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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
CAVAN COMMUNICATIONS)
CORPORATION)
)
Licensee of Station WTMS(AM),)
Presque Isle, Maine)
)
Order to Show Cause Why the)
License for Station WTMS(AM),)
Presque Isle, Maine, Should)
Not be Revoked)

MM DOCKET NO. 93-299

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

To: Administrative Law Judge
Edward Luton

MASS MEDIA BUREAU'S
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Summary

Cavan Communications Corporation is qualified to be and remain the licensee of Station WTMS(AM), Presque Isle, Maine. However, Cavan should be admonished for having violated § 73.1740 of the Commission's Rules on multiple, continuous occasions.

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I. Preliminary Statement

1. By Order to Show Cause and Hearing Designation Order, 8 FCC Rcd 8414 (MMB 1993) ("Show Cause Order"), the Chief, Audio Services Division, Mass Media Bureau, ordered Cavan Communications Corporation ("Cavan") to show cause why its license for Station WTMS(AM)¹, Presque Isle, Maine, should not be revoked upon the following issues:

- (a) To determine whether Cavan Communications Corporation has the capability and intent to expeditiously resume broadcast operations of WTMS(AM) consistent with the Commission's Rules.
- (b) To determine whether Cavan Communications Corporation has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules.
- (c) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether Cavan Communications Corporation is qualified to be and remain the license of Station WTMS(AM).

2. The Show Cause Order placed the burden of proceeding with the introduction of the evidence and the burden of proof with respect to the designated issues upon the Mass Media Bureau. The Show Cause Order also directed that, if it is determined that revocation of the WTMS(AM) license is not warranted, the Presiding Judge shall determine, pursuant to § 503(b) of the Communications Act of 1934, as amended, whether to issue an Order of Forfeiture against Cavan in an amount not to exceed \$250,000 for the willful and/or repeated violation of § 73.1740 and/or § 73.1750 of the Commission's Rules.

¹ Effective March 18, 1994, the call sign for Station WTMS(AM) was changed to WEGP(AM). (Cavan Ex. 1, Attachment O). In order to avoid any confusion, however, the Bureau will herein continue to refer to the facility by its previous call sign.

3. A hearing in this proceeding was held in Washington, D.C., on March 24, 1994, after which the record in this proceeding was closed. See Order, FCC 94M-198 (released March 28, 1994).

II. Proposed Findings of Fact

4. Cavan purchased WTMS(AM) and co-located sister station WTMS-FM (also licensed to serve Presque Isle, Maine) on November 1, 1987. Station WTMS(AM) is authorized to operate on 1390 kilocycles with five kilowatts non-directionally during the day and five kilowatts directionally at night. (Tr. 84). Initially, the AM and FM stations were programmed separately, and WTMS(AM) employed its own live on-air staff. However, from the outset, revenues from the operation of WTMS(AM) fell short of Cavan's expectations. In an effort to trim expenses, Cavan commenced simulcasting the two stations in the Fall of 1989. Nevertheless, the cash-flow from the combined operation of the two stations remained disappointing. (Cavan Ex. 1, p. 1).

5. On or about March 29, 1991, the main transmitter tube for WTMS(AM) failed, and the station went off the air. Cavan determined that it could not afford the expense of replacing the \$2,000 tube. Consequently, Cavan made the decision to keep WTMS(AM) silent. (Cavan Ex. 1, p. 1).

6. Nearly two months later, by letter dated May 17, 1991, Cavan filed with the Commission its *first* request for authority for WTMS(AM) to stay off the air. (MMB Ex. 1) The letter was signed by Cavan's President, J. Dominic Monahan ("Monahan"), who is, and was at the time, an experienced communications attorney. (Tr. 50-51). As was his practice, Monahan obtained a date-stamped copy of the submission demonstrating that it had been

properly filed with the Office of the Secretary of the Commission. (Tr. 52). The letter does not state exactly when the station first went off the air. (MMB Ex. 1). The Commission acted on Cavan's request within a matter of days. By letter dated May 23, 1991, the Commission granted Cavan temporary authority for WTMS(AM) to remain silent. The letter provided that WTMS(AM) could stay off the air through August 23, 1991. (MMB Ex. 2; Tr. 59-60).

7. After WTMS(AM) initially went dark, it was Cavan's intention to restructure its financing in a manner which would allow the company to make necessary repairs and place the station back on the air. However, shortly thereafter, in the Summer or Fall of 1991, Cavan abandoned plans to operate WTMS(AM) and decided instead to direct its efforts toward selling the station. (Cavan Ex. 1, p. 2; Tr. 57-59).

8. On August 23, 1991, Cavan's authority for WTMS(AM) to remain silent expired. Cavan did not file a request for further authority by that date. Approximately six months later, by letter dated February 28, 1992, the Commission advised Cavan that WTMS(AM) was off the air without authority. The Commission's letter of inquiry required Cavan to submit a written response within 30 days informing the Commission as to the status of WTMS(AM). (MMB Ex. 3; Tr. 60-61).

9. By letter dated March 11, 1992, Cavan submitted its response to the Commission's letter of inquiry. In its response, Cavan made its *second* request for authority

to keep WTMS(AM) silent. The letter was signed by Monahan, who, consistent with his practice, obtained a date-stamped copy of the correspondence demonstrating that it had been properly filed with the Office of the Secretary of the Commission. (MMB Ex. 4; Tr. 61). The Commission acted on Cavan's request within a month. By letter dated April 10, 1992, the staff granted Cavan authority to keep WTMS(AM) silent through July 10, 1992. (MMB Ex. 5; Tr. 61-62).

10. By letter dated July 10, 1992, Cavan filed its *third* request for authority for WTMS(AM) to remain silent. Monahan authorized the filing of the letter, and, consistent with his practice, obtained a date-stamped copy demonstrating that the correspondence had been properly filed with the Office of the Secretary of the Commission. (MMB Ex. 6; Tr. 63-64).

11. Less than two weeks later, the Commission responded to Cavan's request. A letter to Monahan dated July 23, 1992, stated that the Commission was deferring action on Cavan's request for further silent authority pending receipt of an executed Anti-Drug Abuse Act certification. (MMB Ex. 7; Tr. 64). Nearly a month later, Cavan filed an executed Anti-Drug Abuse Act certification. Consistent with his practice, Monahan obtained a date-stamped copy of the certification and accompanying transmittal letter, dated August 20, 1992, demonstrating that the correspondence had been properly filed with the Office of the Secretary of the Commission. (MMB Ex. 8; Tr. 64-65). In response to a subsequent informal request by the Commission staff, Cavan tendered a copy of the same certification on

October 23, 1992. Consistent with his practice, Monahan obtained a date-stamped copy of the October 23, 1992, submission, demonstrating that it had been properly filed with the Office of the Secretary of the Commission. (MMB Ex. 9; Tr. 66). One week later, on October 30, 1992, the Commission granted Cavan further authority for WTMS(AM) to remain silent. The station's silent authority extended to January 30, 1993. (MMB Ex. 10; Tr. 67).

12. On January 30, 1993, Cavan's authority for WTMS(AM) to remain silent expired. Cavan did not submit a request for further silent authority by that date. Three weeks later, by letter dated February 18, 1993, the Commission advised Cavan that WTMS(AM) was off the air without authority. The Commission's letter required Cavan to submit a written response within 30 days informing the Commission as to the status of WTMS(AM). (MMB Ex. 11).

13. Cavan did not respond to the Commission letter of inquiry within 30 days. However, on March 22, 1993, Cavan filed its *fourth* request for authority to keep WTMS(AM) silent. As was his practice, Monahan obtained a date-stamped copy of the correspondence demonstrating that it had been filed with the Office of the Secretary of the Commission. (MMB Ex. 12; Tr. 69). Approximately one week later, by letter dated March 30, 1993, the Commission granted Cavan's request for authority for WTMS(AM) to remain silent. Cavan was authorized to keep WTMS(AM) dark through June 30, 1993. (MMB Ex. 13; Tr. 69).

14. On June 30, 1993, Cavan's authority to keep WTMS(AM) silent expired. Cavan did not request further silent authority by that date. Nearly one month later, by letter to Monahan dated July 26, 1993, the Commission informed Cavan that WTMS(AM) was off the air without authority. The Commission's letter required Cavan to file a written response within 30 days informing the Commission as to the status of WTMS(AM). (MMB Ex. 14; Tr. 70).

15. Commission records do not reveal that Cavan filed a response to the July 26, 1993, letter of inquiry. Although Monahan claims that he transmitted to the Commission a *fifth* request for silent authority on August 26, 1993, Monahan did not obtain (and consequently Cavan was unable to produce at hearing) a date-stamped copy of any such filing with the Commission. (Cavan Ex. 1, Attachment J; Tr. 71). Furthermore, the Commission never acknowledged receiving a further request for silent authority from Cavan; no further authority was ever granted; and, despite the passage of several months without any action, at no time subsequent to August 26, 1993, did Monahan inquire of the Commission's staff about the status of Cavan's purported request. (Tr. 74-75). Monahan learned that the Commission had commenced this proceeding to revoke Cavan's license for WTMS(AM) shortly after the Show Cause Order was released on November 30, 1993. (Tr. 75).

16. Upon release of the Show Cause Order, Cavan made the decision to take all necessary actions in order to return WTMS(AM) to the air as soon as possible. Repairs were made at a cost of approximately \$13,000. (Tr. 88). Within four months, on March 18,

1994, WTMS(AM) commenced broadcasting pursuant to Special Temporary Authority. (MMB Exs. 16 and 17; Tr. 81). On March 22, 1994, Cavan filed its required application on FCC Form 302.² (MMB Ex. 18; Tr. 85).

17. On March 23, 1994, Cavan entered into a Local Marketing Agreement ("LMA") with Lobster Radio Network, Inc. ("Lobster"). The LMA, which is effective as of April, 1, 1994, permits Lobster to operate WTMS(AM) on behalf of Cavan until such time as: (a) either party terminates the contract upon 90-days written notice to the other; (b) both parties terminate the contract by mutual written agreement; (c) Lobster purchases the station from Cavan; or (d) the contract is determined to be illegal or in violation of the Commission's Rules or the Communications Act of 1934, as amended. (Cavan Ex. 1, Attachment K).

18. Although WTMS(AM) has a main studio with program origination capability, the station is presently broadcasting programming which is produced in, and delivered by satellite from, Florida by a company called International Broadcast Network ("IBN"). IBN provides its programming to WTMS(AM) pursuant to a written contract with Lobster. Monahan has never seen, and is unfamiliar with, the terms of IBN's contract with Lobster. Furthermore, Monahan is unaware as to how long WTMS(AM) will continue to broadcast IBN programming. (Tr. 91-94).

² The Commission requires AM stations which are silent for more than six months to file an FCC Form 302 prior to returning to the air.

19. Cavan does not have a written operating budget for WTMS(AM). (Tr. 97-98). Nor does Cavan have any contingency plans for operating the station in the event the LMA with Lobster is terminated. If, for any reason, the LMA were terminated, Cavan would be unable financially to operate the station without an immediate infusion of money from Cavan's shareholders. (Tr. 103-104).

20. Although Cavan has experienced severe financial hardship since it acquired WTMS(AM) and WTMS-FM in 1987, the company reported a net income of \$5,553 in the year ending December 31, 1993. The company has not prepared any projected financial statements for the current 1994 fiscal year. (Cavan Ex. 1, Attachment N; Tr. 107).

III. Conclusions of Law

A. Section 73.1740 Issue

1. Section 73.1740(a)(4) of the Commission's Rules provides:

In the event that causes beyond the control of a 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., not 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.

2. The record evidence in this case reveals that Cavan has violated § 73.1740 of the Commission's Rules on multiple occasions since 1991. Station WTMS(AM) initially went off the air on or about March 29, 1991. However, it was not until May 17, 1991 -- nearly two months later -- that Cavan sought authority from the Commission to keep WTMS(AM) silent. Since Cavan was required by § 73.1740 to submit its request for silent authority within 30 days of the date on which the station first went silent, and Cavan waited nearly twice that long to do so, it is concluded that Cavan violated § 73.1740 of the Commission's Rules in May 1991 by failing to seek in a timely manner Commission authority for WTMS(AM) to remain silent.

3. Cavan violated § 73.1740 a second time during a continuous period from August

1991 to April 1992. The record evidence shows that on May 23, 1991, the Commission granted Cavan's initial request for authority to keep WTMS(AM) off the air, and that such authority expired on August 23, 1991. Cavan, however, did not request further silent authority until March 11, 1992, and the Commission did not grant such further authority until April 10, 1992. Since WTMS(AM) was off the air without Commission authority during the entire period from August 23, 1991, through April 10, 1992, and § 73.1740 required Cavan to obtain Commission authority to keep WTMS(AM) silent during that period, it is concluded that Cavan violated § 73.1740 for approximately eight continuous months by keeping WTMS(AM) silent without authority.³

4. Cavan violated § 73.1740 a third time during the months of February and March 1993. The record evidence reveals that on October 30, 1992, the Commission granted Cavan further authority to keep WTMS(AM) silent through January 30, 1993. However, Cavan did not request any additional authority for WTMS(AM) to remain silent until March 22, 1993. Moreover, the Commission did not grant Cavan's request for additional time to keep WTMS(AM) off the air until March 30, 1993. Since WTMS(AM) was off the air without Commission authority from January 30, 1993, until March 30, 1993, and § 73.1740 required Cavan to obtain Commission authority in order to keep WTMS(AM) silent during that period, it is concluded that Cavan violated § 73.1740 again, this time for two continuous

³ Even assuming, arguendo, that Cavan's March 11, 1992, request for further authority tolled the clock on the length of time that WTMS(AM) was silent without authority, Cavan would still be in violation of § 73.1740 for having kept WTMS(AM) off the air without authority for at least seven continuous months.

months during which time the station was silent without authority.⁴

5. Cavan's fourth and most recent violation of § 73.1740 occurred between June 1993 and March 1994. The record evidence reveals that on March 30, 1993, the Commission granted Cavan further authority to keep WTMS(AM) silent through June 30, 1993. After that authority expired, however, Cavan failed to request any additional authority for WTMS(AM) to remain silent. The station returned to the air on March 18, 1994. Since WTMS(AM) was off the air without Commission authority from June 30, 1993, until the station returned to the air on March 18, 1994, and § 73.1740 required Cavan to obtain Commission authority in order to keep WTMS(AM) silent during that period, it is concluded that Cavan violated § 73.1740 yet again, this time for nine continuous months during which the station was silent without Commission authorization.⁵

6. Evidence concerning *all* of Cavan's violations of § 73.1740 is unquestionably relevant in this proceeding despite the fact that the Show Cause Order made specific reference to only Cavan's most recent transgression of that rule section. Show Cause Order, at ¶¶ 2-3. "It is well established that evidence relevant to the designated issues should not be

⁴ Even assuming, arguendo, that Cavan's March 22, 1993, request for further authority tolled the clock on the length of time that WTMS(AM) was silent without authority, Cavan would still be in violation of § 73.1740 for having kept WTMS(AM) off the air without authority for approximately 1 $\frac{3}{4}$ months.

⁵ Even assuming, arguendo, that Cavan's purported August 26, 1993, request for further authority was filed, and that tolled the clock on the length of time that WTMS(AM) was silent without authority, Cavan would still be in violation of § 73.1740 for having kept WTMS(AM) off the air without authority for approximately two months.

excluded 'merely because it was not included among the specific instances which warranted the hearing.'" Clay Frank Huntington, 61 FCC 2d 123, 124 (Rev. Bd. 1976), citing, Chronicle Broadcasting Co., 20 FCC 2d 33, 39 (1969); Belk Broadcasting Co. of Florida, Inc., 27 FCC 2d 921 (Rev. Bd. 1971); WPIX, Inc., 25 FCC 2d 678 (Rev. Bd. 1970). Moreover, the Show Cause Order specifically contemplated that evidence of Cavan's other, prior violations of § 73.1740 should be considered. The Show Cause Order, at ¶ 7, directed the Presiding Judge to determine whether to issue an Order of Forfeiture against Cavan for its willful and/or "repeated" violation of § 73.1740. It would render the reference to "repeated" superfluous if the only evidence that could be considered was evidence involving Cavan's single most recent violation of § 73.1740. Furthermore, evidence of Cavan's multiple violations of § 73.1740 is relevant to determining the extent of any forfeiture directed against Cavan.

B. Section 73.1750 Issue

7. Section 73.1750 of the Commission's Rules provides:

The licensee of each station 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.

8. The issue as to whether Cavan violated § 73.1750 is resolved in Cavan's favor.

Although the station was off the air for some two years, the evidence plainly reveals that WTMS(AM) has commenced broadcasting again. Indeed, Cavan obtained Special

Temporary Authority to return WTMS(AM) to the air, and the licensee has filed an application on FCC Form 302, as required by the Commission. The question as to whether Cavan permanently discontinued operating WTMS(AM) is adequately dispelled by the fact that Cavan has taken all necessary steps to make the station operational again.

C. Resumption of Operations Issue

9. In determining whether Cavan has the capability and intent to expeditiously resume broadcast operations of WTMS(AM) consistent with the Commission's Rules, evidence that the station is back on the air is certainly relevant, but not necessarily dispositive. Indeed, if Cavan's aim was to return the station to the air on only a temporary basis for the duration of this hearing proceeding or, if the station were not operating in compliance with the Commission's Rules, then this issue would have to be resolved against the licensee. That, however, does not appear to be the case.

10. The evidence reveals that Cavan has managed to return WTMS(AM) to the air on what appears to be a long-term basis. Cavan obtained Special Temporary Authority prior to commencing broadcast operations, and it has filed an application on FCC Form 302. Furthermore, Cavan has entered into a Local Marketing Agreement with a company that itself has contracted for the broadcast of syndicated programming. Based on the foregoing, the issue as to whether Cavan has the capability and intent to expeditiously resume broadcast operations of WTMS(AM) should be resolved in Cavan's favor.

IV. Ultimate Conclusions

11. The ultimate question to be decided in this proceeding is whether, on the basis of the evidence adduced at hearing, Cavan's license to operate WTMS(AM) should be revoked. It is concluded that Cavan has the capability and intent to expeditiously resume broadcast operations of WTMS(AM) consistent with the Commission's Rules. Furthermore, it is concluded that Cavan has not violated § 73.1750 of the Commission's Rules. However, the facts plainly demonstrate that Cavan has repeatedly violated § 73.1740 of the Commission's Rules. Nevertheless, revocation is not warranted on the basis of these transgressions.

12. The Show Cause Order, at ¶ 7, directed that, if it is determined that revocation of the WTMS(AM) license is not warranted, the Presiding Judge shall determine, pursuant to § 503(b) of the Communications Act of 1934, as amended, whether to issue an Order of Forfeiture against Cavan in an amount not to exceed \$250,000 for the willful and/or repeated violation of § 73.1740 and/or § 73.1750 of the Commission's Rules.

13. Determining whether to impose a forfeiture in this case is not an easy task. On the one hand, Cavan has repeatedly violated § 73.1740 of the Commission's Rules. On the other hand, however, given Cavan's lackluster financial condition, the imposition of a forfeiture could have a deleterious impact on the company and its ability to continue operating both its AM and FM stations in Presque Isle, Maine. It would make little sense to levy a crippling fine on Cavan when the licensee has only recently managed, after a hiatus of

several years, to return WTMS(AM) to the air.

14. On balance, it is concluded that a forfeiture in this instance would not serve the public interest. However, given the repeated nature of the violations involved, the Presiding Judge should admonish Cavan for its transgressions. Accordingly, it is ultimately concluded that Cavan should be admonished for its multiple, continuous violations of § 73.1740 of the Commission's Rules.

Respectfully submitted,
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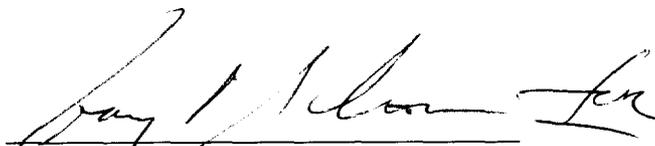
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May 20, 1994

CERTIFICATE OF SERVICE

I, Michelle C. Mebane, a secretary in the Hearing Branch, Mass Media Bureau, certify that I have, on this 20th day of May 1994, sent by regular United States mail, U.S. Government frank, copies of the foregoing, "Mass Media Bureau's Proposed Findings of Fact and Conclusions of Law" to:

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