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In re: WVXG(FM), Mt. Gilead, Ohio
ICS Holdings, Inc.
Facility ID No. 74300
File No. BRH-20040526AED

Petition to Deny

Dear Counsel:

On file is the above-noted application of ICS Holdings, Inc. ("ICS") for renewal of the license of WVXG(FM), Mt. Gilead, Ohio. Also before the staff is a Petition to Deny the application filed on behalf of William J. Cusak ("Cusak") on September 1, 2004, and related pleadings.¹ For the reasons set forth below, we grant Cusak's Petition to the extent indicated and deny it in all other respects, and grant the renewal application.

In his Petition and attached Declaration,² Cusak alleges that, on September 22, 2003, Mark S. Litton ("Litton"), the sole principal of ICS Holdings, Sub 1, Inc. ("ICS Sub"), requested, in an FCC Form 314, approval of the assignment of the WVXG(FM) license to ICS Sub.³ Cusak states that on May 26, 2004, Litton applied for the WVXG(FM) license renewal, not in the name of ICS Sub, but in that of ICS.

¹ William J. Cusak, Petition to Deny (filed Sept. 1, 2004) ("Petition"). Related pleadings include: (1) Declaration of William J. Cusak in Support of Petition to Deny filed September 1, 2004 ("Cusak Declaration"); (2) Motion for Extension of Time to oppose, filed by ICS on September 15, 2004; and (3) Opposition to Petition to Deny filed by ICS on October 1, 2004 ("Opposition"). Mr. Cusak did not respond to the Opposition.

² This Declaration also serves as a sworn affidavit because it was made before a person legally authorized to administer an oath or affirmation. See 47 C.R.R. § 1.16.

³ See File No. BALED-20030828ASB. Cusak claims that ICS Sub was an alternate, fictitious trade name for ICS that was never registered with the Ohio Secretary of State's office. See Cusak Declaration at 1.

Cusak claims that at no time did Litton acknowledge the business relationship between ICS and ICS Sub, the licensee of record. Cusak also contends that Litton failed to disclose his existing interest in WINF-LP, Delaware, Ohio, in the application for approval of the assignment of WVXG(FM). Finally, Cusak alleges misrepresentation and lack of candor issues.

In its Opposition, ICS argues that: (1) the petitioner lacks standing because the WVXG(FM) signal cannot be heard clearly from the petitioner's home; (2) ICS principal Litton informed the Commission that the ICS Sub trade name for ICS was no longer being employed and that the licensee was to be ICS; (3) Litton resigned from the board of the permittee of WINF-LP four days before he filed the FCC Form 314 WVXG(FM) assignment application stating that he had no attributable interest in any other broadcast facility; and (4) petitioner has not established a substantial or material question of fact regarding the grant of the WVXG(FM) license renewal application.

Procedural Matter. When challenging an application pursuant to Section 309(d)(1) of the Communications Act of 1934, as amended (the "Act"),⁴ a petitioner must demonstrate party-in-interest status.⁵ The Commission accords party-in-interest status to a petitioner who demonstrates either that he/she resides in the service area of the station that is the subject of the petition or that he/she listens to or views the station regularly and that such listening or viewing is not the result of transient contacts with the station.⁶ To do so, the petitioner must provide an affidavit or declaration that establishes such standing.⁷

Here, Cusak has filed as an individual entitled to standing as a "frequent listener" of WVXG(FM), and his Petition contains his Declaration to that effect.⁸ However, ICS argues in its Opposition that Cusak cannot be a "frequent listener" of WVXG(FM) and thus lacks standing because his residence and workplace are beyond the signal coverage of the station. Apart from a mere statement in his Declaration that he is a resident of Westerville, Ohio, and a frequent listener of the station, we find that Cusak has not established the requisite standing because he has not "demonstrated" that he lives within WVXG(FM)'s signal coverage area and acknowledges that he lives in Westerville, not in the station's community of license, Mt. Gilead, Ohio.⁹ We will, therefore, treat Cusak's pleading as an informal objection pursuant to Section 73.3587 of the Commission's rules.¹⁰

⁴ 47 U.S.C. § 309(d).

⁵ *Id.* at § 309(d)(1).

⁶ See *Tabback Broadcasting Company*, 15 FCC Rcd 11899, 11900 n. 3 (2000), and *Chet-5 Broadcasting, L.P.*, 14 FCC Rcd 13041 (1999).

⁷ See *Petition for Rulemaking to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application*, 82 FCC 2d 89 (1980); see also *Infinity Broadcasting Corp. of California*, 10 FCC Rcd 9504 (1995); *Tabback Broadcasting Company, supra*, and *Niles Broadcasting Company*, 7 FCC Rcd 5959 (1992).

⁸ *Id.*

⁹ See n.6, *supra*. We note that Cusak failed to respond to ICS' Opposition and its statement that he does not live within the station's service area. Commission records reveal that the station's 60 dBμ protected service contour does not reach his home community of Westerville.

¹⁰ 47 C.F.R. § 73.3587.

Substantive Matters. In evaluating an application for license renewal, the Commission’s decision is governed by Section 309(k) of the Act. That section provides that if, upon consideration of the application and pleadings, we find: (1) the station has served the public interest, convenience, and necessity; (2) there have been no serious violations of the Communications Act or the Commission’s rules; and (3) there have been no other violations which, taken together, constitute a pattern of abuse, we are to grant the renewal application.¹¹ If, however, the licensee fails to meet that standard, the Commission may deny the application – after notice and opportunity for a hearing under Section 309(e) of the Act – or grant the application “on terms and conditions that are appropriate, including a renewal for a term less than the maximum otherwise permitted.”¹²

Renewal Application filed in false name. Concerning the name of the entity that filed the renewal application and that which holds WVXG(FM)’s license, the record indicates that, although he never registered the name “ICS Holdings, Sub 1, Inc.” with the Office of the Ohio Secretary of State,¹³ Litton “held out” ICS Sub as a fictitious business name, or trade name, for ICS, a corporation organized under the laws of Ohio.¹⁴ Litton, disclosed as the sole principal of ICS Sub in the assignment application, is the sole principal of ICS.¹⁵ Although the WVXG(FM) assignment application, File No. BALED-20030828ASB, listed ICS Sub as the assignee, upon consummation of the assignment, ICS properly notified the Commission in the station’s 2004 Ownership Report that it had dropped its trade name and that the license would be held by ICS itself.¹⁶ Thus, the captioned license renewal application was properly filed by ICS, the licensee of record. We find, therefore, that Cusak has not submitted sufficient evidence to raise a substantial and material question of fact calling for further inquiry on this issue.¹⁷

Misrepresentation/Lack of candor. Regarding Cusak’s claim that ICS’s sole shareholder, Mark Litton, failed to disclose to the Commission, in the WVXG(FM) assignment application, his attributable interest in an LPFM station, we note first that Commission precedent holds that a misrepresentation is a false statement of fact made with intent to deceive the Commission.¹⁸ Lack of candor is a concealment, evasion, or other failure to be fully informative, accompanied by an intent to deceive.¹⁹ Fraudulent intent can be found from “the fact of misrepresentation coupled with proof that the party making it had

¹¹ 47 U.S.C. § 309(k)(1). The renewal standard was amended by Section 204(a) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). See *Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures)*, 11 FCC Rcd 6363 (1996).

¹² 47 U.S.C. §§ 309(k)(2), 309(k)(3).

¹³ See Secretary of State of Ohio website, <http://www.sos.state.oh.us/sos/busiServ/index.html>, visited 06/21/2006.

¹⁴ See Opposition at Exhibits 1 and 6.

¹⁵ See File No. BOS-20040517AAJ.

¹⁶ See *id.*

¹⁷ See 47 U.S.C. § 309(k); see also *Equinox, Inc.* 87 FCC 2d 1099 (1981).

¹⁸ *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983).

¹⁹ *Id.*; *Trinity Broadcasting of Florida, Inc.*, 10 FCC Rcd 12020, 12063 (1995).

knowledge of its falsity.”²⁰ Intent can also be derived from motive.²¹ Because “the [Commission] relies heavily on the honesty and probity of its licensees in a regulatory system that is largely self-policing,” federal appellate courts have recognized that “the Commission may disqualify an applicant who deliberately makes misrepresentations or lacks candor in dealing with the agency.”²²

In this case, the record indicates that Litton, by letter, resigned from his position as president of Delaware County Development Company, the permittee of WINF-LP. There is no date on the letter, but ICS represents that Litton faxed this letter to the board members of the permittee on August 24, 2003.²³ ICS admits, however, that the resignation was not accepted by the permittee’s board until September 5, 2003, the date on which Litton executed, as an officer of the permittee, an FCC Form 319 for the permittee.²⁴ Nevertheless, in the WVXG(FM) assignment application, on August 28, 2003, over a week earlier, ICS²⁵ represented to the Commission that it (including Litton) had no “attributable interest” in any other broadcast station. This certification was, it appears, untrue. However, we do not find the evidence presented by the petitioner or the record as a whole is sufficient to raise a substantial and material question of fact calling for further inquiry. Particularly in light of the fact that, at the time he signed the assignment application, Litton had tendered his resignation from the LPFM permittee and that it ultimately became effective, prior to the grant of the assignment application, we cannot infer an intent to deceive on the record in this proceeding. Moreover, we reject Cusak’s untimely attempt to litigate matters relating to the now-final grant of the application for approval to assign WVXG(FM). We find, considering the record as a whole, that Cusak has presented no evidence that ICS or Litton intentionally made misrepresentations to or lacked candor with the Commission.²⁶

However, because of the untruthfulness of ICS’s certification in the WVXG(FM) assignment application that it had no other broadcast interests at a time when Litton, its sole principal, was still an officer of another Commission broadcast permittee, and subsequently certified an FCC filing on behalf of that permittee, confirming his continued position in it, ICS violated Section 1.17 of the Commission’s

²⁰ *David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253, 1260 (D.C. Cir. 1991) (quoting *Leflore Broadcasting Co. v. FCC*, 636 F.2d 454, 462 (D.C. Cir. 1980)).

²¹ *Joseph Bahr*, 10 FCC Rcd 32, 33 (Rev. Bd. 1994).

²² *Contemporary Media, Inc. et al. v. FCC*, 214 F.3d 187, 193, 196 (D.C. Cir. 2000), citing *Schoenbohm v. FCC*, 204 F.3d 243, 247 (D.C. Cir. 2000).

²³ See Opposition at Exhibit 7.

²⁴ See Opposition at Exhibit 8, “Minutes of [September 1, 2003] Regular Meeting of Trustees of the Delaware County Development Company,” p.2 (resignation of Mark Litton accepted effective after a license application for WINF-LP is filed).

²⁵ In light of the fact that ICS Sub is a mere trade name for ICS, rather than a separate entity, we consider the assignment application to have been filed by ICS, which is responsible for the representations made therein by the proposed assignee.

²⁶ See *Greater Muskegon Broadcasters, Inc.*, 11 FCC Rcd 15,464 (1996); *Garrett, Andrews and Letizia, Inc.*, 86 FCC 2d 1172, 1180 (Rev. Bd. 1981), *modified on other grounds*, 88 FCC 2d 620 (1981); *Kaye-Smith Enterprises*, 71 FCC 2d 1402, 1415 (1979); see also *MCI Telecommunications Corp.*, 3 FCC Rcd 509, 512 (1988) (The existence of a mistake in an application, without any evidence that the licensee meant to deceive the Commission, does not amount to misrepresentation).

rules.²⁷ We will admonish ICS for that violation, and we caution it to be more attentive to its applicant certifications in the future. A false statement, even absent an intent to deceive, constitutes an actionable violation of Section 1.17 of the Commission's rules.²⁸

Conclusion/Order. Accordingly, IT IS ORDERED, that the Petition to Deny filed on September 1, 2004, on behalf of William J. Cusak IS GRANTED to the extent indicated and IS DENIED in all other respects. IT IS FURTHER ORDERED, that ICS Holdings Inc. IS ADMONISHED for its violation of Section 1.17 of the Commission's rules. Additionally, because we find, pursuant to Section 309(k) of the Act, that Station WVXG(FM) served the public interest, convenience, and necessity during its license term, there have been no serious violations of the Communications Act or the Commission's rules, and there have been no other violations which, taken together, constitute a pattern of abuse, IT IS FURTHER ORDERED, that the application (File No. BRH-20040526AED) of ICS Holdings, Inc. to renew the license for Station WVXG(FM) IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: ICS Holdings, Inc.

²⁷ 47 C.F.R. § 1.17.

²⁸ See *Letter to John Jason Bennett and David D. Oxenford, Esq. from Peter H. Doyle, Chief, Audio Division, Media Bureau, Federal Communications Commission*, DA 05-2908 (rel. Nov. 4, 2005).