

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

In re Application of:	)		
	)		
BIRACH BROADCASTING CORPORATION	)		
	)		
For Renewal of License	)	File No.	BR-950608YB
Station WDMV(AM)	)		
Pocomoke City, Maryland	)		

**MEMORANDUM OPINION AND ORDER**

**Adopted:** February 22, 2001

**Released:** February 28, 2001

By the Commission:

1. The Commission has under consideration an Application for Review, filed December 22, 1997, by New World Radio Inc. (“New World”), of a November 20, 1997 letter from the Chief of the Audio Services Division, Mass Media Bureau.<sup>1</sup> The *November 1997 ASD Letter* denied New World’s petition for reconsideration of the staff’s January 14, 1997 grant of WDMV(AM)’s renewal application (the “Renewal Application”). Birach Broadcasting Corporation, the licensee of WDMV(AM) (“Birach”), filed an Opposition to New World’s Application for Review and New World filed a Reply.

2. In its Application for Review, New World alleges that the WDMV renewal application should be denied because Birach failed to provide service to its community of license during the license term and repeatedly misrepresented to the Commission its reasons for not returning WDMV to the air in Pocomoke City – that it was planning to relocate the station and did not want to incur unnecessary expenses in the interim. Birach argues that it made clear to the Commission when it acquired the station that it was not acquiring the Pocomoke City transmission facilities used by the former station owner. For the reasons set forth below, we deny New World’s Application for Review.

**BACKGROUND**

3. Birach acquired WDMV(AM) from Five Star Broadcasting, Inc. (“Five Star”) on January 15, 1993. As disclosed in the application for consent to assign WDMV(AM) from Five Star to Birach (the “Assignment Application”), Birach’s obligations under the WDMV purchase agreement were contingent on the Commission’s approval of an application to change WDMV’s community of license from Pocomoke City to Brinklow, Maryland, and for new technical facilities (the “Brinklow Application”).<sup>2</sup> On November

<sup>1</sup> See *Letter from Linda Blair, Chief, Audio Services Division, dated November 20, 1997* (“November 1997 ASD Letter”).

<sup>2</sup> See May 8, 1992 Letter from Lauren A. Colby, counsel for Birach, to Donna R. Searcy, Secretary, FCC, transmitting Assignment Application for WDMV(AM); see also October 1, 1991 Letter of Intent between principals for Birach and Five Star, which was included in Assignment Application (File No. BAPL-19920508EB) (“Letter of Intent”). The Letter of Intent states: “If the FCC does not grant the modification (continued....)”

25, 1992, the Commission simultaneously granted the Assignment Application and the Brinklow Application.<sup>3</sup> On January 15, 1993, Birach notified the Commission that it and Five Star had consummated the assignment, and that Five Star had taken WDMV off the air on January 14, 1993. As disclosed in the Assignment Application, Five Star did not convey WDMV's main technical facilities to Birach at closing.<sup>4</sup> On May 6, 1994, Birach filed an application to extend the Brinklow construction permit (the "Brinklow Permit") beyond its May 25, 1994 expiration date, stating that it was unable to obtain the transmitter site specified in the Brinklow Application (the "Brinklow Extension Request").<sup>5</sup> New World filed an Informal Objection to the Brinklow Extension Request on June 20, 1994, alleging that Birach had engaged in misrepresentations and/or lacked candor in connection with its certification of site availability. WDMV remained off the air pursuant to Commission consent under successive special temporary authorizations until November 11, 1996, when, following Birach's acquisition of the transmission facilities used by the former licensee, it resumed operations in accordance with the Pocomoke City license. Birach filed the instant Renewal Application on May 30, 1995.<sup>6</sup>

4. On July 15, 1996, prior to resumption of broadcast operations, Birach filed another major change application to relocate WDMV to Damascus, Maryland (the "Damascus Application"),<sup>7</sup> noting the loss of the site specified in the Brinklow Permit. In light of the Damascus Application, on January 14, 1997, the Audio Services Division staff dismissed as moot the Brinklow Extension Request and cancelled the Brinklow Permit.<sup>8</sup> Thereafter, on January 16, 1997, the Commission issued a Public Notice accepting the Damascus Application for filing and establishing a cut-off date of February 17, 1997 for the filing of mutually exclusive applications. The *January 1997 ASD Letter* also granted WDMV's Renewal Application.

5. In February 1997, New World sought reconsideration of the staff's grant of the Renewal Application. The *November 1997 ASD Letter* denied reconsideration and rejected New World's request that the Renewal Application be designated for hearing to determine whether Birach engaged in misrepresentation and/or lacked candor with regard to its ability to operate at Pocomoke City. In denying reconsideration, the staff noted that Birach had disclosed that it was not acquiring the transmission facilities used by the former licensee. The *November 1997 ASD Letter* concluded that Birach's purchase in late 1996 of the former Pocomoke City WDMV transmission facilities did not raise a substantial and material question of fact as to whether Birach intentionally concealed information from the staff regarding Birach's

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application, the whole deal will terminate and neither party will have any obligation to the other." Letter of Intent at 1.

<sup>3</sup> The Brinklow construction permit bore file number BP-920508AA (the "Brinklow Permit").

<sup>4</sup> See Letter of Intent, stating that the physical facilities of WDMV(AM) would not be included in the sale.

<sup>5</sup> See File No. BMP-940506DD.

<sup>6</sup> Although the Renewal Application has a file-date stamp of June 6, 1995, a file stamp copy of the Renewal Application transmittal letter establishes the application was timely filed on May 30, 1995.

<sup>7</sup> See FCC File No. BP-960715AC. The Damascus Application was dismissed by the Audio Services Division staff on January 4, 2001. See *Letter from Linda Blair, Chief, Audio Services Division, dated January 4, 2001*. Birach filed a Petition for Reconsideration of the dismissal on/about January 8, 2001, which is pending.

<sup>8</sup> See *Letter from Linda Blair, Chief, Audio Services Division, dated January 14, 1997 ("January 1997 ASD Letter")*.

ability and intent to return to the air in Pocomoke City.<sup>9</sup> The Letter upheld the grant of the Renewal Application in light of Birach's resumption of service at its licensed site, and stated that it is not in the public interest to "designate for hearing the license renewal application of a station that has resumed broadcast operations, particularly where the station has remained silent pursuant to continuing Commission authorizations."<sup>10</sup> Lastly, the *November 1997 ASD Letter* rejected New World's request for a hearing on a Brinklow site availability misrepresentation issue.<sup>11</sup> The *November 1997 ASD Letter* also affirmed the cancellation of the Brinklow Permit and the dismissal of the Brinklow Extension Request.

6. In its Application for Review, New World requests that the Commission reverse the staff action and deny the Renewal Application.<sup>12</sup> New World contends that Birach failed to fulfill its statutory public interest responsibilities by failing to operate the station during any portion of the prior license term when it was the licensee of WDMV. New World also claims that Birach intentionally misled the Commission concerning the availability of the licensed Pocomoke City transmission facility, and Birach's ability to serve Pocomoke City. It accuses the staff of ignoring evidence that Birach misled the Commission repeatedly regarding its failure to acquire the Pocomoke City transmission facilities sooner than 1996, and its motive for doing so: that Birach was seeking to relocate WDMV to Brinklow, in the Washington, DC suburbs, and did not want to incur the expenses of operating WDMV at Pocomoke City pending the proposed move. New World argues that, as a "licensee without programming, facilities or a transmitter site during the license term, [Birach] utterly failed to serve the public interest during the license term, . . ."<sup>13</sup> Regardless of Birach disclosures to the Commission, New World maintains that Birach failed to meet its obligation to serve its community of license unless reasons beyond its control prevented it from returning WDMV to the air.<sup>14</sup> It also re-alleges that Birach misrepresented its reasonable assurance of site availability when it filed the Brinklow Application. Taken together, New World asserts that Birach's incomplete and inaccurate representations concerning transmitter sites at Brinklow, Pocomoke City and Damascus put at issue Birach's truthfulness and require that the Commission dismiss the Renewal Application or, alternatively, designate misrepresentation and lack of candor issues against Birach.

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<sup>9</sup> *November 1997 ASD Letter* at 5.

<sup>10</sup> *November 1997 ASD Letter* at 5.

<sup>11</sup> *November 1997 ASD Letter* at 3-4.

<sup>12</sup> New World also requests that the Commission deny or dismiss "with prejudice" the already-dismissed Brinklow Extension Request, and by separate action deny or dismiss "with prejudice" the Damascus Application. The Damascus Application was dismissed by the staff on January 4, 2001. *See* n.7, *supra*. In addition, the Brinklow Extension Request was dismissed in the January 1997 ASD Letter.

<sup>13</sup> *Reply to Opposition to Application for Review* at 3. New World likens Birach's stewardship of WDMV to that of a permittee of an unbuilt station and asserts that the "Commission's erroneous deference to incumbent licensees reflected in *Southwestern Broadcasting Corporation*, 11 FCC Rcd 14880 (1996), cannot be squared with the strict standards applied to holders of construction permits for unbuilt stations . . ." *Application for Review* at 19. New World cites as examples, *Kin Shaw Wong*, 11 FCC Rcd 11928 (1996), *Carolyn S. Hagedorn*, 11 FCC Rcd 1695 (1996), *Contemporary Communications*, 11 FCC Rcd 5230 (1996), *Deltaville Communications*, 11 FCC Rcd 10793 (1996) and *McElroy Electronics Corporation v. FCC*, 990 F 2d 1351, 1365-66 (D.C. Cir. 1993). *Id.*

<sup>14</sup> New World notes that any Commission pronouncement allowing Birach to remain silent for so long would have violated a number of Commission rules. *See Application for Review* at 16.

7. In its Opposition, Birach attacks New World's motives for filing the Application for Review, charging that New World fears competition from another foreign-language broadcaster. Birach also alleges that the Application for Review is procedurally defective because, *inter alia*, it purports to be directed at both the Renewal Application and the Brinklow Extension Request, the latter of which was dismissed.<sup>15</sup> Substantively, Birach defends the staff's grant of the Renewal Application, noting that Commission policy has been to encourage silent stations to return to the air to avoid forfeiture of licenses under 47 U.S.C. § 312(g).<sup>16</sup> Birach contends that it had reasonable assurance of site availability for Brinklow. It challenges New World's suggestion that Birach was obligated as a licensee to take "extraordinary steps" to acquire the Pocomoke City transmission facilities and maintains that it fully disclosed its plans to the Commission.

## DISCUSSION

8. New World's misrepresentation and lack of candor allegations arise principally from Birach's prosecution of the Assignment and Brinklow Applications. However, New World raised these issues for the first time 18 months after the grant of those applications had become final. Its untimely attempt to use the Renewal Application to litigate these issues is fundamentally flawed. It is well settled that we do not re-open proceedings that are final unless there has been fraud on our processes or the challenged result is unconscionable.<sup>17</sup> New World has not shown that such circumstances are present here. Indeed, New World has failed to raise a substantial question as to the most fundamental of issues in a misrepresentation allegation -- that the Birach assertions on which New World's misrepresentation theory is premised were, in fact, false. Further, New World's argument is premised on its erroneous view that Birach was required to make diligent efforts to acquire the station's former physical facilities and have some specific intent to resume broadcasts in Pocomoke City while it sought to relocate WDMV to Brinklow and then, Damascus. There was no such particular obligation and thus no apparent motive to underlie Birach's alleged misrepresentations as to its future operation of WDMV at Pocomoke City.

9. Moreover, numerous WDMV application filings conclusively establish that the

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<sup>15</sup> Birach contends New World waived its right to challenge the Renewal Application by failing to file a petition to deny that application, and thus lacks standing, notwithstanding any discretionary action the staff may have taken on New World's informal objection or petition for reconsideration. Birach also argues that New World failed to include a statement of questions presented for review, as required by 47 C.F.R. § 1.115(b)(2).

<sup>16</sup> 47 U.S.C. § 312(g) states: "If a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary." This provision was added to the Communications Act as a result of Section 403(l) of the Telecommunications Act of 1996, Pub. L. No. 104-101, 110 Stat. 56. In an Order released May 17, 1996, the Commission stated that the 12 month period for stations that were silent when the Telecommunications Act was passed will commence on the date of the Telecommunications Act's enactment, February 8, 1996. Thus, if Birach had not resumed broadcast operations by February 8, 1997, the WDMV license would have expired on February 9, 1997.

<sup>17</sup> "The courts have noted a strong policy in favor of administrative finality, and have held that proceedings that have become final will not be reopened unless there has been fraud on the agency's or the court's processes, or unless the result is manifestly unconscionable." *Radio Para La Raza*, 40 FCC 2d 1102, 1104 (1973); *citing Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238 (1944), *Greater Boston Television Corporation v. FCC*, 463 F.2d 268 (D.C. Cir. 1971), *KIRO, Inc. v. FCC*, 438 F.2d 141 (D.C. Cir. 1970); *see also KRPL, Inc.*, 5 FCC Rcd. 2823, 2824 (1990).

Commission had ample notice of Birach's plans to cease broadcast operations and relocate the station. Documents submitted with the Assignment Application condition Birach's contractual obligations on the approval of the Brinklow Application. The Petition for Waiver that accompanied the Brinklow Application specifically stated that Station WDMV was losing money and "may well be forced off the air." *Petition for Waiver for 47 C.F.R. § 73.37*, filed as part of BP-920508AA, at 2. The Letter of Intent that was included in the Assignment Application stated that the "physical facilities of Radio Station WDMV-AM" would not be purchased by Birach. *Letter of Intent in Assignment Application (File No. BAL-19920508EB)*. These facts reflect Birach's intention, as evidenced by the Brinklow Application and the Petition for Waiver accompanying it, to relocate from Pocomoke City. After the assignment of WDMV to Birach had been consummated, Birach notified the Commission the station had discontinued broadcasting and Birach was not in a position to resume operations from Pocomoke City.<sup>18</sup> It also filed for authorization to remain silent, stating that Birach was diligently pursuing the construction of the facilities proposed in the Brinklow Application. *See, February 8, 1994 Letter from Sima Birach to William Caton*. In the Renewal Application, Birach certified that WDMV was off the air and "not expected to resume operations." *See Renewal Application, Section III, Question 3 and Exhibit I*. Based on these multiple disclosures, we conclude that New World's misrepresentation allegation relating to Birach's intentions to operate WDMV in Pocomoke City are unfounded. Secondly, New World has not shown that Birach intended to deceive the Commission about the Brinklow site's availability. Birach based its reasonable assurance of site availability on its contacts with a realtor who listed the property for sale. We agree with the staff's conclusion that while Birach's efforts to confirm the availability of the Brinklow site were careless and inconclusive, there is no basis on which to conclude that Birach misrepresented its site assurance. The fact that Birach had contractually tied the grant of the Brinklow Application to its obligations to acquire WDMV and had incurred significant expenses in pursuing this modification also support our conclusion that Birach was unaware of the Brinklow site's unavailability at the time the Brinklow modification application was filed. In sum, we conclude that Birach did not engage in misrepresentation or lack candor in its dealings with the Commission regarding these matters. New World has failed to show that the reopening of these final application proceedings is warranted.<sup>19</sup>

10. While not untimely, we reject for the same reasons New World's claim that Birach misrepresented the availability of the Pocomoke City facilities or its intentions to resume broadcasting from the former site in connection with either its requests to remain silent or in the license renewal application. Section 312(g) now places strict deadlines on licensees to return to the air. However, prior to the enactment of Section 312(g), the staff was particularly lenient on requests from AM stations to remain silent. It routinely granted such requests on the basis of a pledge to resolve technical difficulties, the pendency of a modification application, or because the licensee had obtained a construction permit to modify the licensed, silent station. Facilitating the return of a station to the air *where this goal appeared achievable* was viewed as a preferable public interest outcome to the revocation of a station license and the uncertain long-term prospects for licensing a new, replacement station. In these circumstances, New World's fly-specking critique of certain Birach statements regarding the ability and intent to resume broadcasting in Pocomoke City simply will not support an inference that Birach intended to deceive the Commission on these matters.

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<sup>18</sup> See January 15, 1993 Letter from Lauren Colby to Donna Searcy regarding consummation of assignment of license.

<sup>19</sup> New World's bare license attack against the Assignment Application does not involve fraud. For the reasons stated above, we will not further consider this untimely argument.

11. Accordingly, the only issue before us is whether the staff acted properly in granting a renewal application where the licensee initiated broadcasts for the first time after the renewal application had been filed and the license term had ended.<sup>20</sup> Based on the record before us, we find that the staff's decision to grant WDMV's license renewal application is appropriate and so affirm it. As noted above, the Commission's longstanding policy has been to encourage silent stations to resume broadcast operations. It has resolved revocation<sup>21</sup> and license renewal hearings<sup>22</sup> in favor of licensees following the stations' return to the air. The Commission continued this policy following the enactment of Section 312(g). It has accepted post-designation efforts to establish that a station has the capability and intent to promptly resume broadcast operations, and has directed staff to grant a designated license renewal application upon the resumption of broadcasts. See *Southwestern Broadcasting Corp.*, 11 FCC Rcd 14880 (1996).

12. Thus, it was not unreasonable for Birach to conclude that the Commission would apply the same deferential standard at the time it filed the Renewal Application. Birach's application filings plainly revealed its plans for WDMV. Its decision to resume broadcasts at the licensed site was fully explicable in terms of the impending statutory deadline for automatic license cancellation. At no point was Birach cautioned that keeping WDMV silent could put at risk the Renewal Application or that it was inconsistent with its obligations as a licensee. Nevertheless, establishing that a licensee has the capability and intent to resume broadcast operations does not necessarily resolve the renewal inquiry as to whether "during the *preceding* term of its license . . . the station has served the public interest, convenience and necessity." 47 U.S.C. § 309(k)(1) (emphasis added). It is axiomatic that Birach's failure to provide any service during the license term is material to this statutory determination. Moreover, consideration of post-term developments is fundamentally at odds with this backwards-looking standard.<sup>23</sup>

13. Our resolution of the license renewal issue must recognize the harsh consequences of a denial, and therefore, the due process protections that must be afforded to licensees in this situation. Based on the Commission's policy favoring the resumption of broadcast operations and Birach's filing of numerous applications that fully apprised the staff of its station plans, we cannot conclude that Birach "knew or should have known what the Commission expected" of it. *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351, 1358 (D.C.Cir. 1993). Having failed to provide "full and explicit notice" of all requirements, *Salazar v. FCC*, 778 F.2d 869, 871-71 (D.C.Cir. 1985), we conclude that it would be fundamentally unfair to deny the Renewal Application on the unique facts of this case. See, e.g., *General Electric Co. v. Environmental Protection Agency*, 53 F.3d 1324, 1328 (D.C.Cir. 1995). Section 312(g) will sharply curtail the possibility that a licensee would find itself in a similar situation in the future. However, we take this opportunity to caution all licensees that as a result of the clarification provided herein, a licensee will face a very heavy burden in demonstrating that it has served the public interest where it has remained silent for most or all of the prior license term. In this particular case, it is the listeners in

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<sup>20</sup> By its own admission, New World lacked standing to file a Petition to Deny the Renewal Application. However, due to the novel nature of this issue, we believe its consideration by the Commission is warranted.

<sup>21</sup> *Keyboard Broadcasting Communication*, 10 FCC Rcd 4489 (1995) (revocation proceeding terminated following resumption of broadcasts after station was silent for more than three years).

<sup>22</sup> *Cavan Communications*, 10 FCC Rcd 2873 (ALJ 1995) (renewing license without Bureau objection based on post-designation steps to return station to air).

<sup>23</sup> *But see Alabama Educational Television Commission*, 50 FCC 2d 461, 476 (1974) ("evidence of improved performance may in some circumstances be advanced by a renewal applicant as evidence of his willingness to correct deficient license term performance").

Pocomoke City who were most severely impacted by the loss of an existing service for more than three and one half years. The fact that Birach resumed WDMV operations only when faced with the potential license cancellation is not lost on us. Although we have concluded that Birach is qualified to be a licensee and that grant of the renewal application was proper, it is equally clear to us that Birach's conduct as a licensee upon acquiring WDMV fell far short of the service commitment which most licensees fulfill to their communities of license on a daily basis.

14. Accordingly, IT IS ORDERED, that the Application for Review filed by New World Radio, Inc. IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas,  
Secretary.