

FCC MAIL SECTION

Nov 12 before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-35

In the Matter of

BROWN COMMUNICATIONS

Licensee of Station WKIJ(AM)
Parrish, Alabama

Order to Show Cause
Why the License for
Station WKIJ(AM), Parrish,
Alabama, Should Not Be Revoked

Appearances

Kathryn M. Swisher, Esq., on behalf of Brown Communications; Charles E. Dziedzic, Esq. and Y. Paulette Laden, Esq., on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

**INITIAL DECISION OF ADMINISTRATIVE
LAW JUDGE RICHARD L. SIPPEL**

Issued: November 2, 1992; Released: November 12, 1992

PRELIMINARY STATEMENT

1. This proceeding was commenced on March 26, 1992, by *Order To Show Cause And Hearing Designation Order*, FCC 92-85, reported at 7 F.C.C. Rcd 2135 (Comm'n 1992). The show cause order is based on a charge made by the Mass Media Bureau ("Bureau") that Station WKIJ(AM) has been off the air without authority since January 21, 1991. Brown Communications, the station's licensee, was ordered by the Commission to show cause why its license should not be revoked or if the hearing record does not warrant a revocation, whether an order of monetary forfeiture shall be issued.

2. The issues set for adjudication are as follows:

- (a) To determine whether Brown has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules.
- (b) To determine, in light of the evidence adduced pursuant to the foregoing issue, whether Brown is qualified to be and remain the licensee of Station WKIJ(AM).

The burden of proceeding and the burden of proof are assigned to the Bureau. *Id.* at Para.5. See also 47 U.S.C. Section 312(c) and (d). On April 16, 1992, the Bureau issued the required Bill Of Particulars which was served on Brown Communications. On May 1, 1992, the Bureau filed and served a Request For Admissions to which Brown timely responded on May 6, 1992. (Bur. Exhs. 12, 13.)¹

3. A prehearing conference was set in the assignment order for May 27, 1992. See *Order FCC 92M-398*, released March 31, 1992. A prehearing conference was held in which Brown's principal, at that time appearing *pro se*, was permitted to participate by speakerphone. See *Order, FCC 92M-559*, released May 14, 1992. A hearing was set for June 29, 1992, the hearing was held as scheduled, and the record was closed on June 29, 1992. The parties were ordered to submit Proposed Findings Of Fact And Conclusions Of Law ("PFC") on August 21, 1992, and Reply Proposed Findings Of Fact And Conclusions Of Law ("RPFC") on September 18, 1992. See *Order, FCC 92M-736*, released July 1, 1992. Brown retained local counsel to assist in the preparation of findings. Counsel requested additional time to prepare findings. There was no objection interposed by the Bureau and for cause shown, the filing dates were extended to September 4, 1992 and October 2, 1992, respectively. See *Order FCC 92M-911*, released August 24, 1992. The Bureau has filed a complete round of pleadings. Brown Communications filed only its Proposed Findings of Fact and Conclusions of Law.

4. Under the findings and conclusions of the Presiding Judge as made below, the sole remedy to be imposed in this case is revocation. It is noted that the Bureau posits in its PFC that if revocation is ordered a forfeiture need not be imposed. Since the *Order To Show Cause And Hearing Designation Order, supra*, Para. 7, sets a forfeiture issue in the disjunctive should there be no revocation, there is no basis under these findings and conclusions to consider a forfeiture.

FINDINGS OF FACT

5. The licensee is a limited partnership organized under the laws of the State of Alabama. (Brown Exh. 7.) The general partners are Jimmy Dan Brown ("Brown") and his wife Sherry Ann Brown. (*Id.*) There are three limited partners who are relatives of Brown. Brown is the station manager who is responsible for the day-to-day operation of the station and the principal who represented the licensee in the hearing phase of this case. (Brown Exh. 9.)

6. Station WKIJ(AM) went on the air in September 1983. (Brown Exh. 9.) The original transmitter site was on leased land and the last lease document was signed on July 15, 1988. (Brown Exh. 8.) The lease had a one year option after which the licensee would become a tenant at will. The landlord terminated the lease relationship in July of 1990 but permitted Brown to continue as a month-to-month tenant. (Tr. 194-96.) It later became necessary for Brown to move to another site and in doing so, he intended to improve the strength of the station's signal. (Brown Exh. 9 at 2.)

¹ The Request For Admissions and the Admissions were received in evidence. (Bur. Exhs 12, 13.) Cf. *Oliver Kelley et al.*, 7 F.C.C. Rcd 4239 (Comm'n 1992) (answers to interrogatories

must be admitted in evidence to qualify for consideration in findings.)

7. However, for strictly economic reasons that were unrelated to the loss of the lease, on June 24, 1990, Brown took the station silent. Brown informed the Commission in writing on June 25, 1990, after the fact, that he was making a request:

[t]o remain silent until [we] can restructure (sic) our finances, and or sale (sic) WKIJ.

(Bur. Exh. 1.) At that time, technical modifications were not contemplated by Brown. (Tr. 231.) By letter dated July 9, 1990, the Commission's AM Branch granted Brown Communications and WKIJ(AM) a temporary authority to remain silent through October 9, 1990. (Bur. Exh. 2.)

8. On October 8, 1990, Brown requested an extension of the authorization to keep the station silent because there was no qualified purchaser yet to be found and because Brown had ascertained that there was no market for a 1 kw daytime only AM station in the Parrish market. (Bur. Exh. 3.) Brown went on to report in that same letter that on October 5, 1990, he had been notified that the lessor was not renewing the lease on the antenna site and that therefore, Brown was requesting a field test for the purpose of relocating the antenna tower for that reason and in order to increase the station's power. By letter dated October 30, 1990, the Commission's AM Branch again granted Brown Communications and Station WKIJ(AM) a temporary authority to remain silent through January 21, 1991. (Bur. Exh. 4.) However, that letter advised Brown that an FCC Form 301 was required to be filed for relocation of the tower and for an increase of power. Also, in that letter Brown was advised that any further request for an extension of authorization to remain silent must be accompanied by a progress report. (*Id.*) No Form 301 was filed and no such progress report was submitted.

9. On November 9, 1990, Brown wrote in separate correspondence to the Commission's Mass Media Bureau that he was requesting a waiver on behalf of the licensee of the then present freeze on the AM band so that Brown might complete field test measurements and expedite a return of the station to the air. (Brown Exh. 2.) Brown had concluded that the contemplated change to increase the station's power would make the station more marketable. (Tr. 225.) By *Order* FCC 90-112, released March 29, 1990, the Commission had imposed a freeze on the acceptance of applications for new AM stations and for major changes in existing AM stations. *See Review Of The Technical Assignment Criteria For The AM Broadcast Service*, 5 F.C.C. Rcd 2136 (Comm'n 1990). But there were exceptions to the freeze for applications for minor changes necessitated by causes beyond the control of an applicant, such as the unavoidable loss of a transmitter site. (*Id.*) (Bur. Exh. 18.) Brown contends that Station WKIJ(AM) could not make use of this exception because the station required a major change. (Bur. Exh. 4; Tr. 206, 225.) The freeze was removed on April 19, 1992. (Bur. Exh. 19.) There has been no Form 301 application filed by the licensee to change the station's facilities since 1986. (Bur. Exh. 17; Tr. 220,230.)

² There is evidence in the record showing that two pleadings were served on two separate occasions by Bureau Counsel addressed to Brown at 314 Highway 78 By-Pass, Jasper, Alabama 35501. Brown acknowledged receipt of those items by signing

10. Brown had requested authorizations to remain silent and the Commission granted temporary authority until January 21, 1991. (Bur. Exh. 4.) Brown also received authority to conduct field tests at the new location until February 28, 1991. (Bur. Exh. 5.) Brown had sought the authorization to field test on November 9, 1990, and the first authorization was granted on December 18, 1990, approximately one month before the authorization to remain silent was to expire. (Bur. Exh. 5.) Brown made no further requests for an authorization to remain silent.

11. On April 25, 1991, Brown wrote to the Commission and requested a ninety (90) day extension of the authorization to complete field strength measurements. (Bur. Exh. 6.) Brown represented that the tests had not been completed during the earlier authorization because of inclement weather. (*Id.*) By letter dated May 16, 1991, the Commission's AM Branch responded to Brown at P.O. Box 1332, Jasper, Alabama, and the Branch again extended the authorization to continue field testing until August 31, 1991. (Bur. Exh. 7.) That letter contained an admonition to Brown to "more closely observe the expiration dates of temporary authorizations." (*Id.*) However, there was no extension of the authorization to remain silent which had expired on January 21, 1991. Thereafter, by formal letter dated June 24, 1991, the Chief, Audio Services Division wrote to the licensee at 314 Highway 78 By-Pass, Jasper, Alabama and, noting that the station had been off the air since January 21, 1991, requested copies of authorizations. (Bur. Exh. 10.)² In that letter, Brown was advised that a failure to submit a showing sufficient to justify an extension of an authority to remain silent could result in the cancellation of Brown Communication's license. (*Id.*) The Bureau also introduced evidence showing that in December 1988, Brown had filed on an appropriate form, a notice of a change of address which reported the licensee's address at 314 Highway 78 By-Pass, Jasper, Alabama. (Bur. Exh. 11.) Brown testified that he had not received the aforementioned letter of June 24, 1991. (Tr. 179-81.) But the address provided by Brown in December 1988 was not changed until April 27, 1992.³ In addition, as recently as April and May, 1992, Brown has actually received mail that was addressed to the Jasper location at the Highway 78 Bypass address. (Bur. Exhs. 15, 16; Tr. 180-81.) There also is evidence in the record which establishes that U.S. postal authorities have forwarded mail to Brown that was addressed to the 78 Bypass address. (Brown Exh. 1 at 3.7.) Brown is conclusively presumed to have received the letter of June 24, 1991 which is the Bureau's Exhibit 10.

12. On August 16, 1991, Brown wrote to the Commission noting that the relocation of WKIJ(AM)'s transmitter constituted a "major change" to the station. (Bur. Exh. 8.) Based on that assertion, Brown requested that the Commission grant "an extension until the freeze is lifted." (*Id.*) The Commission's AM Branch responded by letter dated August 29, 1991, and advised Brown that "your temporary authority for special field test for Radio Station WKIJ (AM) will not be extended unless you submit an acceptable status report outlining your progress." (Bur. Exh. 9.) Brown was allowed ten days within which to submit a status report. And there was no authority to remain silent

and returning a return receipt form. (Bur. Exhs. 15, 16.)

³ By that latest change the licensee's address is now stated to be 4002 McIngvale Road, Hernando, Mississippi 38632. (Bur. Exh. 14.)

in the Bureau's letter of August 29, 1991. (*Id.*) However, that letter (Bur. Exh. 9) was misaddressed to Brown at Pittsburgh, Pennsylvania and Brown did not receive that letter. (Tr. 175, 177-78.) Brown asserts that since he did not receive a reply to his August 16 letter, he assumed that he was in compliance due to the freeze on AM applications and that he had an implied authority to remain silent until the freeze was lifted. (Brown PFC at 10.)

13. Effective April 19, 1992, the Commission lifted the AM freeze. (Bur. Exh. 19.) Brown has not yet filed a Form 301 application to change the station's facilities. (Bur. Exh. 17; Tr. 220,230.) As of the date of the hearing, Brown testified that the application for change of location and increase in power was still being worked on and was near completion. (Tr. 208,228.) However, Station WKIJ was still silent. (Tr. 220,230.) Brown relies on his letter of August 16, 1991, wherein he requested to be accorded the protection of the AM freeze and he argues that since he had not received an answer to that letter, he appropriately assumed that he had authorization for the station to remain silent. (Brown PFC at 10 and Tr. 239, 242.)

14. Brown testified that prior to receipt of the Commission's show cause order, he first learned through an employee of an engineering firm that the Commission would proceed against the licensee for its unauthorized silence. (Tr. 143; Brown Exh. 9; Brown PFC at 3.) The Commission's designation and show cause order was released on March 26, 1992, and there is no assertion that Brown did not receive a timely notice of these proceedings. It is found as a fact based upon substantial evidence in the record that the licensee had received written authorizations from the Bureau to remain silent from June 24, 1990, until January 21, 1991. (See Bur. Exhs. 2, 4.) It is further found that thereafter, commencing January 22, 1991, through the date of the hearing, June 29, 1992 and to the present the licensee has remained silent without authorization.

15. The following facts are considered in finding that Brown knew or should have known that his authorization had expired on January 21, 1991. As of December 1988, the Bureau relied on the address form which had been submitted by Brown that reported the licensee's current address at 314 Highway 78 Bypass, Jasper, Alabama. The Commission's letter dated June 24, 1991 (Bur. Exh. 10) was mailed to that address and Brown and the licensee are conclusively presumed to have received it. The station was already silent by virtue of two authorizations since June 24, 1990. (Bur. Exhs. 2, 4.) Brown knew that Commission authorization was needed to remain silent and yet Brown failed to take any positive steps to seek authorization to maintain the station in a silent condition after January 24, 1991. Rather, after being specifically informed by the Commission that the station's authorization to remain silent would terminate on January 21, 1991 (Bur. Exh. 4), Brown acted on an unverified and therefore unreasonable assumption that the AM freeze could operate as an implied authorization for the station to remain silent.

16. Brown Communications asserts certain peripheral matters in mitigation that are noted by the Presiding Judge. Mr. Brown has shown that he had an interest in broadcasting. He worked for six years at a television station in Greenwood, Mississippi and he is currently employed at Station WREG-TV in Memphis, Tennessee. (Brown Exh. 9.) Brown had installed part time employees at WKIJ(AM), who were his relatives, while he worked in Memphis. Brown worked at the TV station during the regular work week and he worked at the AM station on weekends. Mrs.

Brown has a job at a local bank and she also worked part time at the station when it was operating. It was a family venture that was unable to support a full-time staff while experiencing a short fall in advertising sales. (*Id.*) When the station lost its lease, Brown decided to move it to a parcel that he owned and to increase its power. In that way, Brown hoped to either obtain more advertising revenues or to increase the value of the station for a sale. There is no evidence to establish that there was an abrupt unexpected cancellation of the lease. Rather, the evidence shows that the station went silent on June 24, 1990, because the station was losing money and it was not returned to the air because Brown's business plan to improve the station for sale could not be accomplished.

17. There were two extensions granted to remain silent and additional extensions may have been granted if Brown had provided a status report that showed progress in response to the Bureau's letters of October 30, 1990 (Bur. Exh. 4) and of June 24, 1991 (Bur. Exh. 10). While it is found that Brown did not receive the Commission's letter of August 29, 1991, which was sent to Pittsburgh by error (Bur. Exh. 9), the earlier letter of June 24, 1991, was clear and explicit notice that Brown Communications must comply with Section 73.1740 of the Commission's rules regarding the minimum schedule of broadcast operation. That letter of June 24 was sent to the address that Brown had advised the Commission was the correct address for the licensee. The evidence also fails to disclose that Brown took any initiative to assure that he received a written extension from the Commission staff after the authority to remain silent had expired on January 21, 1991. It was unreasonable for Brown to rely on the AM freeze for any implied authorization to remain silent. In that regard, it is noted that correspondence from the Commission concerning the freeze were in the context of field testing, including the Bureau's misdirected letter of August 29, 1991. (Bur. Exh. 9.) A consequence of Brown's unreasonable assumption and equally unreasonable failure to remain informed is the manner in which he first learned through an engineer that WKIJ(AM) was on a Commission list of stations that could lose their licenses. (Brown Exh. 9.)

18. There were two occasions in which there were contacts between Brown and the Commission wherein he was not told that the station was silent without authorization. In late 1991, he received emergency broadcast data for the first three months of 1992. (Tr. 133-34.) And in May 1992, he was requested by a Commission employee to submit a current ownership report. Brown asked for the appropriate report form which was sent to him and which he submitted. (Tr. 168.) In none of those contacts did a Commission employee advise or refer to any authorization to remain silent. (Tr. 206.) Brown suggests that by the absence of a warning from the Commission staff, he was lulled into believing that he had been authorized to maintain the station in a state of silence after January 21, 1991. It was unreasonable for Brown to assume that he would be advised by Commission staff in a telephone conversation concerning an ownership report of his obligations with respect to the station's operation. It was equally unreasonable for Brown to assume that the absence of volunteered advice by the Commission staff inferred an authorization to remain silent. And there is no evidence that Brown affirmatively raised the question with a Commission employee or that Brown was affirmatively misled by anyone.

19. Brown also was in the process of negotiating with a third person and some businessmen for the possible barter of broadcast time for religious programming. Those negotiations began in late 1991 when the field testing was being delayed by inclement weather. The negotiations continued to the time that the show cause order was released. (Tr. 202-06.) The negotiations and the work on field testing ceased with the issuance of the show cause order on March 26, 1992. (*Id.*) Those circumstances, which are advanced by Brown Communications, are probative of the fact that Brown had received timely notice of the possible loss of the station before any commitment was made for bartered time. Therefore, there are no equities to consider, such as estoppel, with regard to actions taken by Brown and third persons in reliance on an assumed authorization to remain silent by way of the AM freeze. However, the fact that Brown was seeking barter arrangements while the station was silent evidenced an intent to ultimately resume operations. Therefore, it is found that Brown did not intend to abandon the station.

20. Brown continues to assert that since June 24, 1990, he was diligently seeking to obtain authority to enhance the station's power and that he had therefore not abandoned the station. (Tr. 212-13.) In preparation for filing an application to increase the station's power, Brown was in the process of preparing a contour map and overlay and documents showing that there would be no interference with the signal of other broadcast stations. (Tr. 209.) Brown contends that he was working on those documents for a period of from three to four months. (Tr. 211.) He claims to have spoken with the Chief of the AM Branch who advised Brown that his application to enhance the station's power would not be favorably considered while the show cause proceeding was pending. (Tr. 211-12.) In view of such advice from the Commission staff, there was no basis in fact for Brown to rely on any assumed authorization to continue to permit the station to remain silent. However, such positive steps to prepare for a new site is additional evidence that Brown did not intend to abandon the station.

CONCLUSIONS OF LAW

21. This proceeding has been set for hearing in accordance with the Communications Act of 1934, as amended, under its provisions at 47 U.S.C. Section 312. The relevant Commission rule is as follows:

In the event that causes beyond the control of the licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. no later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary.

47 C.F.R. Section 73.1740(a)(4).

22. The Commission's rules also provide:

The licensee---shall notify the FCC in Washington, D.C. of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, D.C. for cancellation.

47 C.F.R. Section 73.1750. Brown Communications admits that it has not submitted its license to the Commission for cancellation. (Bur. Exh. 13.) But Brown never intended to permanently discontinue the station's operation and he continued to attempt to restore its operation at a new site. Therefore, the licensee is not in willful violation of Section 73.1750 of the Commission's rules.

23. For reasons stated below, it is found by substantial evidence that Station WKIJ(AM) has been silent since June 24, 1990, and that such silence was without authorization since January 22, 1991. Also, it is found that the licensee has failed to adhere to its operating schedule since January 22, 1991, without authority from the Commission to remain silent. In addition, during the period January 22, 1991, to the present, the licensee has effectively discontinued the operation of Station WKIJ(AM) without Commission authorization. However, it is concluded that the preponderance of the evidence does not establish that Brown Communications permanently discontinued its operation of Station WKIJ(AM). Therefore, it cannot be determined that Brown Communications was required to forward its license and other instruments of authorization to the Commission.

24. The Bureau contends that the licensee had authorization to remain silent only until January 21, 1991, and that Brown never sought an authorization to remain silent beyond that date. *See* Bureau PFC at 9. The Bureau is correct for the following reasons. The applicable rule provides that where a station cannot operate for causes beyond its control, it may discontinue its operations up to thirty days without authorization and, if time is needed beyond the first thirty days, Commission authorization is required to be sought by written request. 47 C.F.R. Section 73.1740(a)(4). The last authority to remain silent that the Commission granted to Brown was in the letter dated October 30, 1990, from the Chief, AM Branch wherein temporary authority was granted to remain silent only until January 21, 1991. (Bur. Exh. 4.) All requests from Brown thereafter and all authorizations from the Bureau's AM Branch were concerned with authority to conduct field tests and not with any authority to remain silent.

25. The Bureau further argues that the silence of Station WKIJ (AM) after January 21, 1991, was not the result of causes beyond the control of the licensee. *See* Bureau PFC at 8. The Bureau is also correct in that respect. The lease under which the station was operating expired in July 1990. Brown went on a month-to-month tenancy as an interim measure while he established a new location. Brown was given two successive authorizations to remain silent in order to move to a new location and either find a purchaser or return to the air. Brown did neither by the expiration of the last extension. Nor did Brown submit a status report as required by the Bureau or specifically seek

a further extension of an authorization to remain silent. Brown admitted that he wanted to upgrade the station's power at the new site in order to attract a purchaser. Brown also was actively involved in negotiations for the barter of time until he received notice of these proceedings. He had an interest in remaining silent because it gave him an opportunity to optimize his search for new advertising clients and to simultaneously attempt to locate a purchaser. However, he required a further temporary authorization from the Commission to remain silent after January 21, 1991. That authorization was neither sought nor granted. Instead, the Commission instituted this proceeding. Thereafter it became illegal to assign the station license to a purchaser because the station was in a revocation proceeding. See *Jefferson Radio Co. v. F.C.C.*, 340 F.2d 781 (D.C. Cir.1964).

26. The irremedial defect with Brown's case is the lack of substantial evidence which would peculiarly be in his possession showing all preparatory steps taken to move the tower site to the new location and to obtain the necessary FAA clearance so that Station WKIJ(AM) could return to the air by January 21, 1991. If for reasons beyond his control Brown was unable to effect the move, obtain the clearance and return to the air by January 22, 1991, then it was up to Brown to obtain the additional authority from the Bureau to remain silent past that date, a remedial procedure which Brown failed to pursue. In order to obtain the necessary relief from the Bureau it was essential that Brown submit meaningful progress reports. The Bureau could not react favorably to Brown's needs in a vacuum. Thereafter, on or about June 24, 1991, Brown was given formal notice by the Chief, Audio Services Division that the station was deemed to have been off the air without authority since January 21, 1991. Brown was specifically warned by the Chief of the Division that a failure to respond or to submit a showing sufficient to justify an extension of authority to remain silent could result in a cancellation of the station's license. That letter was sent to the licensee's address of record and it is presumed conclusively to have been received by Brown. Yet Brown never responded to the matters raised in that letter or, if he did not know of the letter, Brown failed to affirmatively contact the Bureau to ascertain the information needed to satisfy Brown's need for an extension of authority to remain silent.

27. Fortuitously, in March 1990 the Commission had ordered a freeze on applications for AM broadcast stations, including applications for major changes. See *Review Of The Technical Assignment Criteria, supra*. In connection with the intended move to a new site and increase of the station's broadcast power, Brown Communications would need to file an application for major change on Form 301. The freeze criteria permitted an exception for minor changes where the changes were necessitated by causes beyond the control of the applicant. But there is no evidence to show that Brown could have brought the station

back on the air by January 22, 1991, with minor changes. The move and the contemplated power increase were in fact major changes.⁴

28. Also, there still remained a requirement for Brown to fully respond to the Commission's demand for a status report and to the Bureau's letter of possible cancellation dated June 24, 1991, in order for the licensee to be considered for further authorization to remain silent beyond January 21, 1991. The Commission provided substantial opportunity for Brown to show why he should receive further authority to remain silent. Yet Brown failed to submit a status report, failed to make an additional informal request for authorization for silence, and unreasonably assumed that he could maintain the station in a silence mode by virtue of the AM freeze. The AM freeze was lifted on April 19, 1992 (Bur. Exh. 19), yet as of the date of the hearing, June 29, 1992, there was no Form 301 application filed by Brown Communications and the licensee was not prepared to file a Form 301.

29. There has been consideration given by the Presiding Judge to mitigation factors urged by Brown. It is recognized that the station has been operated as a family business since 1983 and that Brown had an interest in succeeding as a broadcaster. However, the station was operating under a short term lease and Brown should have anticipated that it might not be renewed. The efforts that he was making to move the antenna site and increase the power were efforts to increase the value of the station for the purpose of sale. This is evidenced by Brown's own admissions, the advice that Brown was giving to the Commission in his requests for authorization to remain silent, and in the more recent negotiations for barter time. The evidence establishes that while seeking to make those improvements, Brown maintained the station in a state of silence without Commission authorization since January 22, 1991. Also, there is no evidence to show that Brown was ready and able to file a Form 301 for the contemplated major changes when the AM freeze was lifted on April 19, 1992. In short, after receiving authorization to conduct field testing at the new site, Brown ceased to communicate any substantive data to the Commission on the status of the move to a new site, his contacts with FAA, the progress of his testing, and the preparation of a Form 301. Therefore, it is concluded that Brown elected to continue to maintain the station in a condition of silence while he sought to make improvements for personal business reasons that were not related to the public interest and while remaining indifferent to the lack of Commission authorization. The Commission will not permit the retention of a license to broadcast under such circumstances. See *KQED, Inc.*, 5 F.C.C. Rcd 1784 (Comm'n 1990), *recon. denied*, 6 F.C.C. Rcd 625 (Comm'n 1991) (license revoked notwithstanding good broadcast record where licensee left the air for business reason without authorization). Therefore, the appropriate remedy to impose here against Brown Communications is revocation for willful violation of the Commission's rule Section 73.1740 as charged by the Bureau.

⁴ The rules for processing AM broadcast applications identify a "major change" as any increase in power or any change in station location. 47 C.F.R. Section 73.3571 (a)(1). The Bureau was at all times assuming that Brown Communications would be making major changes in relocating the tower. That conclusion is evidenced in the letter from the Chief, AM Branch dated October 30, 1990, stating that temporary authority was being

granted to remain silent through January 21, 1991, "to allow time to locate a qualified buyer, and relocate tower." (Bur. Exh. 4.) That letter was mailed to the licensee's address of record. And that was the same letter in which the Bureau required a report of progress "toward resumption of operation" which Brown failed to submit. Brown admits to receiving the letter of October 30, 1990. See Brown PFC at 8-9.

ULTIMATE FINDINGS AND CONCLUSIONS

30. Due to an absence of revenue, Brown took Station WKIJ(AM) off-the-air on June 24, 1990, without first obtaining Commission authorization. Immediately thereafter he sought and received authorization to remain silent for approximately three and one half months so that he could obtain financing or find a qualified buyer. Brown later was notified in October 1990 that his site lease would not be renewed. He owned a plot of land which was to be used as the new site. Brown saw the situation as presenting an opportunity to increase the output power of the station from 1 kw to 5 kw which would either enhance advertising revenue for Brown or would improve the opportunity for a profitable sale. There was nothing illegal about Brown's scheme so long as he abided by the Commission's rules. Twice the Bureau responded positively to the request. But the last authorization expired on January 21, 1991, and Brown did not follow up in seeking further authorizations. He knew from the correspondence with the Commission that he would need to file a Form 301 for the major changes and he also knew from the correspondence that the Bureau both demanded and expected an informative progress report. The burden was on Brown Communications to respond to the Bureau's need for meaningful information if favorable extensions of time were to be expected. In fact, Brown was warned to avoid permitting authorizations to approach expiration dates before requesting an extension.

31. Brown knew or had sufficient reason to know as a Commission licensee that the authorization to remain silent expired on January 21, 1991. Rather than seeking to pursue and justify a reasonable further extension of the authorization, Brown either deliberately, or without sufficient inquiry, used two unrelated regulatory developments to attempt avoiding the fact that the authorization to remain silent had expired on January 21, 1991. First, Brown was simultaneously seeking authority to conduct field testing at the new site incident to the contemplated move and the possible increase in power. Second, the Commission had established a freeze on the filing of new AM applications for major changes. Brown used the first unrelated event to argue that he thought that the Bureau was granting him further authority to remain silent. But as noted in the findings above, the Bureau made no mention of extending the authorization to remain silent in correspondence relating to field testing and requests by Brown for additional time within which to conduct field tests. Again, if Brown had made timely and responsive status reports which the Bureau was seeking, Brown may have avoided the violation. With respect to the freeze, Brown only requested a waiver of the freeze in conjunction with requests for more time to complete field testing. The Bureau was cooperative in granting two of those requests but Brown persisted in failing to submit a status report. Thus, the AM freeze was merely an attendant circumstance to the quandary that Brown had created. It had no relevance to the fact that Brown had ceased to operate the station without authorization on and after January 22, 1991.

32. Brown Communications, a Commission licensee, has not made any showing that it had been misinformed or affirmatively misled in its unauthorized silencing of Station WKIJ(AM) after January 21, 1991. Brown was on written

notice that January 21, 1991, was the last extension and Brown took no steps to affirmatively seek a further authorization to maintain silence or to acknowledge the Bureau's requirement for progress reports. Such inaction and inattention on the part of a Commission licensee cannot be accepted where the outcome is a discontinuance of use of an allotted frequency. See *Midwest Radio Television, Inc.*, 45 F.C.C. 1137, 1141 (Comm'n 1963) (Comm'n demands high standards from licensees where violations can be avoided; laxity on the part of a licensee can result in a sanction and willfulness need not be shown where a licensee knows that it is doing the act in question). Here, in the absence of a written authorization from the Bureau to remain silent, Brown's conduct in seeking a business opportunity relating to the station without giving the Bureau the progress report to which it was entitled was an intentional act of defiance which, at a minimum, showed a laxness for compliance with the Commission's rules that cannot be tolerated. If Brown Communications were allowed to retain its broadcast license under these circumstances, the high standards demanded by the Commission of its broadcast licensees could be substantially diminished.

33. Since revocation is an appropriate remedy there is no basis to consider a monetary forfeiture. See Para. 4, *supra*. Although Brown was in violation of the Commission's rule concerning the station's operation, the evidence does not support a finding under the standard of *Midwest Radio Television, supra* that there was a knowing permanent discontinuance of the operation of the station. See 47 C.F.R. 1750 (Commission to be notified and license to be returned where there is a "permanent discontinuance of operation"). The evidence indicates that Brown would continue to operate Station WKIJ(AM) after he succeeded in moving the tower site and increasing the power, or that Brown would succeed in his efforts to obtain a qualified purchaser who would operate the station. The record does not support a finding of an abandonment of the station or an intentional permanent discontinuance of its operation. The discontinuance would be temporary until Brown could return to the air with increased power or until a qualified purchaser was located. However, even without a violation of Section 73.1750, there is a sufficient basis in this record to revoke the license of Brown Communications.

ORDER

IT IS ORDERED pursuant to Section 312 of the Communications Act of 1934, as amended [47 U.S.C. Section 312] that the AM broadcast license of Brown Communications for Station WKIJ(AM) at Parrish, Alabama IS REVOKED.⁵

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

⁵ This *Initial Decision* of the Presiding Judge shall become effective 50 days after its public release if exceptions are not

filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. Section 1.276(d).