



Federal Communications Commission  
Washington, D.C. 20554

November 8, 2016

*In Reply Refer to:*  
1800B3-KW

Mt. Rushmore Broadcasting, Inc.  
218 N. Walcott  
Casper, WY 82602

In re: KFCR(AM), Custer, SD  
Facility ID No. 43913  
File No. BR-20121203BBX

KZMX-FM, Hot Springs, SD  
Facility ID No. 46712  
File No. BRH-20121203ASH

KIQZ(FM), Rawlins, WY  
Facility ID No. 46737  
File No. BRH-20130603BFW

Dear Applicant:

We have before us the applications (Applications) of Mt. Rushmore Broadcasting, Inc. (MRBI) for renewal of the license of each of the referenced radio stations (Stations). For the reasons set forth below, we grant the Applications for a renewal period of two years from the date of this letter, instead of a full term of eight years, pursuant to Section 309(k)(2) of the Communications Act of 1934, as amended (Act).<sup>1</sup>

**Background.** MRBI filed the Applications on December 3, 2012 and June 3, 2013, seeking to renew the Stations' licenses. In Section III of each Application, Question 4 required MRBI to disclose whether or not the Station had been silent for more than 30 days at any time during the pending license term. In response, MRBI disclosed that each Station had been silent pursuant to special temporary authority for several different periods in the license term. In each case, the Station was silent much longer than it operated in the last three years of the license term ending in 2013.<sup>2</sup> CBI stated that the silent periods were primarily due to difficult economic conditions and difficulty obtaining qualified personnel, particularly engineers, to staff the stations. Since the end of the license terms in 2013, each Station has been primarily silent.<sup>3</sup>

**Discussion.** In evaluating an application for license renewal, the Commission's decision is governed by Section 309(k) of the Act.<sup>4</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

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<sup>1</sup> 47 U.S.C. § 309(k)(2).

<sup>2</sup> Application, Exh. 13. Each period of silence was authorized under special temporary authority in accordance with 47 CFR § 73.1740.

<sup>3</sup> Only KIQZ has had substantial periods of operation since 2013, but with temporary facilities instead of licensed facilities.

<sup>4</sup> 47 U.S.C. § 309(k).

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>5</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>6</sup>

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>7</sup>

The policy against allowing extended periods of silence 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.”<sup>8</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>9</sup>

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>10</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. In this case, the Station had multiple periods of silence that each lasted for several months, resulting in silence for nearly half of the license term.

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

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<sup>5</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>6</sup> 47 U.S.C. §§ 309(k)(2), 309(k)(3).

<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).

<sup>8</sup> *Family Life Ministries, Inc.*, Letter, 23 FCC Rcd 15395, 15397 (MB 2008).

<sup>9</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); *Liberman Broad. of Dallas License LLC*, Letter, 25 FCC Rcd 4765, 4768 (MB 2010).

<sup>10</sup> *See Eagle Broad. Group, Ltd. v. FCC*, 563 F.3d at 545.

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 into the station's frequency.

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> The Commission acknowledged that the agency's longstanding policy had been to encourage stations to resume broadcast operations. 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.<sup>12</sup> The Commission held that denial of the renewal application of the station in question in *Birach* would be fundamentally unfair because the Commission had not provided sufficient notice of the effect the Section 309(k)(1) standard would have on silent stations.<sup>13</sup> Since the issuance of the *Birach* decision in 2001, licensees have been on notice as to how Section 309(k)(1) applies to silent stations.

In this case, Licensee's conduct has fallen far short of that which would warrant routine license renewal. Licensee's stewardship of the Stations fails to meet the public service commitment which licensees are expected to provide to their communities of license on a daily basis because the Stations were silent for significant portions of their license terms, particularly in the final years of those terms (as well as during the pendency of the renewal applications).<sup>14</sup>

On the facts presented here, we conclude that a short-term license renewal for each of the Stations is the appropriate sanction. Although MRBI faced a number of difficulties beyond its control and sought Commission authorization for each Station's periods of silence, we cannot find that the Stations served the public interest, convenience and necessity during the license term due to the extended periods of non-operation. Accordingly, pursuant to Section 309(k)(2) of the Act, we will grant each of the Stations a short-term license renewal, limited to a period of two years from the date of this letter.<sup>15</sup> This limited renewal period will afford the Commission an opportunity to review the Stations' compliance with the

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<sup>11</sup> See *Birach Broad. Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 5015, 5020 (2001) ("*Birach*").

<sup>12</sup> *Id.* ("[C]onsideration of post-term developments is fundamentally at odds with this backwards-looking standard.").

<sup>13</sup> 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.

<sup>14</sup> 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).

<sup>15</sup> See, e.g., *South Seas Broad., Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability, 24 FCC Rcd 6474 (MB 2008) (two-year renewal granted, NAL issued, for willfully and repeatedly violating 47 C.F.R. § 73.1350 by engaging in operation of the station at an unauthorized site and willfully and repeatedly violating 47 C.F.R. § 73.1740 by leaving the station silent without the proper authorization).

Act and the Commission's rules and to take whatever corrective actions, if any, that may be warranted at that time.

**Conclusion.** Accordingly, for the reasons set forth above, IT IS ORDERED THAT the license renewal applications (File Nos. BR-20121203BBX, BRH-20121203ASH, and BRH-20130603BFW) filed by Mt. Rushmore Broadcasting, Inc. ARE GRANTED pursuant to 47 U.S.C. § 309(k)(2), in each case for a license term of two years from the date of this letter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Peter H. Doyle".

Peter H. Doyle  
Chief, Audio Division  
Media Bureau

cc: Mark N. Lipp, Esq.