

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

In re Application of)	MB Docket No. 17-198
)	
Radioactive, LLC)	
)	
For Renewal of License)	Facility ID No. 164247
Station WRAX(FM), Lake Isabella, MI)	File No. BRH-20120531AHY

HEARING DESIGNATION ORDER

Adopted: August 3, 2017

Released: August 3, 2017

By the Commission: Chairman Pai and Commissioners Clyburn and O’Rielly issuing separate statements.

I. INTRODUCTION

1. This *Hearing Designation Order* commences a hearing proceeding before the Commission to determine whether the captioned license renewal application (WRAX Renewal Application) for Station WRAX(FM) (Station) filed by Radioactive, LLC (Radioactive) should be granted pursuant to Section 309(k)(1) of the Communications Act of 1934, as amended (Act).¹

II. BACKGROUND

2. A broadcast licensee’s authorization to use radio spectrum in the public interest carries with it the obligation that the licensee use the station to serve its community, providing programming responsive to local needs and interests.² Broadcast licensees also are required to operate in compliance with the Communications Act of 1934, as amended (Act), and the Commission’s rules (Rules). These requirements include the obligation to transmit potentially lifesaving national level Emergency Alert System (EAS) messages in times of emergency and to engage in periodic tests to ensure that their stations are equipped to do so.³

3. The basic duty of broadcast licensees to serve their communities is reflected in the license renewal provisions of the Act.⁴ In 1996, Congress revised the Commission’s license renewal process and the renewal standards for broadcast stations by adopting Section 309(k) of the Act.⁵ Section 309(k)(1) of the Act provides that the Commission shall grant a license renewal application if it finds, with respect to the applying station, that during the preceding license term: (a) the station has served the public interest, convenience, and necessity; (b) there have been no serious violations by the licensee of the Act or the Rules; and (c) there have been no other violations by the licensee of the Act or the Rules which, taken together, would constitute a pattern of abuse. Section 309(k)(2) of the Act provides that if a station fails to meet the foregoing standard, the Commission may deny the renewal application pursuant to Section 309(k)(3) or grant the application on appropriate terms and conditions, including a short-term renewal. Section 309(k)(3) of the Act provides that if the Commission determines, after notice and opportunity for

¹ 47 U.S.C. § 309(k)(1).

² See *In the Matter of Broadcast Localism*, Report on Broadcast Localism and Notice of Proposed Rulemaking, 23 FCC Rcd 1324, 1327 (2007).

³ See 47 CFR §§ 11.1 *et seq.*, particularly 11.51.

⁴ 47 U.S.C. § 309(k).

⁵ 47 U.S.C. § 309(k)(1); see Pub. L. No. 104-104, Sec. 204(a)(1).

hearing, that the licensee has failed to meet the standard of Section 309(k)(1) and that no mitigating factors justify the imposition of lesser sanctions, the Commission shall issue an order denying the license renewal application for the station.

4. Section 312(g) of the Act, which Congress also added in 1996 and then amended in 2004, 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.⁶

5. Thus, Section 312(g) has relieved the Commission of the need to conduct license renewal or revocation proceedings, with their lengthy and resource-intensive procedural requirements, including evidentiary hearings, for stations that remain silent for extended periods of time.⁷ However, in response to Section 312(g), some licensees of silent stations⁸ have adopted a practice of resuming operation for a short period of time, in some cases as little as a day or less, before the one-year limit in Section 312(g) applies and the station license automatically expires. Other stations have alternated between periods of silence and operations with minimal power levels—in some cases as low as five watts⁹—that may be insufficient to allow them to actually provide service to their communities of license.¹⁰

6. These practices raise a question as to whether the licenses for such stations should be renewed pursuant to Section 309(k) of the Act. In 2001, the Commission cautioned “all licensees 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.”¹¹ This warning in *Birach* borrowed from the court’s language in *Office of Communication of the United Church of Christ*,¹² where the court stated: “When past performance is in conflict with the public interest, a very heavy burden rests on the renewal applicant to show how a renewal can be reconciled with the public interest. Like public officials charged with a public trust, a renewal applicant . . . must literally ‘run on his record.’”¹³ The *UCC* decision further

⁶ 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 Broad. Group, Ltd. v. FCC*, 563 F.3d 543, 545 (D.C. Cir. 2009) (*Eagle*).

⁷ See *Eagle*, 563 F.3d at 545.

⁸ A “silent station” is a radio or television station that is authorized to broadcast but is not doing so. Any station that remains silent for more than 30 days must obtain special temporary authority (STA) to remain silent. See 47 CFR § 73.1740(a)(4). Similarly, a station that is operating with reduced power for more than 30 days must obtain an STA to do so. See 47 CFR § 73.1560(c).

⁹ By comparison, low power FM stations operate at 100 watts.

¹⁰ This is not intended to suggest that a particular power level or ratio is critical. We believe the most significant factor in the determination of whether operation below the station’s licensed power level served the public interest is whether or not the station provided service to its community of license. See 47 CFR §§ 73.24(i), 73.315(a), 73.515, and 73.625(a). Of course, if the reduction in power from the licensed power level is unauthorized, then Section 312(g) would apply. See *Eagle*, 563 F.3d at 553 (“Under the statute, unauthorized and unlicensed transmissions are no better than silence”).

¹¹ *Birach Broad. Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 5015, 5020, para. 13 (2001) (*Birach*), appeal dismissed sub nom. *New World Radio, Inc. v. FCC*, 294 F.3d 164 (D.C. Cir. 2002).

¹² *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) (*UCC*).

¹³ *Id.* at 1007.

stated: “A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations . . . a broadcast license is a public trust subject to termination for breach of duty.”¹⁴ Although *UCC* was decided long before Section 309(k) was adopted, these principles aptly describe the public interest standard codified there.

7. In *Birach*, where the licensee was silent for all but 56 days of its initial four-year license term, the Commission acknowledged that the agency’s longstanding policy before the 1996 enactment of Section 312(g) had been to encourage silent stations to resume broadcast operations rather than to terminate their operation.¹⁵ However, the Commission noted that Section 309(k)(1) applies a “backwards-looking standard” that does not give any weight to efforts to return a station to full-time operation in the future.¹⁶ The Commission held that denial of the renewal application of the station in question in *Birach* would have been fundamentally unfair because the Commission had not provided sufficient notice of how the Section 309(k)(1) renewal standard would be applied to silent stations.¹⁷ However, after noting that, given the lack of notice, it was renewing the license in question, the Commission provided the following clear warning to all licensees: “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 . . . fell far short of the service commitment which most licensees fulfill to their communities of license on a daily basis.”¹⁸

8. The policy against allowing extended periods of silence or minimal operation by licensed stations is to ensure “that scarce broadcast spectrum does not lie fallow and unavailable to others capable of instituting and maintaining service to the public.”¹⁹ In addition to enforcing Section 312(g) of the Act, the Commission has stressed its interest in promoting efficient use of radio broadcast spectrum for the benefit of the listening public in several different contexts since the enactment of Section 312(g).²⁰ These

¹⁴ *Id.* at 1003.

¹⁵ *Birach*, 16 FCC Rcd at 5019, para. 10.

¹⁶ *Id.* at 5020, para. 12 (“[C]onsideration of post-term developments is fundamentally at odds with this backwards-looking standard”).

¹⁷ The *Birach* station’s period of non-operation commenced prior to the enactment of Section 312(g). The Commission’s policy was that, for such stations, the 12 month period for purposes of Section 312(g) would commence on that date of enactment, February 8, 1996. Thus, had *Birach* failed to resume broadcast operations by February 8, 1997, its station license would have expired the next day. *Birach*, 16 FCC Rcd 5018, n.16.

¹⁸ *Id.* at 5021, para. 13. See also *LKCM Radio Group, L.P.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 1045, 1048-50, paras. 10-16 (MB 2014); *Lazer Licenses, LLC*, Memorandum Opinion and Order, 30 FCC Rcd 6357, 6364, para. 21 (MB 2015); *Roger L. Hoppe, II*, Memorandum Opinion and Order and Notice of Apparent Liability, 31 FCC Rcd 8790, 8793, para. 11 (MB 2016).

¹⁹ *Family Life Ministries, Inc.*, Letter Order, 23 FCC Rcd 15395, 15397 (MB 2008).

²⁰ See *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Third Report and Order, 26 FCC Rcd 17642, 17645, para. 7 (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, 23093, para. 90 (1998), *on reconsideration*, 14 FCC Rcd 17525, 17539, para. 35 (1999); *Lieberman Broad. of Dallas License LLC*, Letter Order, 25 FCC Rcd 4765, 4768 (MB 2010) (“continued warehousing of this spectrum by Susquehanna in the face of Lieberman’s long-standing competing demand is plainly contrary to the public interest”); *Great Lakes Community Broad., Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 13487, 13489, para. 3 (MB 2009). See also *Roger L. Hoppe, II*, 31 FCC Rcd at 8793, para. 11, *citing Birach* (“Silence instead of licensed operation is a fundamental failure to serve [a] 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.”)

concerns about efficient use of spectrum are also reflected in the Commission's statutory authority to award licenses at auction.²¹ We find that, in light of this important policy, delay in acting on the WRAX Renewal Application would be contrary to the public interest. In addition, this Order provides for certain procedures intended to expedite the hearing process, allowing an expeditious resolution of these matters.

III. DISCUSSION

A. WRAX(FM) Operational History

9. Radioactive was the successful bidder in Auction No. 37 for a new FM station serving Walhalla, Michigan and was issued the construction permit for Station WRAX(FM) in 2006.²² Radioactive then modified the permit to specify Lake Isabella as the community of license and commenced operations on November 12, 2009.²³ The station was then licensed on March 1, 2010, for a term ending on October 1, 2012.²⁴ The Commission's records show that the station was silent for all but two days of that period, and, since then has continued the pattern of one partial isolated day of operation per year²⁵:

²¹ See 47 U.S.C. §§ 309(j)(3)(D) (obligation to promote the objective of "efficient and intensive use of the electromagnetic spectrum); 309(j)(4)(B)(auction rules shall include performance requirements in part "to prevent stockpiling or warehousing of spectrum").

²² See FCC File No. BNPH-20050103ACP; see also *FM Broadcast Construction Permits Auction Closes*, Public Notice, 20 FCC Rcd 1021 (MB 2004), Attach. A, p. 5 (Radioactive wins, among others, Walhalla, MI).

²³ See FCC File No. BMPH-20090818ABD.

²⁴ See WRAX Renewal Application, Ex. 13. Section 307(c)(3) of the Act provides for the Commission to continue broadcast licenses in effect while the license renewal application is pending. 47 U.S.C. § 307(c)(3); see *Fox Television Stations, Inc.*, Memorandum Opinion and Order, 29 FCC Rcd 9564, 9571 n.40 (MB 2014) (Commission considers the licensee's performance since the beginning of its most recent license term, but performance during the pendency of a renewal application is given less weight).

²⁵ According to Radioactive's filings for WRAX(FM), the station was actually in operation for less than a day (for 13 hours) each year: "The station resumed licensed operations on October 23, 2013, at 9:00 a.m. and operated on that date until 10:05 p.m. (local time). Thus, the station operated on October 23, 2013 in accordance with the minimum operating requirements of Section 73.1740(a)(1) of the Commission's rules." Resumption of Operations, Exh. 3 (Oct. 24, 2013); see also similar filings regarding the station dated November 10, 2010, November 8, 2011 and October 31, 2012.

Silent	Operating
3/1/2010 to 11/8/2010 (253 days)	11/9/2010 (1 day)
11/10/2010 to 11/6/2011 (362 days)	11/7/2011 (1 day)
11/8/2011 to 9/30/2012 (328 days)	
Total = 2.6 years	Total = 2 days
Section 307(c)(3) record	
10/1/2012 to 10/29/2012 (29 days)	10/30/2012 (1 day)
10/31/2012-to 10/22/2013 (357 days)	10/23/2013 (1 day)
10/24/2013 to 10/19/2014 (361 days)	10/20/2014 (1 day)
10/21/2014-10/19/2015 (364 days)	10/20/2015 (1 day)
10/21/2015 to 10/15/2016 (361 days)	10/16/2016 (1 day)
10/17/2016 to present ²⁶	
Total= 4.6 years	Total = 5 days

B. Procedures for Hearing

10. Section 309(k)(3) of the Act requires “notice and opportunity for a hearing as provided in subsection (e).”²⁷ Section 309(e) requires a “full hearing in which the applicant and all other parties in interest shall be permitted to participate.”²⁸ The Commission and courts have held that the hearing need not be a trial-type evidentiary hearing meeting the standards of Sections 554 and 556 of the Administrative Procedure Act.²⁹ The Commission has repeatedly observed that trial-type hearings impose significant burdens and delays, both on applicants and the agency.³⁰ We here have found no substantial issues of material fact or any credibility issues regarding this renewal application. We thus believe cases such as this one can be appropriately resolved with a “paper” hearing.

11. Discovery and Hearing Procedures. The underlying purpose of the discovery rules is “to eliminate those facts which will not be disputed at the hearing or about which there is no real controversy, to relieve the parties of proving them, to expedite the hearing, and to facilitate a proper decision on the

²⁶ In 2009, Radioactive notified the Commission of its intention to suspend operations of Station WRAX(FM) “due to inadequate long-term staffing and programming resources. Radioactive, LLC continues to work towards refining and implementing a business plan to ensure the financial viability of the station and resumption of operations.” Notification of Suspension of Operations, Exh. 4 (Nov. 23, 2009). According to Commission records, the station is currently silent.

²⁷ 47 U.S.C. § 309(k)(3).

²⁸ *Id.* § 309(e).

²⁹ 5 U.S.C. §§ 554, 556. *See Gencom Inc. v. FCC*, 832 F.2d 171, 174 n.2 (D.C. Cir. 1987) (Section 309(e) does not “use the ‘on the record’ language necessary to trigger the full panoply of trial-type hearing requirements embodied in Section 554 of the APA.”); *see also Cellular Mobile Sys. of Pa.*, 782 F.2d 182, 197-98 (D.C. Cir. 1985), citing *United States v. Storer Broad. Co.*, 351 U.S. 192, 202 (1956), *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 333 (1945), and *United States v. FCC*, 652 F.2d 72, 88-96 (D.C. Cir. 1980) (*en banc*); *U.S. v. Fla. E. Coast Ry.*, 410 U.S. 224, 237-38 (1973). *Compare Crestview Parke Care Ctr. v. Thompson*, 373 F.3d 743, 748 (6th Cir. 2003) (under the Administrative Procedure Act, 5 U.S.C. §§ 554 and 556, a formal adjudication featuring an oral evidentiary hearing is required if the statute provides for a hearing “on the record” as specified in Section 554).

³⁰ *See, e.g., Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Further Notice of Proposed Rulemaking, 13 FCC Rcd 21167, 21171, para. 9 (1998) (“traditional comparative hearings can be cumbersome, costly, and delay service to the public without substantial offsetting public interest benefits”); *Competitive Bidding for Commercial Broadcast and ITFS Service Licenses*, Notice of Proposed Rulemaking, 12 FCC Rcd 22363, 22365, para. 3 (1997) (same).

merits.”³¹ To promote these goals, the Commission reasoned “that discovery should be used only when relevant to an issue in the hearing”³² Thus, with respect to discovery as well as other matters, the Commission has “broad discretion to choose a course of action to conduct its business.”³³ Although Part 1, Subpart B rules³⁴ generally apply to applications designated for hearing,³⁵ this discretion includes the power “to preclude any use” of discovery procedures where the presiding officer “finds that their use will not contribute to the proper conduct of the proceeding.”³⁶

12. We have identified no substantial and material questions of fact with respect to the WRAX Renewal Application, which presents only a narrow range of issues for Commission consideration. Thus, many Subpart B rules are facially irrelevant to this proceeding. In these circumstances we find that the use of summary procedures would expedite the resolution of this hearing while affording Radioactive the full hearing required by Section 309, and not placing unnecessary burdens on the licensee.³⁷ Accordingly, we find that the following rules are either inapplicable to or would serve no useful purpose in this proceeding: Sections 1.221(c) – (h); 1.241 – 1.253; 1.255 – 1.279; 1.282(a) and (b)(2); 1.297 – 1.340; and 1.352 – 1.364.³⁸

13. Petitions to intervene. Anyone seeking status as a party in interest in this proceeding must file a petition to intervene in accordance with Section 1.223(a) of the Rules.³⁹ Anyone else seeking to participate in the hearing as a party may file a petition for leave to intervene in accordance with Section 1.223(b) of the Rules.⁴⁰ Any filing in this docket must be served in accordance with Section 1.211 of the Rules on all other parties, including each person or entity that has filed a petition to intervene or petition for leave to intervene, pending a ruling on each such petition.⁴¹

14. Interlocutory Actions. Radioactive shall have the right to seek reconsideration of any interlocutory action in this proceeding. Accordingly, we waive the Section 1.106(a) restriction limiting the filing of a petition for reconsideration by Radioactive of this hearing designation order.⁴²

³¹ *Rules and Policies to Facilitate Public Participation and Reregulation of the Various Communications Industries in the Public Interest*, Memorandum Opinion and Order, 61 FCC 2d 1112, 1127, para. 61 (1976) (*Public Participation Order*).

³² *Id.*

³³ *Id.* at 1127, para. 61. See 47 U.S.C. § 154(j).

³⁴ 47 CFR §§ 1.201 – 1.364.

³⁵ See 47 CFR § 1.201(a).

³⁶ *Amendment of Part 1 of the Rules of Practice and Procedure to Provide for Discovery Procedures*, Report and Order, 11 FCC 2d 185, 186-87 (1968). *Accord*, *Amendment of Part I, Rules of Practice and Procedure To Provide for Certain Changes in the Commission’s Discovery Procedures in Adjudicatory Hearings*, Memorandum Opinion and Order, 91 FCC 2d 527, 528-29, 531 (1982).

³⁷ See *Mobilemedia Corp.*, Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing for Forfeiture, 12 FCC Rcd 14896 (1997) (Commission takes steps to expedite hearing based on concerns about financial stability of licensee in revocation hearing).

³⁸ 47 CFR §§ 1.221 (c) – (h); 1.241 – 1.253; 1.255 – 1.279; 1.282(a) and (b)(2); 1.297 – 1.340; and 1.352 – 1.364.

³⁹ *Id.* § 1.223(a). We hereby delegate to the Media Bureau authority to address interlocutory pleadings if any are filed unless the issues are new or novel. See 47 CFR §§ 0.61(k) and 0.283.

⁴⁰ *Id.* § 1.223(b).

⁴¹ *Id.* § 1.211.

⁴² See 47 CFR § 1.106(a) (permitting petitions for reconsideration of hearing designation orders only with respect to an adverse ruling with respect to petitioner’s participation in the proceeding).

15. Production of station records and discovery. Radioactive shall file in this docket, within 30 days of publication of this Order in the Federal Register, complete copies of the following Station records (as such records exist as of the release date of this Order): (a) all station logs⁴³ for the relevant license term;⁴⁴ (b) all quarterly issues and programs lists⁴⁵ for the relevant license term; and (c) to the extent not included in the station logs, all Emergency Alert System participant records⁴⁶ for the relevant license term. Radioactive may not destroy or remove any of such records prior to such filing, or redact or modify any information in such records as they exist as of the release date of this Order. In the event that, on or after the release date of this Order, Radioactive creates or modifies any documents that it so provides, each such document should be prominently marked with the date that it was created or revised (identifying the revision(s)) and Radioactive should include in the sponsoring affidavit or declaration an explanation of who created or revised the document and when he or she did so.⁴⁷ We otherwise will conduct the hearing without discovery, although the Commission or its staff may make inquiries or conduct investigations pursuant to Part 73 of the Rules and any reports filed in this docket as a result of such inquiries or investigations will become part of the record in this hearing.

16. Presentation of evidence. We will take official notice of all publicly-available Commission records for WRAX(FM) as part of the record in this docket.⁴⁸ Radioactive has the burden of proceeding with evidence and the burden of proof in this hearing.⁴⁹ Within 60 days of publication of this Order in the Federal Register, Radioactive will file a written direct case on the designated issues for the Station, no longer than 25 pages, and supported by an affidavit or unsworn declaration pursuant to Section 1.16 of the Rules.⁵⁰ Within 30 days of Radioactive's filing, any other person granted party status pursuant to paragraph 13 of this Order may file a responsive submission, no longer than 25 pages and supported by an affidavit or unsworn declaration. Within 10 days of the deadline for filing such responses, Radioactive may file a rebuttal submission addressing all responses, no longer than 10 pages and supported by an affidavit or unsworn declaration.

⁴³ See *id.*, § 73.1800 *et seq.*

⁴⁴ The phrase "relevant license term" as used herein should include records for the entire license period until the release date of this Order. See note 24 *supra*.

⁴⁵ 47 CFR § 73.3526(e)(12).

⁴⁶ See *id.*, §§ 11.35(a), 11.54(a)(3), 11.55(c)(7), 11.55(d)(4), and 11.61(b).

⁴⁷ This requirement regarding newly-created or reconstituted records in the licensee's document production is not intended to preclude the licensee from presenting evidence in the proceeding (per para. 16 *infra*) in the manner it deems appropriate, subject to the Commission's applicable procedural rules for hearings as applied herein.

⁴⁸ Section 1.203 of the Rules provides that any party to the proceeding will be afforded an opportunity to contest a material fact that was officially noticed. 47 CFR § 1.203. Any party that wishes to challenge any portion of the Commission's publicly-available records for WRAX(FM) shall submit a pleading, supported by an affidavit or an unsworn declaration in accordance with 47 CFR § 1.16, stating the basis for such challenge within 30 days of publication of this Order in the Federal Register. Any other party may file a responsive pleading, supported by an affidavit or an unsworn declaration in accordance with 47 CFR § 1.16, within ten days of the filing of the original pleading. Based on any such filings, the decision herein will specify which portions of those records are part of the record of this proceeding.

⁴⁹ 47 U.S.C. § 309(e); 47 CFR § 1.254.

⁵⁰ 47 CFR § 1.16. Page limits described herein apply to the text containing arguments, attachments, appendices, supplements and supporting materials, such as testimony, data and documents, but excluding tables of contents, summaries of arguments and certificates of service.

IV. ORDERING CLAUSES

17. ACCORDINGLY, IT IS ORDERED, pursuant to Sections 309(e) and (k)(3) of the Communications Act of 1934, as amended,⁵¹ the captioned application for renewal of license for Station WRAX(FM) IS DESIGNATED FOR A HEARING upon the following issues:

- (a) To determine, with respect to Station WRAX(FM), Lake Isabella, Michigan, whether, during the preceding license term, (i) the station has served the public interest, convenience, and necessity, (ii) there have been any serious violations by the licensee of the Communications Act of 1934, as amended, or the rules and regulations of the Commission, and (iii) there have been any other violations of the Communications Act of 1934, as amended, or the rules and regulations of the Commission which, taken together, would constitute a pattern of abuse;
- (b) In light of the evidence adduced pursuant to issue (a) above, whether the captioned application for renewal of the license for Station WRAX(FM) should be granted on such terms and conditions as are appropriate, including renewal for a term less than the maximum otherwise permitted, or denied due to failure to satisfy the requirements of Section 309(k)(1) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(k)(1).

18. IT IS FURTHER ORDERED, pursuant to Section 309(e) of the Communications Act of 1934, as amended and Section 1.254 of the Commission's Rules,⁵² that the burden of proceeding with the introduction of evidence and the burden of proof with respect to the issues specified in Paragraph 17 of this Order shall be on the applicant, Radioactive, LLC.

19. IT IS FURTHER ORDERED that Radioactive, LLC IS MADE A PARTY to this proceeding.

20. IT IS FURTHER ORDERED that, to avail itself of the opportunity to be heard and the right to present evidence at a hearing in these proceedings, Radioactive, LLC shall file complete and correct copies of the documents described in Paragraph 15 of this Order, on or before the date specified. If Radioactive, LLC fails to file such documents within the time specified, or a petition to accept, for good cause shown, such filing beyond the expiration of such period, its captioned license renewal application shall be dismissed with prejudice for failure to prosecute and the license of the captioned station shall be terminated.⁵³

21. IT IS FURTHER ORDERED that Radioactive, LLC shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended,⁵⁴ and Section 73.3594 of the Commission's Rules,⁵⁵ give notice of the hearing within the time and in the manner prescribed therein, and thereafter submit the statement described in Section 73.3594(g) of the Commission's Rules.⁵⁶

22. IT IS FURTHER ORDERED that a copy of this Order shall be sent by Certified Mail, Return Receipt Requested, and by regular first class mail to Radioactive, LLC, 1717 Dixie Hwy., Suite

⁵¹ 47 U.S.C. §§ 309(e), (k)(3).

⁵² 47 U.S.C. § 309(e); 47 CFR § 1.254.

⁵³ See 47 CFR § 73.3568(a).

⁵⁴ 47 U.S.C. § 311(a)(2).

⁵⁵ 47 CFR § 73.3594.

⁵⁶ *Id.* § 73.3594(g).

650, Ft. Wright, KY 41011, with a copy to its counsel of record, Marissa G. Repp, Esq., 1629 K St., N.W., Suite 300, Washington, DC 20006-1631.

23. IT IS FURTHER ORDERED, that the Secretary of the Commission shall cause to have this Order or a summary thereof published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**STATEMENT OF
CHAIRMAN AJIT PAI**

Re: *Application of Radioactive, LLC For Renewal of License, Station WRAX(FM), Lake Isabella, MI, MB Docket No. 17-198.*

There are certain things that you typically do one day a year. Celebrate your birthday. Watch the Super Bowl. Eat Thanksgiving dinner. But if you have an FCC broadcast license, airing programming shouldn't be on this list.

Unfortunately, this *Hearing Designation Order* addresses an FM radio station (WRAX) that has been on the air just one day a year for the last seven years. The station's licensee, Radioactive, has asked the FCC to renew its license. But I'm not sure we should.

Under the Communications Act, the FCC must grant a broadcast station's renewal application if, among other things, the station can demonstrate that it has served the public interest, convenience, and necessity.¹ It's hard to say that a station has served the public interest if it's only been on the air one day a year during its license term.

The Communications Act further provides that if the licensee of a station fails to meet this standard, the Commission may deny the application for renewal after notice and opportunity for a hearing.² And given the facts here, holding a hearing is clearly the right step to take. But full hearings before an Administrative Law Judge can be lengthy, costly, and extremely resource-intensive for all parties.

So today, we are launching a streamlined procedure by which we will evaluate certain license renewal applications. When a station has been off the air for a long period of time, the FCC itself will conduct a paper hearing. This reform will help us cut down on the backlog of such applications while still giving licensees like Radioactive every opportunity to present their case for their licenses to be renewed.

The message the FCC is sending to broadcast licensees today is clear: Broadcast stations must serve the public interest, and they must provide service to their local community.

I'd like to thank the Commission staff who worked on this *Hearing Designation Order*. From the Media Bureau, thank you Michelle Carey, Peter Doyle, Tom Horan, Tom Hutton, and Holly Saurer. And from the Office of General Counsel, thank you Jake Lewis, Keith McCrickard, Linda Oliver, Bill Richardson, and Marilyn Sonn. We appreciate your efforts on behalf of the public interest—not just one day a year, but every day.

¹ Communications Act § 309(k)(1).

² Communications Act § 309(k)(3).

**STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN**

Re: *Application of Radioactive, LLC For Renewal of License, Station WRAX(FM), Lake Isabella, MI, MB Docket No. 17-198.*

Why would former FCC Commissioner Michael Copps, describe the broadcast license renewal process, as an “utterly ludicrous, no-questions-asked regime?” Because in the past, when it was determined that a broadcast licensee failed to meet its obligation to serve and be responsive to the local needs and interests of their community, the FCC reached a Consent Decree, which included a fine, a shortened license term and/or the implementation of a compliance plan and everyone went on their merry way.

In many cases, I reluctantly supported such agreements while expressing my frustration and view, that an egregious disregard for the Communications Act and the Commission’s rules, should be referred to our Enforcement Bureau to initiate the process for revoking a license.

Today I amplify my voice.

A license to use the public airwaves comes with a significant responsibility to uphold the public interest, and accept enforceable public obligations. Radioactive, the licensee of WRAX (FM) in Lake Isabella, Michigan is a perfect example of why an overhaul of the license renewal process is necessary. Over the course of seven years, WRAX was silent for all but seven days. You heard me. One day per year and it appears in most instances, they did not even broadcast a full day!

Through the adoption of today's Hearing Designation Order (HDO), we provide for a “paper” hearing process, consistent with Section 309 of the Communications Act, that will allow for a determination on whether WRAX’s license should be renewed or denied.

Given these circumstances, I am pleased to see us utilize a new process for review of WRAX’s license, that will ultimately determine whether this station has served their community of license.

There is not a month that goes by, without someone sharing with me, their dream of being a broadcast station owner. Their largest impediment is usually access to capital, but another is the inability to secure an available license. So when a broadcast license holder is unable or unwilling to meet its obligations to their community, it is high time that the FCC acts to ensure that someone else who has the desire and ability, can and will.

My thanks to the Chairman for hearing my past concerns, and to the Media Bureau staff for implementing a process that upholds the sanctity of the public airwaves. I look forward to considering additional reforms in the future, that ensure broadcast licensees adhere to their responsibility to serve with programming and emergency alerts, that meet the unique local needs and interests of the communities they made a commitment to serve.

**STATEMENT OF
COMMISSIONER MICHAEL P. O'RIELLY**

Re: *Application of Radioactive, LLC For Renewal of License, Station WRAX(FM), Lake Isabella, MI, MB Docket No. 17-198.*

Let me start by stating that I make no comments about the particular case raised by the item before us. Instead, I just want to take a moment to discuss the process outlined in the Hearing Designation Order. Specifically, the Commission is creating a mechanism for the Commission to conduct the necessary hearings, pursuant to statutory requirements, for *certain* broadcast license renewals. In effect, the item is establishing an alternative to the current Administrative Law Judge (ALJ) procedures, which I have targeted for reform.

Just last month, I proposed, in part, that the Commission, in cooperation with our Congressional oversight committees, review and consider ways to eliminate or significantly modify our existing ALJ process. My idea raised the ire of a number of outside detractors for one reason or another. These criticisms often ignored the simple fact that cases have been stuck within the ALJ for multiple years. In last month's item, the case had been pending for six years. And, it is my understanding that there are cases stuck within various levels of the ALJ process for well over a decade.

Think about that for a moment. An individual or company raised a complaint or perhaps a set of facts triggered a hearing under our rules or the law, and the Commission's ALJ procedures has delayed resolution for over a decade. That is beyond negligence and borders on misconduct. Don't try to tell me there are difficult cases with no clear outcome as I find that empty excuse not worthy of the role asked of us by the American people. We make difficult decisions all the time. Sometimes I agree and sometimes I do not but we don't sweep the issue under the rug for a decade, hoping the case will be withdrawn or resolve itself in the meantime.

At the same time, the Commission has been forced to overturn decisions resulting from the ALJ process that were simply not logical or justifiable. In essence, this is creating double the work for the Commission staff and delaying resolution even longer. The better question in my mind is why – knowing what we know – would we continue to allow this process to continue under the status quo? The good news is that Chairman Pai, whether heeding my comments or otherwise, is charting a new course and is not stuck in the old and broken adage of “well, we've always done it this way.”

Today's item creates “paper” hearings for license renewals applications without issues of material fact. In doing so, we bypass the need for our traditional extensive and time consuming evidentiary discovery and hearings procedures. This seems like a logical first step that we should be able to expand upon in the future.

In the end, maybe the functions of the ALJ should be to just conduct evidentiary hearings when there are complex factual issues that, for some reason, can't be handled by staff and then let the Commission resolve any pending cases. Then again, maybe after a little more review we can remove the need for an ALJ altogether. I certainly hope the structure we create today will expedite resolution for this case and serve as a model for other instances within the broadcast sphere and elsewhere.