

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

In the Matter of	)	
	)	Facility ID No. 25185
Roger L. Hoppe, II	)	NAL/Acct. No. MB-201641410014
	)	FRN: 0006773196
To Renew and Assign the License of Station	)	File Nos. BR-20121231AME
KLIM(AM), Limon, Colorado	)	BAL-20141214AAH

**MEMORANDUM OPINION AND ORDER  
AND NOTICE OF APPARENT LIABILITY**

**Adopted: August 5, 2016**

**Released: August 5, 2016**

By the Chief, Audio Division, Media Bureau:

**I. INTRODUCTION**

1. We have before us applications of Roger L. Hoppe, II (Licensee), licensee of KLIM(AM), Limon, CO (Station), to renew the Station's license (Renewal Application) and to assign the license to Catholic Radio Network, Inc. (CRN) (Assignment Application). In this Memorandum Opinion and Order and Notice of Apparent Liability (*NAL*),<sup>1</sup> we find that Licensee apparently willfully and repeatedly violated Section 73.1740 of the Rules by discontinuing operation of the Station without timely requesting special temporary authority (STA).<sup>2</sup> Based upon our review of the record before us, we find Licensee apparently liable for a monetary forfeiture in the amount of five thousand dollars (\$5,000). Following resolution of the forfeiture matter, we intend to grant the Renewal Application for a period of two years instead of a full term of eight years<sup>3</sup> and to act on the Assignment Application.

**II. BACKGROUND**

2. Section 73.1740 of the Rules requires that broadcast stations adhere to minimum operating requirements.<sup>4</sup> If a station is unable to do so for more than 30 days, it must request authorization to remain silent.<sup>5</sup> Notwithstanding the grant of such authority, the license of any station that is silent for 12 consecutive months will forfeit automatically pursuant to Section 312(g) of the Communications Act of 1934, as amended (Act).<sup>6</sup>

3. Licensee filed the Renewal Application on December 31, 2012, and seeks renewal based on the license term running from April 1, 2005 to March 31, 2013. Section III of the application form, FCC Form 303-S, required Licensee to answer several questions concerning its operations during that term. In response to Question 4, whether the Station met the minimum operating schedule, Licensee

<sup>1</sup> This *NAL* is issued pursuant to Sections 309(k) and 503(b) of the Communications Act of 1934, as amended (Act), and Section 1.80 of the Commission's rules (Rules). See 47 U.S.C. §§ 309(k), 503(b); 47 CFR § 1.80. The Bureau has delegated authority to issue the *NAL* under Section 0.283 of the Rules. See 47 CFR § 0.283.

<sup>2</sup> See 47 CFR § 73.1740(a)(4).

<sup>3</sup> 47 U.S.C. § 309(k)(2).

<sup>4</sup> See 47 CFR § 73.1740(a)(1) (requirements for commercial AM and FM stations).

<sup>5</sup> See 47 CFR § 73.1740(a)(4).

<sup>6</sup> See 47 U.S.C. § 312(g).

responded “No,” and explained that the Station was silent for five distinct periods, each just under one year, between 2009 and 2014.<sup>7</sup> In answer to Question 5, Licensee certified “Yes,” that none of its silent periods had extended for 12 consecutive months. In response to Question 6, whether the Station was currently on the air, Licensee responded “No.” However, in May 2015, after we granted STA for the Station to operate from an alternate site with reduced power, Licensee amended that answer to reflect that the Station returned to the air and continues to operate. Commission records reflect that Licensee sought and received STA to remain silent for four periods due to storm damage, health issues, financial difficulties, and equipment problems.<sup>8</sup> With respect to a fifth period of silence, December 11, 2011 to December 6, 2012, we cannot locate any STA request, consistent with Licensee’s statement in the Renewal Application that “some required notifications have been overlooked.”<sup>9</sup>

### III. DISCUSSION

4. In evaluating an application for license renewal, the Commission’s decision is governed by Section 309(k) of the Act.<sup>10</sup> That Section provides that if, upon consideration of the application and pleadings, we find that: (1) the station has served the public interest, convenience, and necessity; (2) there have been no serious violations of the Act or the Rules; and (3) there have been no other violations which, taken together, constitute a pattern of abuse, we are to grant the renewal application.<sup>11</sup> If, however, the licensee 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 – or grant the application “on terms and conditions that are appropriate, including a renewal for a term less than the maximum otherwise permitted.”<sup>12</sup> Pursuant to this standard, we must address several issues pertaining to Licensee’s silence before we can act upon the Renewal Application.

#### A. Proposed Forfeiture for Unauthorized Silence

5. As discussed above, Section 73.1740(a)(4) of the Rules requires licensees to request permission to remain off the air for more than 30 days, but Licensee acknowledges that it sometimes overlooked that requirement.<sup>13</sup> With regard to the admitted silence from December 11, 2011 to December

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<sup>7</sup> Specifically, Licensee states that the Station was silent from July 29, 2009 to July 28, 2010; from September 24, 2010 to September 22, 2011, from December 11, 2011 to December 6, 2012; from December 12, 2012 to November 17, 2013; and from November 18, 2013 to November 10, 2014. Renewal Application, Ex. 13. The license expired on March 31, 2013 but the silence after that time is relevant because its license renewal application remained pending during that time. See *Fox Television Stations, Inc.*, 29 FCC Rcd 9564, 9571, n.40 (MB 2014) (*Fox*), citing, 47 U.S.C. §§ 309(k)(1), 307(c)(3) (directing the Commission to “continue [a] license in effect” pending its review of a renewal application), 47 CFR §§ 307(c), 503(b)(6) (“A separate license term shall not be deemed to have commenced as a result of continuing a license in effect under section 307(c) pending a decision on an application for renewal of the license.”).

<sup>8</sup> The Station was silent pursuant to STA in accordance with 47 CFR § 73.1740 from July 29, 2009 – July 27, 2010 (File No. BLSTA-20090806ACN); September 24, 2010 – September 21, 2011 (File Nos. BLSTA-20101019ABP and BLESTA-20110608ACA); December 6, 2012 – November 17, 2013 (File Nos. BLSTA-20121231AMB and BLSTA-20130809ACW); and November 18 to November 10, 2014 (File No. BLSTA-20131219FBO).

<sup>9</sup> Renewal Application, Exh. 13.

<sup>10</sup> 47 U.S.C. § 309(k).

<sup>11</sup> 47 U.S.C. § 309(k)(1). The renewal standard was amended to read as described by Section 204(a) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). See *Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures)*, Order, 11 FCC Rcd 6363 (1996).

<sup>12</sup> 47 U.S.C. §§ 309(k)(2), 309(k)(3).

<sup>13</sup> See *supra*, para. 3; 47 CFR § 73.1740(a)(4).

6, 2012, Licensee should have filed an STA request by January 10, 2012 and, again, six months later. It failed to file STA requests for that period. We, thus, find that Licensee apparently violated Section 73.1740 of the Rules by remaining silent without authority.

6. The Commission's *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules establish a base forfeiture amount of \$5,000 for the unauthorized discontinuance of service.<sup>14</sup> Here, the Station was silent for over eleven months without the required STA. Moreover, Licensee has not provided an explanation for its failure to timely request STA, other than to say that it "overlooked" the requirement. Accordingly, we propose a \$5,000 forfeiture for this period of unauthorized silence.

7. This *NAL* is issued pursuant to Section 503(b)(1)(B) of the Act. Under that provision, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.<sup>15</sup> 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.<sup>16</sup> The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,<sup>17</sup> and the Commission has so interpreted the term in the Section 503(b) context.<sup>18</sup> Section 312(f)(2) of the Act provides that "[t]he term 'repeated,' when used with reference to the 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."<sup>19</sup>

#### **B. Extended Periods of Silence**

8. During the last four years of the Station's eight-year license term, it was off air approximately three and one-third years, sometimes with and sometimes without authority. The Station was also off air for additional periods of approximately 17 months while its license renewal application remained pending. Extended periods of station silence are addressed most directly in Section 312(g) of the Act, which Congress added in 1996 and amended in 2004. That Section provides in relevant part:

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, except that the Commission may extend or reinstate such station license if the holder of the station license prevails in an administrative or judicial appeal, the applicable law changes, or for any other reason to promote equity and fairness.<sup>20</sup>

9. The policy against allowing extended periods of silence by licensed stations aims to ensure "that scarce broadcast spectrum does not lie fallow and unavailable to others capable of instituting

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<sup>14</sup> See *Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113-15 (1997) (*Forfeiture Policy Statement*), recon. denied, 15 FCC Rcd 303 (1999); 47 CFR § 1.80(b)(4), note to paragraph (b)(4), Section I.

<sup>15</sup> 47 U.S.C. § 503(b)(1)(B). See also 47 CFR § 1.80(a)(1).

<sup>16</sup> 47 U.S.C. § 312(f)(1).

<sup>17</sup> See H.R. Rep. No. 97-765, 97<sup>th</sup> Cong. 2d Sess. 51 (1982).

<sup>18</sup> See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) (*Southern California*).

<sup>19</sup> 47 U.S.C. § 312(f)(2).

<sup>20</sup> 47 U.S.C. § 312(g); see Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), and Consolidated Appropriations Act, 1995, Pub. L. No. 108-447, 118 Stat. 2809 (2004); see also *Eagle Broadcasting Group, Ltd. v. FCC*, 563 F.3d 543, 545 (D.C. Cir. 2009).

and maintaining service to the public.”<sup>21</sup> In addition to its enforcement of Section 312(g), the Commission has stressed its interest in promoting efficient use of radio broadcast spectrum for the benefit of the public in several different contexts since the enactment of Section 312(g).<sup>22</sup>

10. Section 312(g) has relieved the Commission from the need to conduct revocation proceedings, with their lengthy procedural requirements, including evidentiary hearings, for stations that remain silent for a consecutive 12-month period.<sup>23</sup> However, in response to Section 312(g), some licensees of silent stations have adopted a practice of resuming operation for a short period of time, in some cases as little as a day, before the 12-month limit in Section 312(g) applies.

11. These practices raise a question as to whether the licenses for such stations should be renewed pursuant to Section 309(k) of the Act. Silence instead of licensed operation is a fundamental failure to serve station’s community of license, because a silent station offers that community no public service programming such as news, public affairs, weather information, and Emergency Alert System notifications. Moreover, brief periods of station operation sandwiched between prolonged periods of silence are of little value because the local audience is not accustomed to tuning in to the station’s frequency. In 2001, the Commission issued a decision in the *Birach* case cautioning that “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.”<sup>24</sup> Licensees have been on notice since that time of how Section 309(k)(1) applies to silent stations, and that eventual resumption of operations after long periods of silence does not necessarily resolve the renewal inquiry as to whether the licensee served the public interest during the preceding license term.<sup>25</sup>

12. In the instant case, Licensee’s conduct has fallen far short of that which would warrant routine license renewal. The Station had multiple periods of silence each lasting just shy of twelve months. In all, licensee was off air approximately three and one-third years prior to license expiration and about 17 months during the pendency of its renewal application, with interim periods of service ranging from just one to 80 days. Licensee’s stewardship of the Station fails to meet the public service

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<sup>21</sup> *Family Life Ministries, Inc.*, Letter, 23 FCC Rcd 15395, 15397 (MB 2008).

<sup>22</sup> See *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Third Report and Order, 26 FCC Rcd 17642, 17645 (2011) (citing the Commission’s “fundamental interest” in expediting new radio service and preventing “warehousing” of scarce spectrum); *1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes*, Report and Order, 13 FCC Rcd 23056, 23090-93 (1998), on reconsideration, 14 FCC Rcd 17525, 17539 (1999); *Lieberman Broad. of Dallas License LLC*, Letter, 25 FCC Rcd 4765, 4768 (MB 2010).

<sup>23</sup> See *Eagle Broad. Group, Ltd. v. FCC*, 563 F.3d at 545.

<sup>24</sup> See *Birach Broad. Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 5015, 5020 (2001) (*Birach*).

<sup>25</sup> Section 309(k)(1) applies a “backwards-looking standard” which examines station performance and conduct during the preceding license term. *Id.* Although the Commission has taken into account acts that occur while a license renewal application is pending, it has traditionally been reluctant to afford greater weight to improved performance during a renewal proceeding than to past negative performance. See *Fox*, 29 FCC Rcd at 9571, n.40 (Commission considers the licensee’s performance since the beginning of its most recent license term and while its license application is pending, but improved performance during the pendency of a renewal application is given less weight). In *Birach*, the station was silent for the entire period (approximately two and one-half years) in which the license renewal applicant (*Birach*) held the license. Section 312(g) of the Act took effect during that period, and *Birach* returned the station to operation before that provision would have applied. The Commission stated: “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.” *Id.*, 16 FCC Rcd at 2021.

commitment which licensees are expected to provide to their communities of license on a daily basis because the Station was silent for significant portions of its license term, resuming operation sporadically to avoid license termination under Section 312(g) of the Act.

13. Given the Station's extended periods of non-operation, its performance fell far short of the service commitment which most licensees fulfill to their communities of license on a daily basis. We conclude, however, that this matter, even when coupled with the Rule violation for unauthorized silence discussed above, is not sufficiently "serious" nor evidences any pattern of abuse warranting designation for evidentiary hearing.<sup>26</sup>

14. We believe that the best course is to complete the forfeiture aspect of this license renewal proceeding, as discussed above and then, upon its conclusion, to take separate action granting a short-term license renewal, limited to a period of two years from that date.<sup>27</sup> The limited renewal period will serve to ensure that the Station will provide broadcast service to the public by affording the Commission an opportunity to review the Station's compliance with the Act and the Commission's rules and to take whatever corrective actions, if any, may be warranted at that time. The license renewal appears to be the only impediment to a grant of the Assignment Application. Accordingly, we expect to act on the Assignment Application once we grant the short-term renewal.

#### IV. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's Rules, that Roger L. Hoppe, II, is hereby NOTIFIED of his APPARENT LIABILITY FOR FORFEITURE in the amount of five thousand dollars (\$5,000) for the apparent willful and repeated violation of Section 73.1740 of the Commission's Rules.

16. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission's Rules, that, within thirty (30) days of the release date of this *NAL*, Roger L. Hoppe, II, SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

17. Payment of the proposed forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the *NAL*/Acct. No. and FRN No. referenced in the caption above. Regardless of the form of payment, a completed FCC Form 159 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). Licensee will also send electronic notification on the date said payment is made to Penelope.Dade@fcc.gov and Irene.Bleiweiss@fcc.gov. Below are additional instructions that should be followed based on the form of payment selected:

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<sup>26</sup> For example, we do not find here that Licensee's operation of the Station "was conducted in an exceedingly careless, inept and negligent manner and that the licensee is either incapable of correcting or unwilling to correct the operating deficiencies." See *Heart of the Black Hills Stations*, Decision, 32 FCC 2d 196, 198 (1971). Nor do we find on the record here that "the number, nature and extent" of the violations indicate that "the licensee cannot be relied upon to operate [the station] in the future in accordance with the requirements of its licenses and the Commission's Rules." *Id.*, 32 FCC 2d at 200. See also *Center for Study and Application of Black Economic Development*, Hearing Designation Order, 6 FCC Rcd 4622 (1991); *Calvary Educational Broadcasting Network, Inc.*, Hearing Designation Order, 7 FCC Rcd 4037 (1992). This is especially true, given that Licensee has located another organization to which it has proposed to assign the license once renewed.

<sup>27</sup> See, e.g., *LKCM Radio Group, LP*, Memorandum Opinion and Order and Notice of Apparent Liability, 29 FCC Rcd 1045 (MB 2014) (two-year renewal and *NAL* for station with incomplete public file that was silent for nearly half of the current licensee's portion of the license term); *South Seas Broad., Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability, 24 FCC Rcd 6474 (MB 2008) (two-year renewal and *NAL* for operation at an unauthorized site and unauthorized silence).

Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, at 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. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.

Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 139 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank — Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

18. The response, if any, must be mailed to Office of the Secretary, Federal Communications Commission, 445 12<sup>th</sup> Street, S.W., Washington, DC 20554, ATTN: Peter H. Doyle, Chief, Audio Division, Media Bureau, and MUST INCLUDE the NAL/Acct. No. referenced above.

19. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent 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 respondent'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.

20. Requests for full payment of the forfeiture proposed in this *NAL* under the installment plan should be sent to: Associate Managing Director-Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, DC 20554.<sup>28</sup>

21. IT IS FURTHER ORDERED, that copies of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to Roger L. Hoppe, II, P.O. Box 80495, Rochester, MI 48308, and to his Counsel, Frank Jazzo, Esq., Fletcher, Heald & Hildreth, 1300 N. 17<sup>th</sup> Street, 11<sup>th</sup> Floor, Arlington, VA 22209.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle  
Chief, Audio Division  
Media Bureau

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<sup>28</sup> See 47 CFR § 1.1914.