



Federal Communications Commission
Washington, D.C. 20554

January 12, 2023

SENT VIA CERTIFIED MAIL AND ELECTRONIC MAIL

Birach Broadcasting Corporation
21700 Northwestern Hwy
Ste 1190, Tower 14
Southfield, MI 48075
sima@provide.net

Re: DKIJR-LP, Lucerne Valley, CA
Facility ID No. 14152
License and Construction Permit
Expiration
LMS Pleading No. 0000197164

Dear Former Licensee/Permittee:

This concerns the August 8, 2022, Petition for Reconsideration (Petition)¹ filed by Birach Broadcasting Corporation (Birach) seeking reconsideration of the Video Division's (Division) July 8, 2022 cancellation of the license and construction permit² for former low power television station DKIJR-LP, Lucerne Valley, California (DKIJR-LP or Station). For the reasons below, Birach's Petition is denied.

Background. DKIJR-LP was a low power television station operating on analog channel 47. The Station's analog facilities were displaced by the Incentive Auction and repacking process when the Station's analog channel 47 was designated as a portion of the new wireless band. The Station was granted a digital displacement construction permit (Displacement CP) for channel 30.³ Because the Station had not yet converted to digital, the Displacement CP was assigned an expiration date of July 13, 2021.⁴ Birach was subsequently granted an extension and the Displacement CP expiration date extended to January 10, 2022.⁵

Cancellation Letter. On July 8, 2022, the Division sent Birach a letter finding that Birach had failed to file an application for license to cover by the Displacement CP expiration date and as a result its Displacement CP had been automatically forfeited.⁶ Section 74.788(b) of the Commission's rules (Rules) stated that: "[a]ny construction permit for which construction has not been completed and for which an application for license or extension of time has not been filed, shall be automatically forfeited

¹ Petition for Reconsideration of Birach Broadcasting Corporation, LMS Pleading File No. 0000197164 (Aug. 8, 2022) a copy of which is available at Facility ID No. 14152.

² Letter to Birach Broadcasting Corporation from Barbara A. Kreisman, Chief, Video Division (July 8, 2022) (Cancellation Letter), a copy of which is available at Facility ID No. 14152.

³ See LMS File No. 0000106498.

⁴ See 47 CFR § 74.788(a).

⁵ See LMS File No. 0000152499.

⁶ Cancellation Letter *citing* 47 CFR § 74.788(b). See 47 CFR § 73.1620(a)(1).

upon expiration without any further affirmative cancellation by the Commission.”⁷ As such, the Division concluded that the Displacement CP was automatically forfeited on January 10, 2022.⁸

In addition, section 74.731(m) of the Rules provided that: “[a]fter 11:59 p.m. local time, [[July 13, 2021], low power television and TV translator stations may no longer operate any facility in analog (NTSC) mode and all licenses for such analog operations shall automatically cancel at that time without any affirmative action by the Commission.”⁹ Accordingly, the Division found that the Station’s license was automatically cancelled.¹⁰

Petition. In its Petition, Birach maintains that it “did in fact construct the KIJR-LP [digital] facility more than three weeks before the [Displacement CP] expiration date.”¹¹ In support, Birach includes a sworn declaration from its President, Sima Birach stating that all of the “necessary equipment to complete the digital transition” was delivered and that the Station’s consulting engineer completed construction of the Station’s digital facilities on December 19, 2021.¹² In addition, Birach provides a declaration from its consulting engineer that Birach asserts demonstrates that the Station’s digital facility was “built weeks prior to the [Displacement CP] expiration date.”¹³ Specifically, the engineer in his declaration states that on December 19, 2021, prior to leaving the Station’s transmission site he confirmed that the station was on-air.¹⁴ Both Mr. Birach and the consulting engineer admit in their declarations that the failure to file a license to cover was a mistake¹⁵ and the result of a “total breakdown of communication.”¹⁶ Finally, Birach provides a declaration from a local television programmer who states that he visited the tower site, witnessed the station operating, viewed it on a local television, and has “negotiated an agreement to purchase the KJR Low Power Television Station....”¹⁷ Birach contends that this declaration “confirms KIJR construction was completed and it was operating digitally in December [2021].”¹⁸

⁷ *Id.* citing 47 CFR § 74.788(b).

⁸ *Id.*

⁹ 47 CFR § 74.731(m).

¹⁰ Cancellation Letter at 1.

¹¹ Petition at 1.

¹² *Id.* at Attachment – Declaration of Sima Birach.

¹³ *Id.* at 2.

¹⁴ *Id.* at Attachment – Declaration of Mark Nolte.

¹⁵ We note that even if we were to find that that reinstatement is warranted here, which we do not, the declarations of Mr. Birach and the Station’s engineer admit that the license to cover would not have been timely filed and that the Station would have thereby been operating without a valid authorization for nearly a year. Such facts would clearly support the issuance of a forfeiture.

¹⁶ *Id.* at 1.

¹⁷ *Id.* at Attachment – Declaration of Dr. Norman Quintero (Quintero Declaration).

¹⁸ *Id.* at 2. We take this opportunity to note that the Quintero Declaration is deficient and even with the missing information would not demonstrate that construction of the Station was completed by December 19, 2021. Specifically, the declaration fails to state when the site was visited and the precise location the station was viewed using “local television equipment.” Petition at Quintero Declaration. Unless the site was visited and viewed operating on or before December 19, 2021, the declaration does not support Birach’s claim that the station was in fact constructed and operational by that date. On the contrary, it would potentially demonstrate that the Station was

To support its contention that the Station's digital facilities were constructed and operating in December 2021, Birach included grainy, indistinguishable photographs of what purports to be the Station's digital facilities. Birach maintains that its failure to submit a license application after it completed construction and began operating its digital facilities was "simply due to a total breakdown of communications" between Birach and its engineer.¹⁹ Birach argues that its "failure to file the required license application . . . does not warrant . . . cancellation of license . . ."²⁰ Birach requests reinstatement of the Station's license, waiver of the Commission's rules, and for it to be allowed to submit a late-filed license to cover its Displacement CP facilities.²¹

On August 26, 2022, the Division informed Birach and its counsel that the showing included with the Petition did not include the necessary supporting documents and thereby was insufficient to render a decision.²² Accordingly, Birach was specifically asked to provide: (1) proof that station was built at its authorized location (Examples: a statement from the tower owner, a copy of the tower lease, pictures of the facilities that are more visible and that have something recognizable to identify the exact location); (2) proof that the station has been operating since December 2021, including electric bills, EAS or other Station logs, personnel records and other financial documents relating to the Station's operation; and (3) a declaration by an individual with personal knowledge of the facts and signed under penalty of perjury that the information provided are both true and correct.²³

On September 30, 2022, the Division once again reached out to representatives of Birach, as well as its counsel, reminding them that no response had been received to the Division's request for additional information.²⁴ The Division instructed that the information it requested be provided by Monday October 3, 2022, and that if it did not receive this information by then, the Division would proceed with considering the petition for reconsideration as filed.²⁵ On the same day, counsel for Birach acknowledged receipt of the Division's request.²⁶ No other response to the email was received by staff and, to date, no supplement to the Petition has been received.

Discussion. Despite being provided multiple opportunities to provide the Division with additional information to confirm the Station was in fact constructed, Birach has failed to provide a response. As such we will consider its Petition as filed on August 26, 2022. Under the rules, "[p]etitions for reconsideration are appropriate where the petitioner demonstrates a material error or omission in the underlying order or raises

operating without a valid authorization, was constructed without a valid construction permit, and that Birach is attempting to sell a station without a valid license.

¹⁹ *Id.* at 1.

²⁰ *Id.* at 3 citing *Richard Swift, et al (KXFT-FM)*, Letter, 24 FCC Rcd 13483 (Audio Div. 2009) (*KXFT-FM*).

²¹ *Id.* at 4.

²² See Email to John Trent, Esq., Counsel for Birach Broadcasting Corporation from Shaun Maher, Attorney Advisor, Video Division (Aug. 26, 2022), a copy of which is available at LMS Facility No. 14152.

²³ *Id.*

²⁴ See Email to John Trent, Esq., Counsel for Birach Broadcasting Corporation from Shaun Maher, Attorney Advisor, Video Division (Sept. 30, 2022) and counsel's response, copies of which are available at LMS Facility No. 14152. Birach's electronic mail address of record was cc'd on the e-mail.

²⁵ *Id.*

²⁶ *Id.*

additional facts not known or not existing until after the petitioner's last opportunity to present such matters, or the Commission determines that consideration of the facts is required in the public interest.”²⁷ The Division finds that its Cancellation Letter was properly decided and that Birach fails to demonstrate any material error or omission.

Upon review of the facts and circumstances presented, we find that Birach has failed to provide sufficient evidence that it completed construction of its Station’s digital facilities in December 2021, prior to the expiration date of the Station’s Displacement CP. Although it provided declarations from its President and consulting engineer attesting to the completion and operation of the Station’s digital facilities, the statements in those declarations were not supported by sufficient evidence. When asked to provide additional information and supporting documents, Birach failed to respond. The submission of grainy, indistinguishable photos of what purports to be the Station’s digital facilities are not sufficient. It is impossible for staff to determine what equipment, if any, was present and verify the exact location of the photos. Further, staff cannot verify the accuracy of claims made in the Petition without the additional documentation that was requested. When given the opportunity to submit additional, independent proof that the Station was built at its authorized location (for example, a statement from the tower owner, a copy of the tower lease, pictures of the facilities that are more visible and that have something recognizable to identify the exact location, and EAS or other station logs), Birach did not respond.

The fact that Birach failed to provide sufficient evidence to demonstrate that the Station’s digital facility was completed distinguishes this case from the one cited by Birach in support of its Petition.²⁸ In the case of *KXFT-FM*, the station failed to timely submit a license to cover construction of its facilities.²⁹ In granting a waiver of the filing deadline, the Audio Division cited to substantial evidence that the station submitted to demonstrate that the station had been constructed and was operating including copies of the station’s transmitter maintenance log, program logs, and electric bills that the Audio Division found were sufficient to demonstrate that the station was built and operating at the time in question.³⁰ Here, the Division lacks sufficient information and evidence upon which to conclude that the Station’s digital facilities were completed in December 2021 and are presently operating.

Based upon the foregoing, the Division concludes that Birach has failed to present any facts or arguments that warrant reconsideration of the Cancellation Letter. Accordingly, the Petition for Reconsideration filed by Birach Broadcasting Corporation **IS HEREBY DENIED**.

Sincerely,

/s/

Barbara A. Kreisman
Chief, Video Division
Media Bureau

cc (via electronic mail): John C Trent, Esq.

²⁷ See 47 CFR § 1.106(b)(2).

²⁸ See Petition at 3 citing *KXFT-FM*, *supra* at n. 16.

²⁹ *KXFT-FM*, 24 FCC Rcd at 13487

³⁰ *Id.* at 13487-8