

MAY 19 1993

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.)
)
To: Administrative Law Judge)
Edward Luton)

MM Docket No. 93-299

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Cavan Communications Corporation ("Cavan"), the licensee of Station WTMS(AM) Presque Isle, Maine, through its counsel, respectfully submits its Proposed Findings of Fact and Conclusions of Law in the above entitled proceeding.

1. Preliminary Statement

By Order to Show Cause and Hearing Designation Order ("HDO"), released November 30, 1993 in the above docket, the Commission, through its Mass Media Bureau, directed Cavan to

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show cause as to why its license for Station WTMS(AM)¹ should not be revoked based upon the following issues:

- (a) to determine whether Cavan has the capability and intent to expeditiously resume broadcast operations of WTMS(AM) consistent with the Commission's rules;
- (b) to determine whether Cavan has violated §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 is qualified to be and remain the licensee of Station WTMS(AM).

By Orders dated February 2, 1994, and revised March 9, 1994 (FCC 94-M-55 and FCC 94M-128), hearings were scheduled and held in this matter on March 24, 1994. Pursuant to the further Order dated March 28, 1994 (FCC-94M-198) of the presiding Administrative Law Judge Edward Luton, the parties were directed to submit Proposed Findings of Fact and Conclusions of Law on or before May 20, 1994. The following Findings of Fact and Conclusions of Law are submitted pursuant to that Order.

BACKGROUND STATEMENT

Cavan acquired Station WTMS(AM) on November 1, 1987. At the time Cavan acquired Station WTMS(AM), the Station was

¹ At that time Station WTMS(AM) operated under the call sign WEGP(AM). This call sign was changed to WTMS(AM) in 1989. On March 3, 1994 Cavan requested and was granted application to return the call sign to its original call letters, WEGP(AM). (Cavan Ex 1, Attachments L and O, Tr. 86, 87). For purposes of these findings, the station will be referred to as Station WTMS(AM).

programmed separately from its sister Station WTMS(FM), using a live air staff. In the fall of 1989, the station shifted to a simulcast operation with its sister Station WTMS(FM) in order to reduce operating costs and growing debt. In the spring of 1991, Station WTMS(AM) was experiencing increased technical problems and declining revenues. When the station's main transmitter tube failed, Cavan reluctantly made the decision to take the station off the air until it could increase revenues to the point of purchasing the necessary replacement tube. (See Cavan Ex 1). Over the next two years Station WTMS(AM) remained off the air. During this time, Cavan sought and obtained authority to remain off the air. In two instances this authority inadvertently lapsed but was reinstated by the Commission staff.

On July 26, 1993 the Commission staff sent a letter to Cavan noting that its previous authority to remain silent had expired on June 30, 1993 (MMB Ex 14). The Commission's letter sought information as to the efforts of Cavan to return the station to operation and provided thirty (30) days in which to respond that request. Cavan spoke to the FCC staff on August 26, 1993 and submitted by facsimile a six-page response outlining its efforts to attract a buyer (Cavan Ex 1, Tr. 117, 118, Attachment J). After the submission of that facsimile transmission, Cavan heard nothing further from the FCC until early December, 1993 when it received a copy of the HDO as to why its license for WTMS(AM) should not be revoked. Therein, Commission found that Cavan "had not responded" to the

Commission's letter of July 26, 1993 (See ¶2 of HDO).

On December 9, 1993, Cavan filed a Motion for Certification of an Application for Review to the Commission pointing out that the premise in the HDO that Cavan had not responded to the Commission's letter was in error. Therein Cavan demonstrated that in fact it had submitted a six-page response to the staff providing a detailed showing as to efforts to sell the station and an Order to return it to the air. The showing was supported by the billing records of Metromedia Communication Corporation, a long distance carrier, that the response had been transmitted by facsimile and received at 202-632-0518². (Tr. 117, Cavan Ex 1, Attachment J) The Commission found no record that it received the material. Cavan's Motion for Certification was denied.

FINDINGS

The basic facts of this case are not in dispute. Station WTMS(AM) was silent from the spring of 1991 through March 8, 1994 when it returned to operation. (Tr. 81) The Commission, through a grants of silence authority and its reinstatement of silence authority had authorized Station WTMS(AM) to remain silent through June 30, 1993 (See MMB Ex. 13).

On July 26, 1993, the Commission notified Cavan that its authority to remain silent had expired and sought additional

² The facsimile telephone for the Mass Media Bureau is 202-632-0518.

information to justify further extension of its silence authority. (MMB Ex. No. 14). As shown, Cavan did in fact reply to this request within the deadline specified in the letter. In its response, Cavan demonstrated that it had been diligently seeking a buyer and had retained two separate and independent media brokers to assist in finding a qualified broker (Cavan Ex. 1, Attach. J, Tr. 53). In fact, Cavan pointed out that during the summer of 1993 it was engaged in discussions with two interested parties (Cavan Ex. 1).

After the release of the HDO and prior to the hearing held March 24, 1994, Cavan continued efforts to return the station to the air. As a result of these efforts, Cavan negotiated a local marketing agreement ("LMA") with Lobster Radio Network Inc. ("Lobster"). Per the terms of this agreement Lobster would provide programming for Station WTMS(AM) (Tr. 91-91, Cavan Ex. 1, Attach. K).

Lobster also obtained an option to purchase the station for \$35,000, such option to be exercised within one year. On March 7, 1994, Cavan requested special temporary authority to return Station WTMS(AM) to operation (See MMB Exhibit 16). The Commission staff granted this request on March 9, 1994 and Station WTMS(AM) returned to full-time operation on March 8, 1994 (See MMB Ex. 17, Tr. 81)³. The Agreement between Cavan and

³ Under the FCC's rules a station may not resume operation of a directional mode of a station which has been silent for more than six months without obtaining written authorization for program test authority. See §73.1620(a)(2). Given this requirement Cavan filed a request for the appropriate program test authority on March 7, 1994, using

Lobster provides an option to Lobster to acquire the station. Cavan anticipates that Lobster will exercise that option within the one-year time period provided in the LMA.

The LMA with Lobster did not become effective until April 1, 1994. Prior to that time, Cavan operated Station WTMS(AM), using the satellite fed programming obtained by Lobster (Tr. 92). The station resumed operation on a full-time basis using its two full-time employees and three employees of Lobster (Tr. 95-96).

Cavan has invested \$12,000-\$13,000 into returning the station to operation (Tr. 88). These funds, which were borrowed by one of Cavan's principals, were used to purchase replacement tubes as well as new equipment. Cavan also incurred additional expenses, which were undetermined at the time of the hearing, for consulting services of a radio engineer who was required to prepare a proof of performance necessary to submit the license application (FCC Form 302) required by the Commission to return a silent directional AM station to operation (Tr. 87)⁴. Lobster, in anticipation of operating, has successfully pre-sold advertising on the station (Tr. 100-01). Cavan anticipates that

reduced nighttime power. On March 9, 1994 the Mass Media Bureau issued written program test authority for return to operation.

⁴ It is Commission policy to require a station which operates with a non-directional pattern and has been silent for more than six months to submit a partial proof of performance demonstrating the station has resumed operation consistent with the operating parameters set forth in its license. Cavan completed this proof on March 18, 1994 and submitted its license application to the FCC on March 23, 1994 (See B2-940323AA), accepted for filing by the FCC on March 30, 1994 [FCC Public Notice, Report No. 15770].

Lobster will be successful because Station WTMS(AM) is the only operating AM station in the market (Tr. 101-02).⁵ In addition the demographic makeup of the community consists of an older population, a factor which favors a station with a news-talk format — the format now being used by Station WTMS(AM) (Tr. 102).

Cavan was forced to suspend operation of Station WTMS(AM) for financial reasons. Initially, Cavan had viewed the suspended operation as temporary, hoping it could attract new investors and improve revenues and cash flow would provide the necessary cash to repair the station's transmitter (Tr. 52). This did not happen. Thus, in the fall of 1991, when Cavan was approached by a media broker, it agreed to have the broker seek out a buyer for both Station WTMS(AM), as well as its sister station WTMS-FM (Tr. 52, 59).

Although Cavan engaged in numerous discussions with potential buyers, none were forthcoming with acceptable offers to purchase. In the meantime, the financial performance of Cavan's operation continued to decline. In the spring of 1992, Cavan entered into an LMA with Four Seasons Communications, another party which agreed to provide programming for Station WTMS FM. Part of that arrangement was an offer to purchase both Station WTMS(AM) and WTMS-FM. This offer was contingent on Four

⁵ The market at one time had three other operating AM stations which are now dark. One, WAGM-AM, licensed to Presque Isle, Maine, turned in its license and the others, WFST, licensed to Caribou, Maine, and WREM, licensed to Monticello, Maine, are dark or operating intermittently (Tr. 101, 102).

Season securing financing. When it became apparent that Four Seasons was not likely to secure the necessary financing, Cavan renewed its efforts to find a buyer for Station WTMS(AM) (Tr. 90).

The impact of the financial problems suffered by Cavan were substantial requiring major infusions of loans by its shareholders. Since acquiring the stations Cavan has lost money every year (Tr. 104). In 1991, the year WTMS(AM) suspended operation, Cavan had accumulated aggregate losses of \$473,344.00. It lost \$85,368.00 in 1991 alone. (Cavan Ex. No. 1, Attach. N). By the end of 1992, Cavan's overall losses had grown to some \$558,702.00. By 1993 these losses had amounted to over \$603,000 (Tr. 106).

CONCLUSIONS

Issue (a) in this proceeding seeks to determine whether Cavan has the capacity and intent to resume broadcast operations. Since the release of the HDO, and in fact prior to hearing, Station WTMS(AM) has commenced regular broadcast operations. The Station has returned to operation and as of April 1, 1994, will continue operation under the terms of an LMA with Lobster. That agreement provides Lobster with the option to purchase this facility within one year for \$35,000. (Tr. 89, 99). Cavan entered into the local marketing agreement with Lobster with the full expectation that Lobster will acquire the station WTMS(AM) under the option. In view of the fact that

Station WTMS(AM) has returned to operation and provisions have been made for its continued operation through sale of the facility to Lobster, Cavan respectfully submits that Issue (a) must be resolved in favor of Cavan.

Issue (b) requires the determination as to whether Cavan violated §73.1740 and/or §73.1750 of the Commission's Rules. Section 73.1750 requires a licensee to notify the Commission of its intent to permanently discontinue operation. The evidence in this case makes clear that Cavan never intended a permanent discontinuance of the operation of the station and in fact has returned to operation. Accordingly, Cavan submits that it did not violate §73.1750 of the Rule.

Section 73.1740 of the Commission's Rules sets forth minimum operating schedules for commercial broadcast stations. The Rule requires, among other things, that if a licensee is going to keep its station off the air for more than 30 days it must obtain authorization from the Commission to do so. With regard to this matter the facts are not in dispute. Cavan's authority to remain off the air expired, albeit inadvertently, as of July 1, 1993. Although Cavan did respond to the Commission's letter of July 26, 1993, which raised questions as to Cavan's intent to resume operation, Cavan was in fact off the air without authority to remain silent. Thus the relevant period for consideration under §73.1740's Rules is that approximate six-week period when Cavan did not have authority to remain silent.

Cavan does not deny its silence authority did in fact lapse. However, Cavan would respectfully submit that the evidence in this proceeding clearly shows that it did in fact respond to the Commission's inquiry of July 26, 1993, and did so within the deadline specified in the Commission's letter. Furthermore, Cavan submits that had the Commission acted on Cavan's response of August 26, 1993, the information in that response would have justified a further extension of its silence authority as it demonstrated that Cavan was exerting the kind of good faith effort [finding a qualified buyer] that the Commission has regularly found in previous cases to be sufficient.

Given the facts in this case, Cavan submits that having been subjected to the rigors and expense of a full hearing on the issues raised, including preparation, legal and travel costs, it has already incurred more than sufficient sanction for whatever culpability might be attributed to it for the lapse in silence authority for Station WTMS(AM). While Cavan is well aware the HDO in this case provided for monetary forfeiture, it would respectfully submit that such a forfeiture would be counterproductive in view of Cavan's financial condition. David Lee Communications, Inc. (Summary Decision, FCC D-3, issued by ALJ Joseph Chachkin, released March 31, 1994).

Cavan respectfully requests the presiding judge to consider that this case represents one of those rare instances where a licensee has in fact returned a silent AM station to operation.

In numerous other cases that stations have gone dark⁶, failed to notify the Commission; and when inquiry was made as to the status of the license, simply failed to respond. In those instances the Commission cancels their license without any further sanction. ⁷ Here though, Cavan has not only been fully responsive to the Commission but has fulfilled its commitment to return Station WTMS(AM) to full time operation. Under these circumstances, to further burden a struggling AM station seeking to revive its operation with a forfeiture would be unreasonable. It would not only discourage other silent AM stations seeking to renew operation from pursuing restarts, but it would be grossly disproportionate to those silent stations which are allowed to ignore FCC inquiries and walk away from their responsibilities without any penalty or sanction.

CONCLUSION

In view of the foregoing, Cavan Communications Corporation, respectfully requests that the presiding officer resolve Issues (a) and (b) in its favor. Insofar as Issue (c) is concerned, Cavan submits that the costs and rigors of the hearing process

⁶ See, proceedings involving Station KDEW, DeWitt Arkansas, MM Docket 93-296 (DA-93-1354); Station WNNQ, Ashburn, Georgia, MM Docket 93-288, (DA-93-1319); Station WDIX(AM) Yadkinville, North Carolina, MM Docket 93-289 (DA-93-1320); Station WDTL(AM), Cleveland, Mississippi, MM Docket 93-262 (DA-93-1204); Station WYND(AM), Nelsonville, Ohio, MM Docket 93-261(DA-93-1203); Station KBRS(AM), Springdale, Arkansas, MM Docket 93-34 (DA-93-976); Station WCSP(AM), Crystal Springs, Mississippi, MM Docket 93-306 (DA-93-1522); Station WCSA(AM), Ripley, Mississippi, MM Docket 93-317 (DA-93-1523).

⁷ Station WNNO(AM), Ashburn, Georgia; Station WDIX(AM), Yadkinville, North Carolina; Station WCSP(AM), Crystal Springs, Mississippi.

it has experienced are more than sufficient sanction for any infraction of the Commission's rules stemming from its lapsed silence authority. Accordingly, Cavan respectfully requests that this proceeding be terminated without further sanction and that it be permitted to continue with its renewed operation of Station WTMS(AM).

Respectfully submitted,

CAVAN COMMUNICATIONS CORPORATION



J. Dominic Monahan, Its Counsel

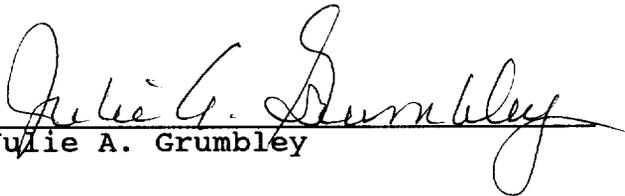
May 18, 1994

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CERTIFICATE OF SERVICE

I, Julie A. Grumbley, a secretary in the law offices of Luvaas, Cobb, Richards & Fraser, certify that I have on this 18th day of May, 1994, sent by Federal Express, on behalf of Cavan Communications Corporation, copies of the foregoing "Proposed Findings of Fact and Conclusions of Law" to:

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Julie A. Grumbley