

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

In the Matter of)	
)	
Birach Broadcasting Corporation)	File No. BP-19960829AA
)	
Request to Toll the Construction Period for)	Facility ID No. 19235
Modification of Station WDMV(AM) (formerly)	
WGOP(AM)), Walkersville, Maryland)	

MEMORANDUM OPINION AND ORDER

Adopted: February 19, 2008

Released: February 20, 2008

By the Commission:

I. BACKGROUND

1. The Commission has before it for consideration two Applications for Review filed by Birach Broadcasting Corporation (“Birach”), regarding its Station WDMV(AM), Walkersville, Maryland, both of which are opposed by New World Radio, Inc. (“New World”).¹ Birach seeks review of staff decisions issued on May 18, 2004 (the “May Decision”),² and June 15, 2004 (the “June Decision”),³ which denied Birach’s two separate requests for additional time to construct the modified WDMV(AM) facilities.⁴ For the reasons set forth below, we deny Birach’s Applications for Review.

2. WDMV(AM) is an operating station currently licensed to Walkersville, Maryland. On July 18, 2001, the staff issued a construction permit to the station’s then-permittee, Elijah Broadcasting Corporation (“Elijah”), authorizing relocation of the station’s transmitter to a site near Damascus, Maryland (the “Damascus Site”), from which the station would serve Poolesville, Maryland, instead of Walkersville. The permit, granted over the objection of New World, required completion of construction by July 18, 2004. On August 22, 2001, New World filed a timely Petition for Reconsideration of the permit’s grant. Birach acquired WDMV(AM) and the contested permit by an assignment from Elijah on December 6, 2002.⁵ On November 26, 2003, the staff affirmed the grant of the WDMV(AM) modified

¹ New World is the licensee of Station WUST(AM), Washington, D.C. Also before the Commission are responsive pleadings.

² See *Letter to Lauren A. Colby, Esq.* (MB May 18, 2004).

³ See *Letter to Lauren A. Colby, Esq.* (MB June 15, 2004).

⁴ At the time of the staff decisions, WDMV(AM), Walkersville, Facility ID No. 19235, operated under call sign WGOP(AM). Call sign WDMV(AM) was used by a different Birach station at Pocomoke City, Maryland, Facility ID No. 5347. The staff has since approved a call sign swap by the Birach stations. WDMV(AM) and WGOP(AM) now designate the Walkersville and Pocomoke City facilities, respectively. Birach also received permits that, if constructed, would change the stations’ communities of license, as follows: WDMV(AM) to Poolesville, Maryland and WGOP(AM) to Damascus, Maryland. The instant Order refers to the stations by their current call signs and communities.

⁵ See File No. BAL-20021118ABX, granted November 26, 2002.

permit⁶ and also granted Birach's application to relocate the licensed facilities of a commonly owned station, Station WGOP(AM), to the same Damascus Site.⁷

3. Under the rules then and still in effect, an initial or successor permittee must complete construction of an authorized facility no later than three unencumbered years after the grant of the original permit.⁸ This period can be "tolled" for certain enumerated "encumbrances" beyond the permittee's control, as follows: acts of God, administrative or 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.⁹ The Commission has also recognized that there may be "rare and exceptional circumstances beyond a permittee's control" other than those delineated above that could warrant a waiver of the construction period rule.¹⁰ Requests for tolling must be filed within 30 days of the event upon which the request is based.¹¹ Requests for waiver of the construction period rule must be filed as soon as possible after the event, generally within the same 30-day period applicable to tolling requests.¹²

4. Birach filed its first tolling request on March 3, 2004, alleging that the construction of WDMV(AM) had been encumbered for 27 months during the pendency of New World's Petition for Reconsideration of the permit grant. Birach also argued that it needed more time due to local zoning problems and because it wished to modify the facilities of WDMV(AM) and WGOP(AM) simultaneously. The staff denied Birach's request in the May Decision. It stated that neither initial zoning delays nor a permittee's desire to construct stations simultaneously are grounds for grant of additional construction time, and that administrative review, while potentially a basis for tolling, warranted no additional time here because Birach's tolling notification had been submitted two years late.¹³ Birach filed a timely Application for Review of the May Decision on May 27, 2004.

5. Along with its Application for Review, Birach filed a second request for tolling, contending that its concurrently filed Application for Review began a new and separate period of

⁶ See *Letter to New World Radio, Inc.* (MB Nov. 26, 2003).

⁷ The WGOP(AM) permit originally required completion of construction by November 26, 2006, but the staff granted a waiver extending that deadline to November 26, 2007, based on events occurring between 2005 and 2006. See *Letter to Bruce A. Henoch, Esq.* (MB Nov. 16, 2006). Birach subsequently surrendered the WGOP(AM) construction permit and the Bureau dismissed a petition against that permit filed by the Damascus Residents for Responsible Tower Siting ("DRRTS"). See Broadcast Actions, Public Notice, Report No. 26611 (Nov. 13, 2007). DRRTS has a pending request for reconsideration of that action. Birach also has a pending application to make a minor modification to WGOP(AM), filed on November 2, 2007, which is similarly contested by DRRTS.

⁸ See 47 C.F.R. § 73.3598(a). See also *1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules, and Processes*, Report and Order, 13 FCC Rcd 23056, 23092 (1998) ("*Streamlining Order*"), *aff'd*, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17539-40 (1999) ("*Streamlining MO&O*").

⁹ See 47 C.F.R. § 73.3598(b); see also *Wendell & Associates*, Memorandum Opinion and Order, 17 FCC Rcd 18576, 18577 (2002) ("*Wendell*").

¹⁰ See *Streamlining MO&O*, 14 FCC Rcd at 17541; *Texas Grace Communications*, Memorandum Opinion and Order, 16 FCC Rcd 19167 (2001) ("*Texas Grace*"). But see *Wendell*, *supra* n.9, 17 FCC Rcd at 18577 (waiver denied when permittee failed to prosecute diligently its modification application and commence preliminary construction efforts); *Birach Broadcasting Corporation*, Memorandum Opinion and Order, 18 FCC Rcd 1414 (2003) ("*Birach I*") (assignee's greater broadcast experience not a relevant good cause for waiver of construction period rule), *recon. denied*, 20 FCC Rcd 5764 (2005) ("*Birach II*").

¹¹ See 47 C.F.R. § 73.3598(c).

¹² See *Birach I*, *supra* n.10, 18 FCC Rcd at 1416.

¹³ See May Decision at 2 (citing *Streamlining Order*, *supra* n.8, 13 FCC Rcd at 23091).

administrative review for which tolling or waiver would be appropriate. The staff rejected Birach's claim in the June Decision, concluding that "administrative review" is a narrowly defined term inapplicable to Birach's claimed circumstances. On July 9, 2004, Birach filed a timely Application for Review of the June Decision. It did not construct by the July 18, 2004, deadline. New World filed a timely Opposition on July 26, 2004.

II. DISCUSSION

A. Procedural Matters

6. The filing deadline for oppositions to Birach's Application for Review of the May Decision was June 6, 2004, ten days from the May 27, 2004, filing date of the Application for Review.¹⁴ New World's July 14, 2004, Opposition was approximately six weeks late. New World explains that, as a non-party to the proceeding, it did not learn of the May Decision until after the pleading cycle had closed, because the May Decision was neither published nor placed on public notice. Birach argues that the untimely Opposition should not be considered.¹⁵

7. The applicable filing deadline for oppositions was based on the filing date of the Application for Review, not of the May Decision being challenged therein.¹⁶ Therefore, New World's claimed lack of notice of the May Decision does not justify the late filing of its Opposition. A public notice announcing the filing of Birach's Application for Review was issued on June 3, 2004.¹⁷ When, as here, there are fewer than seven days following public notice to file a timely responsive pleading, a potential filer seeking additional time must file a motion for extension of time by the due date and (in addition to serving a copy on the parties) orally notify all parties and the Commission staff of its motion.¹⁸ New World failed to follow that procedure and shows no good cause for its failure to have done so. Accordingly, we deny New World's request for leave to late-file and dismiss its untimely-submitted Opposition. We will, however, consider New World's views in the context of its separate and timely filing concerning the June Decision.

B. Substantive Issues

8. *Ability to Refile.* As an initial matter, we note that the staff's denial of Birach's request for tolling has a very limited substantive effect due to WDMV(AM)'s licensed status. The staff noted in the June Decision that, because WDMV(AM) is a licensed station, denial of tolling treatment would not prevent Birach from refileing its request to move the station to the Damascus Site as an application to modify the licensed WDMV(AM) facilities.¹⁹ Under the rules then in effect, such a modification was considered a major change that could be requested only during an AM major change filing window.²⁰

¹⁴ See 47 C.F.R. § 1.45(b).

¹⁵ Specifically, Birach argues that the staff has already considered and denied New World's challenges to the grant of WDMV(AM)'s construction permit, and New World did not seek Commission review of those decisions. See Opposition to Request for Leave at 3.

¹⁶ The May Decision was a staff letter of the type not generally released or placed on a public notice, but rather mailed to parties to the proceeding. New World was not a party.

¹⁷ See *Broadcast Applications*, Public Notice, Report No. 25749 (June 3, 2004).

¹⁸ 47 C.F.R. § 1.46(c).

¹⁹ See June Decision at 2.

²⁰ See 47 C.F.R. § 73.3571(a)(1) (2004). WDMV(AM)'s operations from the Damascus Site would not provide the community of Walkersville with the requisite city grade signal coverage. Birach failed to take advantage of its opportunity to file a major change application for WDMV(AM) during the AM filing window that opened on January 26, 2004.

However, in 2006, while the Applications for Review were pending, the Commission modified its rules to reclassify changes in communities of license as minor changes that could be filed at any time.²¹ Thus, Birach has had the ability since that time to withdraw its Applications for Review in favor of a new modification application for the same facilities which, if granted, would result in the issuance to it of a construction permit with a full three-year construction period. Birach has not pursued that alternative. Rather, on November 14, 2006, it filed a minor change application for facilities other than those specified in its expired WDMV(AM) modified permit.²² This new application remains pending because it has been contested.²³ In view of these circumstances, we will consider the merits of Birach's tolling arguments.

9. *Notification of Administrative Review (May Decision).* Tolling or waiver of a station's construction period is triggered by a notification to the Commission by the permittee; such action does not occur automatically.²⁴ The notification requirement serves to ensure permittee construction diligence and to avoid *post hoc* permittee temporizing.²⁵ Birach notified the Commission of its first tolling claim over two years after the event on which it relied.²⁶ As noted above, the Commission's rules require that requests for tolling be filed within 30 days of the event upon which the request is based. The May Decision therefore correctly concluded that the WDMV(AM) permit was not eligible for tolling treatment or construction period waiver.

10. We reject Birach's contention that the timely notification requirement in Section 73.3598(c) of the Rules is inapplicable to events which, like New World's reconsideration filing, occur as the result of proceedings before the Commission. In establishing the requirement of timely notification, the Commission did not limit the rule to matters outside of the agency. Indeed, the Commission specifically required notification of the commencement and termination of administrative review, which by definition is limited to matters pending within the Commission.²⁷ Although the Commission and its staff are aware of matters within the agency, they cannot be expected to infer whether and to what extent such matters may impact the construction plans of a permittee or assignee.²⁸

²¹ See *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, 14213-23 (2006).

²² See File No. BP-20061114ABV. The pending application would retain Walkersville as the station's community of license, use the currently licensed site, but increase power from 5 to 50 kW using a new four-tower directional array. In contrast, the expired permit that is the subject of the current proceeding would change the community of license from Walkersville to Poolesville and increase daytime power from 5 to 25 kW at the new Damascus Site. Under the Rule prohibiting inconsistent or conflicting applications, Birach could not both re-file an application for the Damascus Site and pursue its application for the new site. See 47 C.F.R. § 73.3518.

²³ The minor change application has been contested by DRRTS. See Informal Objection (Jan. 19, 2007).

²⁴ See 47 C.F.R. § 73.3598(c).

²⁵ See *Birach I*, *supra* n.10, 18 FCC Rcd at 1416.

²⁶ Under such circumstances, ordinary staff practice is to consider whether tolling is appropriate as of a date 30 days prior to the permittee's notification. See, e.g., *Letter to Lauren Colby, Esq.*, 21 FCC Rcd 1260 (MB 2006). That practice is based upon a reasonable reading of Section 73.3598(c), which embodies the 30-day notification requirement, in conjunction with Section 73.3598(b), which recognizes that certain events can continue to prevent construction for considerable periods. On February 1, 2004, *i.e.*, 30 days prior to Birach's first tolling notification, the WDMV(AM) construction permit was unencumbered because New World's Petition for Reconsideration had been denied three months earlier, and no appeal of that decision had been taken.

²⁷ See 47 C.F.R. § 73.3598(c) and (d); *Streamlining MO&O*, *supra* n.8, 14 FCC Rcd at 17541.

²⁸ See *generally Bembenista v. U.S.*, 866 F.2d 493 (D.C. Cir. 1989) (dismissing Federal Tort Claims Act claim allegedly contained in documents submitted with a different claim because "to ask an agency to contemplate the nuances of every sentence in such a submission would hold it to a standard that even a court would be pressed to match."); Instructions to FCC Form 303-S, page 7, Item 4 (license renewal applicant must report to the Commission

(continued...)

11. In the instant case, it was the responsibility of Elijah, WDMV(AM)'s permittee at the time of New World's Petition, to notify the Commission in accordance with Section 73.3598(c) of any impact that the Petition would have on Elijah's plans to construct. As the Commission has advised Birach in a case involving a different station, an assignee of a station will not receive additional construction time based on mistakes made by its assignor.²⁹ Moreover, Birach acquired the permit from Elijah while the New World Petition remained pending, and it became Birach's responsibility to notify the Commission of any impact that the Petition would have on Birach's construction plans.

12. Nor are we persuaded by Birach's argument that we should waive the timely notification requirement. Birach contends that it did not immediately seek tolling because it was awaiting staff action on an application to modify WGOP(AM) so that it could build the two stations concurrently. Birach argues that consolidation of the two stations at a single site would serve the public interest,³⁰ and that the staff should have known that "it would not have been practical to construct" WDMV(AM) independently of WGOP(AM) because the stations would share towers and a ground system. Birach further contends that its counsel had advised it that it would be unwise from a local perspective to pursue zoning until the Commission had granted both construction permits. Birach claims that it began the local zoning process for WDMV(AM) and WGOP(AM) promptly upon the staff's grant of the WGOP(AM) modification application, but that the zoning process had proven to be more cumbersome than anticipated. Based on prior experience, Birach believed that it "had plenty of time to complete the zoning procedures prior to the expiration" and requested additional time only once it became clear that local authorities would not complete the zoning process prior to expiration.³¹

13. These circumstances neither excuse the late notification nor provide good cause for waiving the notification rule. The Commission established the timely notification requirement to remedy various problems with the Commission's enforcement of broadcast station construction requirements, caused in part when permittees did little to construct and requested additional time shortly before permit expiration.³² The notification process is simple, and can generally be accomplished by means of a short letter. Here, for the first 27 months of the WDMV(AM) construction period, Elijah and Birach did little either to construct or to notify the Commission of other intentions. Birach's explanation for its failure to notify the Commission earlier seems to indicate that it expected that the staff would deduce Birach's intent to delay construction of WDMV(AM) by noticing that the unconditional WDMV(AM) permit shared some common geographic coordinates with Birach's separate modification application for WGOP(AM). Even accepting *arguendo*, that there are public interest advantages to use of a shared site for the two stations, such matters would justify neither a significant delay in seeking zoning approval nor in notification to the Commission of a tolling claim based on administrative review. The Commission has

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all Commission determinations of rule violations by the station to enable determination of whether the violations preclude renewal under 47 U.S.C. § 309(k). The Rules impose an affirmative obligation on licensees, permittees and applicants to affirmatively report certain information to the Commission, even if that information relates to other proceedings before the agency. *See* 47 C.F.R. § 1.65(a) ("Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application."); 47 C.F.R. § 1.65(c) ("All broadcast permittees and licensees must report annually to the Commission any adverse finding or adverse final action taken by any court or administrative body that involves conduct bearing on the licensee's character qualifications. . . .").

²⁹ *See Birach I, supra* n.10, 18 FCC Rcd at 1416.

³⁰ *See* Application for Review of May Decision at 5.

³¹ *Id.* at 3.

³² *See Streamlining MO&O, supra* n.8, 14 FCC Rcd at 17539.

long advised permittees to commence the local zoning process at the earliest possible date, and has previously advised *this* permittee – Birach – against making last-minute requests for waiver of the construction period rules.³³ Birach’s decision not to seek zoning for the WDMV(AM) project until 27 months into the station’s construction period, and its failure to have notified the Commission immediately of its tolling claim were clearly matters within its control.³⁴

14. *Definition of Administrative Review (June Decision).* The Rules provide for tolling of the broadcast construction period when construction is prevented by “administrative review,” which the rules define as “petitions for reconsideration and applications for review of *the grant* of a construction permit.”³⁵ Birach’s Application for Review of the June Decision argues that Commission consideration of an Application for Review qualifies as “administrative review” and that the June Decision’s denial of tolling while Birach had a pending Application for Review was therefore erroneous. New World, in contrast, fully supports the staff’s analysis.

15. We affirm the staff’s June Decision conclusion that our consideration of the Application for Review in the instant proceeding does not constitute administrative review warranting tolling. Birach’s Application for Review concerns a permittee’s own challenge of the *denial* of its request for *tolling*, not an opposing party’s challenge of the *grant* of the permittee’s initial construction permit, as administrative review is defined. The former does not encumber construction, but only maintains the original construction deadline. The Commission has previously held that no additional time is warranted under such circumstances.³⁶

III. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED That the Application for Review filed on May 18, 2004, by Birach Broadcasting Corporation concerning tolling of its construction permit (File No. BP-19960829AA) IS DENIED, and that the Request of New World Radio for leave to file a late Opposition to that Application for Review IS DENIED and that New World’s July 14, 2004, Opposition IS DISMISSED.

17. IT IS FURTHER ORDERED That the Application for Review filed on June 15, 2004, by Birach Broadcasting Corporation concerning tolling of its construction permit (File No. BP-19960829AA) IS DENIED, and that the timely Opposition by New World Radio IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³³ See *Birach I*, *supra* n.10, 18 FCC Rcd at 1416.

³⁴ We observe that the staff’s basis for granting additional construction time to Birach’s co-owned station WGOP(AM) would provide no basis for grant of additional time to WDMV(AM). The events that formed the basis for the staff’s WGOP(AM) action involved county government activities that began in July 2005, over a year after the WDMV(AM) permit had expired.

³⁵ 47 C.F.R. § 73.3598(b)(ii) (emphasis added).

³⁶ See *Texas Grace*, *supra* n.10, 16 FCC Rcd at 19172.