *cert. denied*, 532 U.S. 920 (2001).

³⁵ See *Pawley’s Island and Atlantic Beach, South Carolina*, Report and Order, 8 FCC Rcd 8657 (MMB 1993) (“*Pawley’s Island*”) (approving change of community of license of an unbuilt station).

³⁶ See n.19, *supra*. In total, Terre Haute receives 16 reception services.

³⁷ See, e.g., *R&R Radio Corp., c/o Richard A. Helmick, Esq., SBR Broadcasting Corp., c/o Lewis Paper, Esq., Gold Coast Broadcasting, LLC, c/o David Oxenford, Esq.*, Letter, 23 FCC Rcd 16489, 16493 (MB 2008) (six local transmission services found to be abundant for a community of approximately 43,000 persons).

With respect to the WPI Objection, regardless of label, petitions or objections should contain specific factual allegations which would warrant grant of the relief requested.³⁸ WPI has not shown with any degree of specificity the manner in which the Application violates Section 73.3573(a)(i) and (g) of the Rules or Section 307(b) of the Act. Therefore, in view of our conclusions above, we find that WPI has raised no substantial and material question of fact calling for further inquiry regarding grant of the Application. Accordingly we will deny the WPI Objection.

Similarly, in their identical Objections, White and Nation assert simply that the frequency should remain in Terre Haute to provide rural coverage, promote diversity and restore an historic service in the community. They have not shown with any degree of specificity how or in what way Birach, in its Application, has violated either Section 73.3573(a)(i) and (g) or Section 307(b).³⁹ Therefore, we find that White and Nation also have raised no substantial and material question of fact regarding grant of the Application. Accordingly we will deny their Objections.

Frivolous Objection Claim. Regarding Birach's claim that WPI filed a "frivolous" objection, a pleading may be deemed frivolous pursuant to Section 1.52 of the Rules⁴⁰ if there is "no good ground to support it" or it is "interposed for delay."⁴¹ Although we will deny the WPI Objection, we do not find that it is frivolous or abusive. In particular, we note that we have found that Birach's claim that the proposed move would advance Priority (3) is without merit.

Interference Reduction Agreement. The Commission encourages AM licensees and permittees to reach agreements to reduce power or cancel their licenses in order to permit other licensees to improve service, and to reduce overall interference levels.⁴² In amending Section 73.3517 of the Rules⁴³ in 1990 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.⁴⁴

IRAs which propose the deletion or modification of existing AM stations are subject to 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.⁴⁵ The Commission did not choose to "establish a quantifiable service floor that can uniformly be applied with respect to the replacement of deleted facilities. However, the Commission did determine that, at a minimum, an IRA proposing the deletion of a station could not create a "white" or "gray" area."⁴⁶

³⁸ See 47 U.S.C. § 309(d).

³⁹ See Objections at 1.

⁴⁰ 47 C.F.R. § 1.52

⁴¹ Section 1.52 prohibits the filing of frivolous informal objections or petitions to deny. Further, it is Commission policy to investigate legitimate claims of abuse of process, and to take appropriate enforcement action when warranted. See, e.g., *Commission Takes Tough Measures Against Frivolous Pleadings*, Public Notice, 11 FCC Rcd 3030 (1996).

⁴² *Policies to Encourage Interference Reduction between AM Broadcast Stations*, Report and Order, 5 FCC Rcd 4492 (1990) ("*Interference Reduction*").

⁴³ 47 C.F.R. § 73.3517.

⁴⁴ *Interference Reduction*, 5 FCC Rcd at 4492.

⁴⁵ *Id.* at 4494.

⁴⁶ *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.

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 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.⁴⁷ We will therefore examine Birach's IRA in light of these four factors.

Reduction in Interference. The IRA indicates that deletion of station WMFN(AM)'s license would result in the elimination of no domestic interference as defined by Section 73.37 of the Rules.⁴⁸ However, deletion of station WMFN(AM)'s license would result in the elimination of 4,269 kilometers of contour overlap with station CFCO(AM), Chatham, Ontario, Canada.

Increased Service. The IRA indicates that the Station's daytime power increase would permit the Station to serve 6,779,112 more people than the sum of the existing 2 mV/m service contours for WMFN(AM) and a new permit at Terre Haute.

Creation of "White" or "Gray" Areas. Deletion of station WMFN(AM)'s license would not create any white or gray areas.

Local Service Floor. Birach indicates that even after surrender of the WMFN(AM) license, the community of Zeeland, Michigan, would continue to receive primary service from 12 full-time, commercial FM stations and eight AM stations. Our analysis corroborates these claims. Thus, there is a sufficient local service floor, notwithstanding removal of the WMFN(AM) signal, to warrant grant of the Application.

Based on our consideration of these factors, we conclude that the IRA would serve the public interest.

Finding of No Significant Environmental Impact. Because the proposed transmitter location is located in a flood plain, Birach submitted an Environmental Assessment ("EA") as required by Section 1.1307 of the Rules⁴⁹ with the Application. The staff released a *Public Notice* of the acceptance for filing of the EA on February 27, 2014.⁵⁰ The Commission received no comments in response to the *Public Notice*.

Upon examination of the EA, we find that the information supplied satisfies the requirements specified in Section 1.1311 of the Rules.⁵¹ Accordingly, pursuant to Section 1.1308 of the Rules,⁵² we find that the proposed four-tower array at Peotone will have no significant impact on the quality of the human environment, and no further environmental processing is warranted. Moreover, we have examined the Application and find that it complies with all pertinent statutory and regulatory requirements.

Conclusion/Actions. Neither WPI, Ditto, nor Nation and White have established that grant of the Application is inconsistent with the Commission's allotment priorities or otherwise is not in the public

⁴⁷ *Interference Reduction*, 5 FCC Rcd at 4494.

⁴⁸ 47 C.F.R. § 73.37.

⁴⁹ 47 C.F.R. § 1.1307.

⁵⁰ See *Environmental Assessment Accepted for Filing/Environmental Action*, Public Notice, Report No. MB/AD-14-01, DA 14-266 (rel. Feb. 27, 2014) ("*Public Notice*").

⁵¹ 47 C.F.R. § 1.1311.

⁵² 47 C.F.R. § 1.1308.

interest. Accordingly, IT IS ORDERED, that the September 14, 2012, Informal Objection filed by Robert Michael Ditto IS DENIED.

IT IS FURTHER ORDERED, that the September 20, 2012, Petition to Deny filed by Word Power, Inc., IS DISMISSED, and when treated as an Informal Objection, IS DENIED.

IT IS FURTHER ORDERED, that the October 15 and 22, 2012, Informal Objections filed by Anna White and Fred J. Nation, respectively, ARE DENIED.

IT IS FURTHER ORDERED, that the Application, File No. BMP-20120813ABI, filed by Birach Broadcasting Corporation, IS GRANTED, conditioned as follows:

Before program tests are authorized or a license to cover this authorization has been filed, based upon the submitted IRA, the licensee of Station WMFN(AM), Zeeland, Michigan (Facility ID No. 55089), must submit a request to cancel that license due to prohibited daytime groundwave, co-channel overlap and nighttime RSS interference in violation of Sections 73.37 and 73.182 of the Rules.⁵³

We also urge the permittee to expeditiously file for a call sign for this granted permit upon receipt of this action.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

⁵³ 47 C.F.R. §§ 73.37 and 73.182. In the above condition, we reject Birach's request to not surrender its WMFN(AM) license until after its application for a license to cover at Peotone has been filed. *See* n.3, *supra*.