

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

In the Matter of	)	
	)	
Birach Broadcasting Corporation	)	MB Docket No. 18-11
	)	
For Renewal of License	)	Facility ID No. 84068
Station WBVA(AM), Bayside, VA	)	File No. BR-20110518ABS
	)	
For Renewal of License	)	Facility ID No. 57611
Station WVAB(AM), Virginia Beach, VA	)	File No. BR-20110518ABU

**HEARING DESIGNATION ORDER**

**Adopted: January 19, 2018**

**Released: January 22, 2018**

By the Commission:

**I. INTRODUCTION**

1. This *Hearing Designation Order* commences a hearing proceeding before the Commission to determine whether the captioned license renewal applications should be granted pursuant to Section 309(k)(1) of the Communications Act of 1934, as amended (Act).<sup>1</sup> These applications were filed by Birach Broadcasting Corporation (Birach) to renew its licenses for stations WBVA(AM), Bayside, Virginia, and WVAB(AM), Virginia Beach, Virginia,<sup>2</sup> and we are designating them for hearing based on the stations’ records of extended periods of silence during and following their respective license renewal terms.

**II. BACKGROUND**

2. A broadcast licensee’s authorization to use radio spectrum in the public interest carries with it the obligation that the station serve its community, providing programming responsive to local needs and interests.<sup>3</sup> Broadcast licensees also are required to operate in compliance with the 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.<sup>4</sup>

3. The basic duty of broadcast licensees to serve their communities is reflected in the license renewal provisions of the Act.<sup>5</sup> 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.<sup>6</sup> Section 309(k)(1) of

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<sup>1</sup> 47 U.S.C. § 309(k)(1).

<sup>2</sup> We will not use the (AM) parenthetical when referring to the stations herein, except in the caption and ordering clauses. The WBVA application and the WVAB application, respectively, shall be referred to as the WBVA Renewal Application and the WVAB Renewal Application.

<sup>3</sup> See *In the Matter of Broadcast Localism*, Report on Broadcast Localism and Notice of Proposed Rulemaking, 23 FCC Rcd 1324, 1327 (2007).

<sup>4</sup> See 47 CFR §§ 11.1 *et seq.*, particularly 11.51.

<sup>5</sup> 47 U.S.C. § 309(k).

<sup>6</sup> 47 U.S.C. § 309(k)(1); see Pub. L. No. 104-104, Sec. 204(a)(1).

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 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.<sup>7</sup>

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.<sup>8</sup> However, in response to Section 312(g), some licensees of silent stations<sup>9</sup> 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 watts—that cover a small portion of their service areas and may be insufficient to allow them to provide service to their communities of license.<sup>10</sup>

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<sup>7</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 Broad. Group, Ltd. v. FCC*, 563 F.3d 543, 545 (D.C. Cir. 2009) (*Eagle*).

<sup>8</sup> *See Eagle*, 563 F.3d at 545.

<sup>9</sup> 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).

<sup>10</sup> 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 the station provided coverage to its community of license. As the Commission has stated on multiple occasions, “[T]he association of a broadcast station with a community of license is a basic tenet of the Commission’s allocation scheme for broadcast stations.” *1998 Biennial Regulatory Review – Streamlining of Radio Technical Rules In Parts 73 and 74 of the Commission’s Rules*, First Report and Order, 14 FCC Rcd 5272, 5278 n.24 (1999). *See also, e.g., 1998 Biennial Regulatory Review – Streamlining of Radio Technical Rules In Parts 73 and 74 of the Commission’s Rules*, Notice of Proposed Rulemaking and Order, 13 FCC Rcd 14849, 14876, para. 57 (1998); *Amendments of Parts 73 and 74 of the Commission’s Rules To Permit Certain Minor Changes In Broadcast Facilities Without a Construction Permit*, Report and Order, 12 FCC Rcd 12371, 12381, para. 11 n.11 (1997). Of course, if the reduction in power from the licensed power level is unauthorized, then Section 312(g) would apply.

(continued...)

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.”<sup>11</sup> This warning in *Birach* borrowed from the court’s language in *Office of Communication of the United Church of Christ*,<sup>12</sup> 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.’”<sup>13</sup> The *UCC* decision further 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.”<sup>14</sup> 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.<sup>15</sup> However, the Commission noted that Section 309(k)(1) applies a “backwards-looking standard” that does not give any weight to post-term efforts to return a station to full-time operation.<sup>16</sup> 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.<sup>17</sup> 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.”<sup>18</sup>

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

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*See Eagle*, 563 F.3d at 553 (“Under the statute, unauthorized and unlicensed transmissions are no better than silence”).

<sup>11</sup> *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).

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

<sup>13</sup> *Id.* at 1007.

<sup>14</sup> *Id.* at 1003.

<sup>15</sup> *Birach*, 16 FCC Rcd at 5019, para. 10.

<sup>16</sup> *Id.* at 5020, para. 12 (“[C]onsideration of post-term developments is fundamentally at odds with this backwards-looking standard”); see also note 24 *infra*.

<sup>17</sup> 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.

<sup>18</sup> *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).

of instituting and maintaining service to the public.”<sup>19</sup> 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).<sup>20</sup> These concerns about efficient use of spectrum are also reflected in the Commission’s statutory authority to award licenses at auction.<sup>21</sup> Based on these concerns, the Commission recently approved an expedited hearing process to allow for expedited resolution of license renewal determinations involving stations with an extended history of silence.<sup>22</sup> This Order follows that expedited process.

### III. DISCUSSION

#### A. WBVA Operational History

9. We are designating the WBVA Renewal Application for hearing to determine whether the station’s license should be renewed in light of the station’s failure to operate for most of its license term. The assignment of the licenses of WBVA and WVAB from an estate in bankruptcy to Birach was consummated on April 1, 2008.<sup>23</sup> WBVA’s operational history since that date is as follows:

Silent	Operating (STA; 30 Watts)
<b>License term record</b>	
4/1/2008 to 10/4/2008 (187 days)	
10/5/2008 to 3/4/2009 (unauthorized) (151 days)	3/5/2009 to 3/26/2009 (22 days)
3/27/2009 to 3/18/2010 (357 days)	3/19/2010 to 3/28/2010 (10 days)
3/29/2010 to 3/21/2011 (358 days)	3/22/2011 to 4/12/2011 (22 days)
4/13/2011 to 10/1/2011 (172 days)	
<b>Total = 1225 days = 3.4 years, 151 days unauthorized</b>	<b>Total = 54 days</b>

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

<sup>20</sup> 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.”).

<sup>21</sup> 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”).

<sup>22</sup> See *Radioactive, LLC*, Hearing Designation Order, 32 FCC Rcd 6392 (2017).

<sup>23</sup> See File No. BAL-20071119AIW.

<b>Section 307(c)(3) record<sup>24</sup></b>	
10/2/2011 to 4/4/2012 (186 days)	4/5/2012 to 4/18/2012 (14 days)
4/19/2012 to 3/26/2013 (342 days)	3/27/2013 to 4/1/2013 (6 days)
4/2/2013 to 3/20/2014 (353 days)	3/21/2014 to 3/24/2014 (4 days)
3/25/2014 to 3/18/2015 (359 days)	3/19/2015 to 3/26/2015 (8 days)
3/27/2015 to 3/16/2016 (356 days)	3/17/2016 to 3/24/2016 (8 days)
3/25/2016 to 10/24/2016 (expiration) (214 days)	
10/25/2016 to 3/14/2017 (unauthorized) 141 days	3/15/2017 to 4/9/2017 (26 days)
4/10/2017 to 11/30/2017 (235 days)	
<b>Total=2186 days = 6 years, 141 days unauthorized</b>	<b>Total = 66 days</b>

10. WBVA is a Class C AM station licensed to operate with 1 kW of power from a site in Virginia Beach, Virginia.<sup>25</sup> Shortly before Birach purchased WBVA, the interim trustee in bankruptcy filed an application for special temporary authority (STA) to go silent, explaining that the station's tower had been vandalized and fallen, on or about March 15, 2008.<sup>26</sup> During Birach's tenure as licensee of WBVA for the balance of the license term ending in 2011, the station was silent except for brief periods of operations from temporary sites with a power level of 30 watts.<sup>27</sup> On May 18, 2011, Birach filed the WBVA Renewal Application.

11. Following the filing of the WBVA Renewal Application, WBVA continued its pattern of brief 30-watt operations followed by extended periods of silence.<sup>28</sup> In 2013, Birach sought and received a

<sup>24</sup> Section 307(c)(3) of the Act mandates that the Commission continue a broadcast license 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) (in acting on a renewal application, the Commission considers the licensee's performance since the beginning of its most recent license term but gives less weight to improved performance during the pendency of the renewal application).

<sup>25</sup> *See* File No. BL-20010122ANP.

<sup>26</sup> *See* File No. BLSTA-20080321ACQ, Exh. 1.

<sup>27</sup> *See, e.g.*, File No. BSTA-20090227ACA (seeking authority for operation at a temporary site with 30 watts of power because the owner of the licensed site is unwilling to allow the tower to be reconstructed); File No. BLSTA-20090406AHB (seeking silent authority because the temporary site is no longer available); File Nos. BLSTA-20090406AHB, BLESTA-20100216ABL, and BSTA-20100316AAD (silent authority granted, then asked to be extended, followed by STA application for operation from a temporary site); File Nos. BLSTA-20100329AAV (station now silent because the station's temporary operation was shut down on March 29, 2010 by city authorities due to lack of zoning approval), and BLESTA-20101012ADF (extending that silent STA); File Nos. BSTA-20110317AAF (seeking temporary STA to operate) and BLSTA-20110414AAM (reporting that the temporary operation stopped on April 13, 2011 due to lack of zoning approval).

<sup>28</sup> *See* File Nos. BSTA-20120402ANJ, BLSTA-20120420AAS, BLESTA-20121119AGU, BSTA-20130308ADH, BSTA-20130402AAN, BLESTA-20131216CMA, BSTA-20140310AAR, BLSTA-20140326AAN, BLESTA-20141209AAS, BSTA-20150218ABC, BLSTA-20150327AAL, BLESTA-20151019AAU, BSTA-20160303AAS, BLSTA-20160405AAB, BSTA-20170228AAZ, and BLSTA-20170412AAR.

construction permit for permanent full-power operation at a new transmitter site.<sup>29</sup> However, that permit expired after three years.<sup>30</sup> Birach stated that it was unable to obtain zoning approval to construct a tower at that site.<sup>31</sup>

12. WBVA’s temporary 30-watt operations were limited in the area served as well as the days of operation. Although those low-power operations provided city-grade coverage of the community of license (Bayside, Virginia),<sup>32</sup> they covered approximately ten percent of the station’s licensed service area, excluding areas covered by water.<sup>33</sup>

**B. WVAB Operational History**

13. We are also designating the WVAB Renewal Application for hearing to determine whether the station’s license should be renewed in light of the station’s failure to operate for most of its license term and its failure to provide coverage to its community of license during the station’s brief periods of operation.<sup>34</sup> WVAB is a Class C AM station licensed to operate with 5 kW of power. Within the relevant time periods, WVAB has always been co-located with WBVA. WVAB’s operational history has been similar to WBVA’s during the time period under review,<sup>35</sup> except WVAB has operated with only six watts of power during its STA operations.<sup>36</sup>

Silent	Operating (STA; 6 Watts)
<b>License term record</b>	
4/1/2008 to 10/4/2008 (187 days)	
10/5/2008 to 3/10/2009 (unauthorized) (157 days)	3/11/2009 to 3/26/2009 (16 days)
3/27/2009 to 3/18/2010 (357 days)	3/19/2010 to 3/28/2010 (10 days)
3/29/2010 to 3/21/2011 (358 days)	3/22/2011 to 4/12/2011 (22 days)

<sup>29</sup> See File No. BP-20130201BAV. After that application was filed, the WBVA STAs for temporary authorization to operate at 30 watts specified the same transmitter site specified in this application. See, e.g., File No. BSTA-20130308ADH.

<sup>30</sup> See File No. BP-20130201BAV.

<sup>31</sup> See File No. 20170228AAZ, Exh. 16 (“The licensee . . . has spent tens of thousands of dollars on engineering and legal fees to obtain a permanent home for WBVA and WVAB, but these continuing zoning problems have been a complete nightmare.”).

<sup>32</sup> The Commission’s rules require AM stations to provide a minimum strength signal over their communities of license. See 47 CFR § 73.24(i).

<sup>33</sup> The predicted 2 mV/m signal contour of the STA service covers 142 square kilometers of land area, versus 1463 square kilometers of land area within the station’s predicted 2 mV/m signal contour as licensed.

<sup>34</sup> Unlike in the case of WBVA, WVAB did not provide a sufficient signal to meet its community of license coverage requirements. 47 CFR § 73.24(i).

<sup>35</sup> The period of review commenced on April 1, 2008, when the assignment of the license for WVAB from an estate in bankruptcy to Birach was consummated. See *supra* para. 9.

<sup>36</sup> See File Nos. BLSTA-20080321ACR, BSTA-20090227ACC, BLSTA-20090406AGW, BSTA-20100316AAC, BLSTA-20100329AAU, BSTA-20110317AAE, BLSTA-20110414AAL, BLESTA-20120118ACT, BSTA-20120402ANZ, BLSTA-20120420AAQ, BLESTA-20121119AGQ, BSTA-20130308ADG, BLSTA-20130408ACB, BLESTA-20131216CMK, BSTA-20140310AAS, BLSTA-20140404AAO, BLESTA-20150206AAB, BSTA-20150218ABB, BLSTA-20150408AAJ, BLESTA-20151019AAV, BLSTA-20160412AAF, and BSTA-20170315AAN; see also File Nos. BR-20110518ABU and BP-20130201BAT.

4/13/2011 to 10/1/2011 (172 days)	
<b>Total = 1231 days = 3.4 years, 157 days unauthorized</b>	<b>Total = 48 days</b>
<b>Section 307(c)(3) record</b>	
10/2/2011 to 4/4/2012 (186 days)	4/5/2012 to 4/18/2012 (14 days)
4/19/2012 to 4/1/2013 (348 days)	4/2/2013 to 4/7/2013 (6 days)
4/8/2013 to 3/24/2014 (351 days)	3/25/2014 to 4/2/2014 (9 days)
4/3/2014 to 3/26/2015 (358 days)	3/27/2015 to 4/7/2015 (12 days)
4/8/2015 to 3/23/2016 (351 days)	3/24/2016 to 4/11/2016 (19 days)
4/12/2016 to 10/24/2016 (196 days)	
10/25/16 to 3/26/2017 (unauthorized) (153 days)	3/27/2017 to 11/30/2017 (249 days)
<b>Total = 1943 days = 5.3 years, 153 days unauthorized</b>	<b>Total = 309 days</b>

14. At the STA power level of six watts, WVAB serves only a small portion of its community of license (Virginia Beach, Virginia). A modification of a licensed AM station requires 50 percent coverage of the population and land area of the station's community of license.<sup>37</sup> WVAB's STA service provides a predicted 5 mV/m or greater signal to only 6.3 percent of the Virginia Beach population and 1.7 percent of the Virginia Beach land area. As for overall signal coverage, WVAB's predicted 2 mV/m service contour for its STA operation is less than two percent of its licensed 2 mV/m service area.<sup>38</sup>

### C. Procedures for Hearing

15. Section 309(k)(3) of the Act requires "notice and opportunity for a hearing as provided in subsection (e)."<sup>39</sup> Section 309(e) requires a "full hearing in which the applicant and all other parties in interest shall be permitted to participate."<sup>40</sup> 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.<sup>41</sup> The Commission has repeatedly observed that trial-type hearings impose

<sup>37</sup> See 47 CFR § 73.24(i).

<sup>38</sup> The predicted 2 mV/m signal contour of the STA service covers approximately 55 square kilometers of land area, versus 2.931 square kilometers of land area within the station's predicted 2 mV/m or greater signal coverage as licensed.

<sup>39</sup> 47 U.S.C. § 309(k)(3).

<sup>40</sup> *Id.* § 309(e).

<sup>41</sup> 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.

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significant burdens and delays, both on applicants and the agency.<sup>42</sup> 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.

16. 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 merits.”<sup>43</sup> To promote these goals, the Commission reasoned “that discovery should be used only when relevant to an issue in the hearing . . . .”<sup>44</sup> 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.”<sup>45</sup> Although Part 1, Subpart B rules<sup>46</sup> generally apply to applications designated for hearing,<sup>47</sup> 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.”<sup>48</sup>

17. We have identified no substantial and material questions of fact with respect to the WBVA Renewal Application and the WVAB Renewal Application, which present 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 Birach the full hearing required by Section 309, and not placing unnecessary burdens on the licensee.<sup>49</sup> 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.<sup>50</sup>

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224, 237-38 (1973). *Compare Crestview Parke Care Ctr. v. Thompson*, 373 F.3d 743, 748 (6<sup>th</sup> 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).

<sup>42</sup> 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).

<sup>43</sup> *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*).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 1127, para. 61. See 47 U.S.C. § 154(j).

<sup>46</sup> 47 CFR §§ 1.201 – 1.364.

<sup>47</sup> See 47 CFR § 1.201(a).

<sup>48</sup> *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).

<sup>49</sup> 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).

<sup>50</sup> 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.



18. 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.<sup>51</sup> 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.<sup>52</sup> 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.<sup>53</sup> We expect that intervenor status will be granted only with respect to a specific Birach station unless a showing is made that the intervenor has standing to participate more broadly.

19. Interlocutory Actions. Birach 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 Birach of this hearing designation order.<sup>54</sup>

20. Production of station records; discovery. Birach shall file in this docket, within 30 days of publication of this Order in the Federal Register, complete copies of the following records for WBVA and WVAB (as such records exist as of the release date of this Order): (a) all station logs<sup>55</sup> for the relevant license term;<sup>56</sup> (b) all quarterly issues and programs lists<sup>57</sup> for the relevant license term; and (c) to the extent not included in the station logs, all Emergency Alert System participant records<sup>58</sup> for the relevant license term. Birach 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, Birach 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 Birach should include in the sponsoring affidavit or declaration an explanation of who created or revised the document and when he or she did so.<sup>59</sup> 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.

21. Presentation of evidence. We will take official notice of all publicly-available Commission records for WBVA and WVAB as part of the record in this docket.<sup>60</sup> Birach has the burden

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<sup>51</sup> *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.

<sup>52</sup> *Id.* § 1.223(b).

<sup>53</sup> *Id.* § 1.211.

<sup>54</sup> *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).

<sup>55</sup> *See id.*, § 73.1800 *et seq.*

<sup>56</sup> 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*.

<sup>57</sup> 47 CFR § 73.3526(e)(12).

<sup>58</sup> *See id.*, §§ 11.35(a), 11.54(a)(3), 11.55(c)(7), 11.55(d)(4), and 11.61(b).

<sup>59</sup> 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. 21 *infra*) in the manner it deems appropriate, subject to the Commission's applicable procedural rules for hearings as applied herein.

<sup>60</sup> 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 WBVA or WVAB 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

(continued....)

of proceeding with evidence and the burden of proof in this hearing.<sup>61</sup> Within 60 days of publication of this Order in the Federal Register, Birach will file a written direct case on the designated issues for WBVA and WVAB, no longer than 50 pages, and supported by an affidavit or unsworn declaration pursuant to Section 1.16 of the Rules.<sup>62</sup> Within 30 days of Birach's filing, any other person granted party status pursuant to paragraph 18 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, Birach may file a rebuttal submission addressing all responses, no longer than 25 pages and supported by an affidavit or unsworn declaration.

#### IV. ORDERING CLAUSES

22. ACCORDINGLY, IT IS ORDERED, pursuant to Sections 309(e) and (k)(3) and 312(g) of the Communications Act of 1934, as amended,<sup>63</sup> the captioned applications for renewal of licenses for Stations WBVA(AM) and WVAB(AM) ARE DESIGNATED FOR A HEARING upon the following issues:

- (a) To determine, with respect to Station WBVA(AM), Bayside, Virginia, 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 WBVA(AM) 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);
- (c) To determine, with respect to Station WVAB(AM), Virginia Beach, Virginia, 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; and
- (d) In light of the evidence adduced pursuant to issue (c) above, whether the captioned application for renewal of the license for Station WVAB(AM)

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pleading. Based on any such filings, the decision herein will specify which portions of those records are part of the record of this proceeding.

<sup>61</sup> 47 U.S.C. § 309(e); 47 CFR § 1.254.

<sup>62</sup> 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.

<sup>63</sup> 47 U.S.C. §§ 309(e), (k)(3).

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).

23. 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,<sup>64</sup> that the burden of proceeding with the introduction of evidence and the burden of proof with respect to the issues specified in Paragraph 22 of this Order shall be on the applicant, Birach Broadcasting Corporation.

24. IT IS FURTHER ORDERED that Birach Broadcasting Corporation IS MADE A PARTY to this proceeding.

25. 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, Birach Broadcasting Corporation shall file complete and correct copies of the documents described in Paragraph 20 of this Order, on or before the date specified. If Birach Broadcasting Corporation fails to file such documents for either WBVA(AM) or WVAB(AM) 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 for such station shall be dismissed with prejudice for failure to prosecute and the license of such station shall be terminated.<sup>65</sup>

26. IT IS FURTHER ORDERED that Birach Broadcasting Corporation shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended,<sup>66</sup> and Section 73.3594 of the Commission's Rules,<sup>67</sup> 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.<sup>68</sup>

27. 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 Birach Broadcasting Corporation, 21700 Northwestern Highway, Tower 14, Suite 1190, Southfield MI 48075, with a copy to its counsel of record, John C. Trent, Esq., 200 South Church Street, Woodstock, VA 22664.

28. 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

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<sup>64</sup> 47 U.S.C. § 309(e); 47 CFR § 1.254.

<sup>65</sup> See 47 CFR § 73.3568(a).

<sup>66</sup> 47 U.S.C. § 311(a)(2).

<sup>67</sup> 47 CFR § 73.3594.

<sup>68</sup> *Id.* § 73.3594(g).