

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

In the matter of)	
)	
Birach Broadcasting Corporation)	File No. BP-19860725AB
Request to Toll the Period to)	
Construct Unbuilt Station WIJR(AM))	
Palm Beach Gardens, Florida)	Facility ID No. 90157
)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: January 29, 2003

Released: January 31, 2003

By the Commission:

1. Birach Broadcasting Corporation ("Birach") seeks review of a March 6, 2001, staff decision denying reconsideration of the staff's determination that Birach was not entitled to additional time to build new station WIJR(AM), Palm Beach Gardens, Florida, or to a waiver of the Commission's construction period rule. For the reasons set forth below, we deny Birach's Application for Review.

2. Background. A permittee must complete construction of its authorized facility no later than three unencumbered years after the grant of the original permit.¹ The staff issued the initial permit for WIJR(AM) on March 9, 1998, to Leo Kesselman d/b/a Palm Beach Gardens Radio ("Kesselman"). The permit required completion of construction by September 9, 1999, pursuant to the Commission's former 18-month construction requirements. The staff extended the construction deadline to March 9, 2001, at the permittee's request, to give Kesselman the benefit of the newly adopted three-year construction period rule.² On December 21, 2000, Kesselman filed an application to assign the permit for the unbuilt station to Birach. While that application was pending, the prospective assignee requested that the staff toll the WIJR(AM) permit and revise its construction deadline.³ Birach based its request on circumstances that allegedly made it difficult for Kesselman to build. According to Birach, the site specified in the construction permit was no longer available at the time of grant. Birach claimed that Kesselman intended to secure an alternative site and then to sell the permit for profit. Birach contended that Kesselman's nearly three-year search for a new site was unsuccessful due in part to high land prices and in part to Kesselman's lack of Florida construction experience. Birach alleged that Kesselman then decided to assign the station's permit to an entity with sufficient expertise to secure a new site and to complete the

¹47 C.F.R. § 73.3598(a).

²1998 Biennial Regulatory Review, *Streamlining of Mass Media Applications, Rules, and Processes*, 13 FCC Rcd 23056, 23092 (1998) ("Streamlining R&O"), *aff'd Memorandum Opinion and Order*, 14 FCC Rcd 17525, 17540 (1999) ("Streamlining MO&O").

³While Birach's tolling notification was apparently made with Mr. Kesselman's full knowledge, the Commission's rules, 47 C.F.R. § 73.3598(c), state that these requests may only be submitted by the permittee. The staff thus correctly noted on reconsideration that Birach's request should properly have been dismissed.

authorized construction. Birach also maintained that it should have received additional time because Kesselman was adversely affected by the considerable time that the Commission took to approve Kesselman's initial authorization.⁴ On February 7, 2001, the staff denied Birach's request, stating that these events did not satisfy the Commission's tolling criteria.⁵ It also denied Birach's waiver request, which failed to allege "rare and exceptional" circumstances necessary to justify waiver of the rule and which, in any event, contained no documentation or substantiation of the circumstances allegedly justifying waiver.

3. On reconsideration, Birach submitted a new four-paragraph declaration from Kesselman. The declaration reiterated the facts previously alleged by Birach. On this basis, Birach again sought waiver of the Commission's construction period rule. By letter dated March 6, 2001, the staff denied reconsideration. It found that Birach had failed to establish that Mr. Kesselman's statement could not have been submitted in a timely manner and, that the undocumented matters raised in Kesselman's declaration did not warrant waiver of the rules.⁶ Birach and Kesselman consummated the assignment of the permit for the unbuilt station on March 8, 2001, one day before the construction deadline.

4. Discussion. The Commission will grant an Application for Review only if the applicant demonstrates that the staff's decision: (1) conflicts with statute, regulation, case precedent, or established Commission policy; (2) involves a question of law or policy that has not been previously resolved by the Commission; (3) involves precedent or policy that should be overturned or revised; (4) makes an erroneous finding as to an important or material question of fact; or (5) commits a prejudicial procedural error.⁷ In its Application for Review, Birach argues that the staff erred in denying its request for additional time and, in the alternative, that the Commission should revise its tolling policy.

5. Under current procedures, the Commission may "toll" the three-year construction period for certain limited "encumbrances": acts of God, administrative and judicial review of a permit grant, failure of a condition precedent on the permit, or judicial action related to necessary local, state, or federal requirements.⁸ Birach has not shown any such encumbrances. We affirm the staff's finding that the circumstances upon which Birach relies, including loss of site and the high price of land in Florida, do not qualify for tolling. Although Birach argues that we should revise our tolling standards, it presents no basis for that proposal.

6. Nor does Birach show any error with respect to denial of its waiver request. The Commission will not waive its rules absent good cause.⁹ Applicants for waiver face a high hurdle, and must plead with

⁴Birach stated that Mr. Kesselman was an active 49-year old West Coast broadcaster when he applied in 1986 for the Palm Beach Gardens, Florida permit, but was 61 years old and essentially retired from broadcasting when the permit was approved in 1998. We note that the amount of time needed to resolve this proceeding stemmed from the following circumstances: (1) conflicts with five mutually exclusive applications, (2) the return of Kesselman's application for defects and subsequent reinstatement, (3) petitions to deny filed against Kesselman's proposal, (4) settlement negotiations, (5) engineering amendments to Kesselman's application, and (6) lengthy international coordination due to potential interference to a Cuban broadcast station. Kesselman did not object to the September 9, 1999, construction deadline at the time the WIJR permit was issued.

⁵47 C.F.R. § 73.3598(b).

⁶See generally, 47 C.F.R. § 1.106(b)(2).

⁷47 C.F.R. § 1.115(b)(2)(i)-(v).

⁸*Wendell & Associates*, 17 FCC Rcd 18576, 18577 (2002) ("*Wendell*"). See also 47 C.F.R. § 73.3598(b).

⁹See 47 C.F.R. § 1.3.

particularity the facts and circumstances which warrant such action.¹⁰ In turn, the agency must take a “hard look” at requests for waiver¹¹ and consider all relevant factors.¹² With respect to waivers of the broadcast construction period rule, the Commission recognizes that there may be “rare and exceptional circumstances” beyond a permittee’s control that prevents completion of construction.¹³ We find, however, that this case does not present such circumstances. Birach claims to have more experience and resources than its predecessor, but that is simply not a relevant factor in assessing Kesselman’s inaction. In addition, the Commission specifically eliminated extensions when permits are assigned when it adopted the current, substantially longer, three-year construction period.¹⁴ We also find no merit to the argument that we should grant a waiver based on the amount of time Kesselman’s initial construction permit application was pending. Kesselman did not seek reconsideration or protest the construction deadline – subsequently extended by staff – at the time the permit or extension was granted.¹⁵ Moreover, the delay did not affect the amount of time Kesselman was afforded to construct its facility once the permit was issued. We conclude that the WIJR(AM) permit was automatically forfeited upon its expiration on March 9, 2001.

7. The present case illustrates a practice that the Commission sought to end by adopting the new construction rules. Specifically, under our prior extension procedures, a number of permittees failed to diligently complete station construction. Many such permittees sought extensions at the time of permit expiration based on allegedly long-standing but unresolved problems.¹⁶ This approach to extension requests unnecessarily tied up limited spectrum and deprived the public of service. Here, Kesselman failed to secure a new site,¹⁷ did little during the construction period other than to market the permit, and brought its site problems to the staff’s attention shortly prior to the permit’s expiration. Birach acquired the permit one day prior to expiration, knowing that the authorized site was unavailable. This is precisely the sort of nonfeasance that the new construction requirements are designed to eliminate.

8. We take this opportunity to clarify one timing issue. The Commission requires that a permittee file its tolling request no later than 30 days from the event upon which the request is based.¹⁸ This procedure is intended to ensure ongoing permittee construction diligence and to avoid *post hoc* permittee temporizing. Accordingly, Birach’s tolling arguments are untimely. Although the Commission has shown some leniency in the timing of waiver requests, Birach’s waiver request is based on matters as much as three years old. We believe the better approach is to require permittees to file such requests as promptly as possible.¹⁹ A permittee that seeks waiver of a Section 73.3598 construction requirement should file its request as promptly as possible following the event upon which it bases its request, preferably within the

¹⁰*WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (“*WAIT Radio*”), citing *Rio Grande Family Radio Fellowship Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968).

¹¹*WAIT Radio*, 418 F.2d at 1157.

¹²*Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

¹³*Streamlining MO&O*, 14 FCC Rcd at 17541.

¹⁴See 47 C.F.R. §§ 73.3534(d) and 73.3535(c) (1998).

¹⁵See 47 C.F.R. § 1.110.

¹⁶See *Streamlining MO&O*, 14 FCC Rcd at 17539.

¹⁷Kesselman also failed to advise the Commission of the loss of the site specified in its construction permit application in violation of Section 1.65 of the rules.

¹⁸47 C.F.R. § 73.3598(c).

¹⁹*Wendell*, 17 FCC Rcd at 18579 n.14. (considering a waiver request that was based on an event occurring two months previously). See generally *Streamlining R&O*, 13 FCC Rcd at 23091 and *Streamlining MO&O*, 14 FCC Rcd at 17541.

same 30 day period afforded to tolling applicants. This also will help ensure permittee diligence.

9. Accordingly, IT IS ORDERED that the Application for Review filed by Birach Broadcasting Corporation IS DENIED.

10. IT IS FURTHER ORDERED that the staff SHALL DELETE from the Commission's records call sign WIJR(AM), which was forfeited upon permit expiration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary