

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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MAR 25 1997

Administrative Law Judge
Richard L. Sippel

In the Matter of) MM Docket No. 96-209
)
Morgan Media, Inc.)
)
Order to Show Cause Why the License)
for Station WAUB(AM))
Auburn, New York Should not be Revoked)

To: Administrative Law Judge
Richard L. Sippel

MASS MEDIA BUREAU'S COMMENTS
IN SUPPORT OF MOTION FOR SUMMARY DECISION

1. On March 14, 1997, Morgan Media, Inc. ("Morgan") filed a motion for summary decision. The Mass Media Bureau submits the following comments in support.

2. Morgan seeks favorable summary decision of the following issues specified in the *Order to Show Cause and Hearing Designation Order ("OSC")*, 11 FCC Rcd 12815 (MMB 1996):

- (1) To determine whether Morgan Media, Inc. has the capability and intent to expeditiously resume the broadcast operations of WAUB(AM), consistent with the Commission's Rules.
- (2) To determine whether Morgan Media, Inc. has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules.
- (3) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether Morgan Media, Inc. is qualified to be and remain the licensee of Station WAUB(AM).

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Background

3. Morgan is the licensee of WAUB(AM), Auburn, New York. On June 30, 1995, WAUB(AM) ceased broadcast operations due to "severe financial difficulties." On October 11, 1995,¹ Morgan requested that it be allowed to retain the license for a minimum of six months in order to obtain a buyer for the "property." On February 9, 1996, the Audio Services Division granted Morgan special temporary authorization ("STA") to remain silent until August 9, 1996. Morgan filed nothing further until the release of the OSC.

Morgan's Motion

4. Morgan states that it resumed operations on Station WAUB(AM) on February 7, 1997, and that it has since continued to broadcast pursuant to a "Time Brokerage Agreement" with Auburn Broadcasting, Inc. ("Auburn"). On March 7, 1997, Morgan and Auburn filed an application to assign the license for WAUB(AM) (File No. BAL-970307EE). Morgan and Auburn aver that Auburn will continue to broker the programming of the station while the assignment application is pending. Once the application is granted and consummated, Auburn intends to operate the station.

¹ In its letter, Morgan makes reference to an earlier letter in which it supposedly informed the Commission of the station's silence. However, no copy of any such letter was produced and the Commission's records evidence no such letter.

Discussion

5. Section 1.251 of the Commission's Rules provides that the presiding judge may grant a motion for summary decision only in the absence of a genuine issue of material fact for determination at the hearing. See New Broadcasting Corp., 44 FCC 2d 386 (Rev. Bd. 1973); Salem Broadcasting Co., 30 RR 2d 995 (ALJ 1974). In order to sustain such a motion, the burden is on the moving party to demonstrate that no genuine issue as to any material fact remains and that it is otherwise entitled to summary decision. Telecorpus Inc., 30 RR 2d 1641, 1644 (ALJ 1974). Therefore, it must be established that "the truth is clear," that "the basic facts are undisputed," and that "the parties are not in disagreement regarding material factual inferences that may be properly drawn from such facts." Big Country Radio, Inc., 50 FCC 2d 967 (Rev. Bd. 1975). The Mass Media Bureau agrees that no genuine issue as to any material fact remains.

6. Issue (1) seeks to determine whether Morgan has the capability and intent to expeditiously resume the broadcast operations of the station consistent with the Commission's Rules. Considering that WAUB(AM) is back on the air pursuant to a Time Brokerage Agreement, the broker has continued to provide programming for the station, and the parties to that agreement have submitted an assignment application to have the station's license assigned to the broker, it should be concluded that Morgan has the capability and intent to resume broadcasting. Issue (1) should be resolved in Morgan's favor.

7. Issue (2) seeks to determine whether Morgan has violated Section 73.1740 and/or Section 73.1750 of the Commission's Rules. Pursuant to Section 73.1740, Morgan was obligated to submit an informal written request to remain silent when it was unable to continue station operations due to circumstances beyond its control. Pursuant to Section 73.1750, Morgan should have notified the Commission of permanent discontinuance of station operation and forwarded the station's license to the Commission for cancellation if Morgan intended to permanently discontinue operation of WAUB(AM).

8. With respect to Morgan's compliance with Section 73.1740 of the Commission's Rules, the Bureau submits that the proper conclusion is that willful and repeated violations occurred. In this regard, there is no record that Morgan sought Commission permission to remain silent until October 11, 1995, more than three months after WAUB(AM) ceased broadcast operations. Moreover, and in any event, it is beyond dispute that Morgan failed to request further authority to remain silent once its authorization to do so expired August 9, 1996. Thus, from June 30, 1995, until October 11, 1995, and again from August 9, 1996, until the release of the OSC, Morgan was off the air without authority. Accordingly, it should be concluded that Morgan violated Section 73.1740.

9. Concerning Section 73.1750 of the Commission's Rules, Morgan's successful search for a buyer, the return to the air of Station WAUB(AM), and the submission of an assignment application, indicate that Morgan never intended to discontinue operation of WAUB(AM). It therefore appears that Morgan did not violate Section 73.1750 of the Rules.

10. Issue (3) seeks to determine whether Morgan is qualified to be and remain the licensee of WAUB(AM). The resumption of broadcasting on WAUB(AM) pursuant to the Time Brokerage Agreement and the submission of the assignment application, coupled with the relatively minor violation of Section 73.1740 of the rules, indicate that Morgan is qualified to be and remain the station's licensee. The ultimate decision for summary decision in this case is whether Morgan's license to operate WAUB(AM) should be revoked. Morgan willfully and repeatedly violated Section 73.1740 of the Commission's Rules, but the violations, when considered in light of the station's return to the air, do not justify revocation. Therefore, Issue (3) should be decided in favor of Morgan.

11. In sum, the Bureau supports summary decision of the issues as discussed and termination of this proceeding.

Respectfully submitted,
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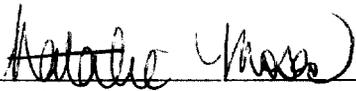
March 25, 1997

CERTIFICATE OF SERVICE

Natalie Moses, a secretary in the Complaints & Political Programming Branch, Mass Media Bureau, certifies that she has on this 25th day of March 1997, sent by regular United States mail, copies of the foregoing "Mass Media's Comments in Support of Motion for Summary Decision" to:

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