

FCC MAIL SECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

DISPATCHED BY
MM Docket No. 93-299

In the Matter of

CAVAN COMMUNICATIONS

License 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.

APPEARANCES

J. Dominic Monahan, Esq. on Cavan Communications Corporation; and *Gary P. Schonman, Esq.* on behalf of the Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD LUTON

Issued: March 10, 1995;

Released: March 17, 1995

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 licensee 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.

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

II. 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. Initially, the AM and FM stations were programmed separately, and WTMS(AM) employed its own live on-air staff. 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, and the station remained silent. (Cavan Ex. 1, p. 1).

6. About 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 has 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. (MM 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. (MM Ex. 2; Tr. 59-60).

7. After WTMS(AM) first went dark, Cavan intended to restructure its financing so that the company could make necessary repairs and place the station back on the air. Shortly, however, 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 silent authority by that date. Approximately six months later, by letter dated February 28, 1992,

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). Herein, the station will be referred to as Station WTMS(AM).

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 of the status of WTMS(AM). (MM 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. (MM Ex. 4; Tr. 61). The Commission acted on Cavan request within a month. By letter dated April 10, 1992, the staff granted Cavan authority to keep WTMS(AM) silent through July 10, 1992. (MM 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. (MM 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. (MM 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. (MM 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. (MM 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. (MM 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 of the status of WTMS(AM). (MM 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. (MM Ex. 12; Tr. 69) Approximately one week later, by letter dated March 30, 1993, the Commission granted Cavan request for authority for WTMS(AM) to remain silent. Cavan was authorized to keep WTMS(AM) dark through June 30, 1993. (MM 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 of the status of WTMS(AM). (MM 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. 64-75). 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 actions necessary 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. (MM Exs. 16 and 17; Tr. 81). On March 22, 1994, Cavan filed its required application on FCC Form 302.² (MM 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 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 provided 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 of 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 is terminated, Cavan would be unable financially to operate the station without an immediate infusion of money from Cavan shareholders. (Tr. 103-104).

20. 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 1994 fiscal year. (Cavan Ex. 1, Attachment N; Tr. 107).

III. CONCLUSIONS OF LAW

A. Section 73.1740 Issue

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.

21. Cavan has violated §73.1740 of the Commission's Rules on several 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.

22. Cavan violated § 73.1740 a second time during the period from August 1991 to April 1992. The evidence is 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.

23. Cavan violated § 73.1740 a third time during the months of February and March 1993. The evidence shows 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 months during which time the station was silent without authority.

24. 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 19, 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.

25. Evidence concerning all of Cavan's violations of §73.1740 is relevant despite the fact that the *Show Cause Order* makes specific reference only to 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 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

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 dis-

continued. 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.

26. 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 answered by the fact that Cavan has taken all necessary steps to make the station operational again.

C. Resumption of Operation Issue

27. Cavan does have the capability and intent to expeditiously resume broadcast operations of WTMS(AM) consistent with the Commission's Rules. 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) will be resolved in Cavan favor.

IV. ULTIMATE CONCLUSIONS

28. 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, license revocation is not warranted for these transgressions.

29. 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 §73.1740 of the Commission's Rules.

30. Cavan has repeatedly violated §73.1740 of the Commission's Rules, and the violations are wholly inexcusable. However, given Cavan's difficult financial condition, the imposition of a substantial forfeiture could have a decidedly negative impact on the ability of the company to continue operating both its AM and FM stations in Presque

Isle, Maine. It is concluded that the public interest will be served by the imposition of a forfeiture in the amount of \$1,000.00.

31. Accordingly, IT IS ORDERED THAT Cavan Communications Corporation forfeit to the United States the sum of \$1,000.00 for its repeated violations of Section 73.1740 of the Commission's Rules.³

FEDERAL COMMUNICATIONS COMMISSION

Edward Luton
Administrative Law Judge

³ In the event exceptions are not filed within (3) days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall

become effective fifty (50) days after its release pursuant to Section 1.276 (d) of the Commission's Rules.