

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

BC Docket No. 82-282

In re Application of

MID-OHIO  
COMMUNICATIONS,  
INC.

File No. BRH-790601F6

For Renewal of License of  
Station WBBY(FM), Westerville,  
Ohio

ORDER

Adopted: July 13, 1990;

Released: July 23, 1990

By the Commission:

1. The Commission has before it an order upholding a Review Board decision which denied Mid-Ohio Communications, Inc. (MOC) renewal of station WBBY(FM) in Westerville, Ohio. *Mid - Ohio Communications, Inc.*, 5 FCC Rcd 940 (1990), *denying review of*, 104 FCC 2d 572 (Rev. Bd. 1986). See also *Mid - Ohio Communications, Inc.*, 104 FCC 2d 604 (I.D. 1985). The Commission agreed with the Board that MOC lacked candor and made misrepresentations to the Commission and that the foregoing misconduct warranted denial of MOC's license renewal. MOC now seeks reconsideration of the Commission's action.<sup>1</sup>

I. BACKGROUND

2. In a series of pleadings filed while this was a comparative renewal proceeding, MOC repeatedly represented that its 24.7 percent stockholder, Richard Nourse (Nourse), served and would continue to serve as WBBY(FM)'s full-time or 40 hour per week station manager. 104 FCC 2d at 606-07 ¶¶ 5-9. MOC claimed comparative integration credit based on these representations. The Commission concluded that MOC's claims that Nourse served as WBBY(FM)'s full-time station manager were lacking in candor and were misrepresentations. MOC deliberately failed to report that Nourse had outside employment with a family-owned automobile dealership which, if disclosed, would have undermined the credibility of his supposed role as station manager. Furthermore, the Commission concluded that a detailed examination of Nourse's participation in station affairs belied the claim that he could fairly be described as a full-time station manager.

3. MOC's petition for reconsideration largely reiterates arguments made in its application for review of the Board's decision, which the Commission denied. Thus, MOC again argues that (1) the Board improperly overturned the ALJ's favorable credibility findings and ignored uncontroverted evidence by MOC's witnesses, (2)

the Board was biased against automobile dealers, (3) MOC had no obligation to report Nourse's outside employment, (4) MOC relied on advice of counsel,<sup>2</sup> (5) the record here does not demonstrate misrepresentation by clear, precise, and indubitable evidence,<sup>3</sup> and (6) MOC's conduct does not warrant disqualification.<sup>4</sup>

4. MOC's repetitious arguments provide no basis for granting reconsideration. See *WWIZ, Inc.*, 37 FCC 685, 686 ¶ 2 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). A petition for reconsideration of an order denying an application for review which fails to rely on new facts or changed circumstances may be dismissed as repetitious. 47 C.F.R. § 1.106(b). Nonetheless, our examination of MOC's petition for reconsideration persuades us that it would be desirable to restate the basis for our action to avoid the possibility of misunderstanding. Additionally, MOC's petition raises two new matters that warrant discussion.

II. BASIS OF PRIOR ACTION

5. During the period in which MOC made its representations that Nourse served as WBBY(FM)'s full-time or 40 hour per week station manager,<sup>5</sup> it failed to report that Nourse spent 2-3 days per week managing a family-owned automobile dealership in another city more than 100 miles from Westerville. Reporting was clearly necessary under 47 C.F.R. § 1.65 because Nourse's outside responsibilities were relevant to the validity of the claim that Nourse currently served and would continue to serve as full-time station manager.<sup>6</sup> Moreover, MOC specifically stated in one pleading that Nourse no longer worked at the automobile dealership and implied as much in another. 104 FCC 2d at 606 ¶¶ 5,7. The record indicated that MOC's attorneys informed MOC that a failure to report might be considered misleading.<sup>7</sup> MOC Ex. 1-R at 13. MOC's failure to disclose Nourse's outside employment under these circumstances represented a serious lack of candor.<sup>8</sup>

6. Moreover, an examination of the record indicated that MOC's characterization of Nourse as WBBY(FM)'s full-time station manager was not accurate. In this regard, the Commission upheld the Review Board's action reversing the ALJ on this point. Examining the record evidence, particularly the testimony of MOC's witnesses, the ALJ concluded that, although the record did not fully corroborate MOC's claim that Nourse was the full-time station manager, his duties substantially complied with MOC's claims. 104 FCC 2d at 623-24 ¶¶ 71-72. The Commission agreed with the Board that Nourse's duties as described could not reasonably be characterized as those of a full-time station manager and that MOC's claims were unrealistic and not made in good faith, especially given MOC's clear motive to exaggerate the significance of Nourse's role. Thus, the Board and Commission, while accepting the ALJ's basic factual findings, disagreed with the inferences he drew from those findings.<sup>9</sup> The Board also focused on aspects of the record that the ALJ did not specifically address; for example, the Board observed that MOC's principal, Carl Nourse, contradicted his prior testimony in attempting to bolster Richard Nourse's responsibilities at the station. *Id.* at 583-84 ¶ 26, 596 ¶ 41.

7. In the Commission's view, the record confirmed the inherent improbability that Nourse served as a full-time manager of WBBY(FM) while also managing an auto-

mobile dealership in a city 120 miles away. For example, during the relevant time period, Nourse's attendance at station management meetings declined continuously. 104 FCC 2d at 614 ¶ 39, 616 ¶ 47, 617 ¶ 54. Additionally, to support its claim that Nourse devoted 40 hours per week to station affairs, MOC attempted to rely on time Nourse spent while primarily involved at the automobile dealership, long distance telephone calls, visits to his parents' house and the like -- as opposed to his physical presence at the station. *Id.* at 617-18 ¶¶ 55-56. In the Commission's view, these activities did not comport with the Commission's definition of integration into management, and they corroborated the inference that MOC left a misleading impression when it described Nourse as WBBY(FM)'s full-time station manager, without qualification.

8. Similarly, the record indicated that Nourse's duties were not those of a station manager. Nourse's duties -- as described by MOC's own witnesses -- did not conform to the specific description given in MOC's pleadings.<sup>10</sup> As described by MOC's witnesses, Nourse's duties did not constitute the kind of fixed managerial responsibilities implied by the title "station manager." See *Minority Broadcasters of East St. Louis, Inc.*, 99 FCC 2d 264, 267 ¶ 6 (Rev. Bd. 1984), modified, 57 RR 2d 1390 (1985).<sup>11</sup> Rather, Nourse performed a miscellaneous collection of duties, which included assisting other station personnel, performing clerical and other nonmanagerial duties, and performing duties not specific to WBBY(FM). 104 FCC 2d at 614-17 ¶¶ 38, 43-44, 46, 49-52. Nourse did not even have an office at the station. MOC Exh. 1-R at 4-6. Indeed, MOC's main witness, Bryan McIntyre, was not comfortable with Nourse's designation as "station manager" (although he said that he considered Nourse's duties managerial). 104 FCC 2d at 583 ¶ 24.

### III. NEW MATTERS

9. As noted, two matters in MOC's petition for reconsideration warrant further discussion. First, as previously mentioned, one of the reasons we cited for finding that Nourse was not a full-time manager of WBBY(FM) was that Nourse relied on time spent on such activities as long distance telephone calls to support his claim that he devoted 40 hours to station affairs. MOC argues that our finding is inconsistent with dicta in *Omaha TV 15, Inc.*, 4 FCC Rcd 730, 732-33 ¶¶ 14-24 (1988). MOC claims that this dicta indicates that integration credit may be given for management involvement without physical presence at the station.

10. The Bureau correctly observes that *Omaha TV 15, Inc.* did not modify the standard -- set forth in *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395 (1965) -- that integration involves active participation in the day-to-day operation of the station. *Omaha* merely clarified that standard to indicate that a principal may receive credit for integration, although the principal is not physically present at the station five days a week. Thus, a proposal to work ten hours a day three days a week would be deemed equivalent to a proposal to work six hours a day five days a week. It did not imply that an applicant could receive credit for time not spent at the station. See *Greater Wichita Telecasting, Inc.*, 96 FCC 2d 984, 989-90 ¶ 10 (1984). In any event, we see no basis for

MOC relying on our *Omaha* decision to assume that it could claim integration credit for Nourse, since *Omaha* was decided after the behavior at issue occurred.

11. Second, MOC appends to its petition for reconsideration numerous statements by community residents regarding the character of MOC's principal, Carl Nourse. These statements, however, are not part of the record in this proceeding, and MOC has not moved to reopen the record to receive them. And, in any event, MOC did not show the relevance of these statements. We will therefore not consider these statements.

### IV. ORDER

12. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 C.F.R. § 1.106(b) the Petition for Reconsideration filed March 23, 1990 by Mid-Ohio Communications, Inc. IS DISMISSED in part as repetitious and is otherwise DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy  
Secretary

### FOOTNOTES

<sup>1</sup> Now pending before the Commission are a Petition for Reconsideration filed March 23, 1990 by MOC, an opposition filed April 5, 1990 by the Mass Media Bureau, and a reply filed April 16, 1990 by MOC.

<sup>2</sup> In its petition for reconsideration, MOC relies on *WEBR v. FCC*, 420 F.2d 158, 166-68 (D.C. Cir. 1969). In that case, an applicant was assessed a comparative demerit for violating the Commission's reporting rules, its principal having relied on counsel to make the required report. An examination of the Board's decision, upheld by the court, gives no indication that the principal there intended to conceal information. See *Ultravision Broadcasting Co.*, 11 FCC 2d 394, 406 ¶ 28 (Rev. Bd. 1968). Thus, the misconduct was less serious than that involved here. In *Microband Corp. of America*, 44 RR 2d 1490, 1494 n.5 (1978), cited by MOC, advice of counsel was among the factors mitigating remote, nonbroadcast misconduct. See also *RKO General, Inc. v. FCC*, 670 F.2d 215, 231 (D.C. Cir. 1981), cert. denied, 456 U.S. 927, 457 U.S. 1119 (1982) (disqualifying RKO notwithstanding its claimed reliance on counsel). In any event, MOC has no basis for claiming reliance on counsel. See 5 FCC Rcd at 941 n.2.

<sup>3</sup> The Board correctly held that the applicable standard of proof is preponderance of the evidence. 104 FCC 2d at 600-01 ¶ 47. See *Steadman v. SEC*, 450 U.S. 91, 95-96 (1981); *Lewell Broadcasting, Inc.*, 86 FCC 2d 896, 913-14 (1981).

<sup>4</sup> MOC complains that the sanction imposed here is harsher than that imposed in *Centel Cellular Company of Virginia*, FCC 90-45 (Jan. 11, 1990). There, Centel agreed to make a voluntary payment of \$1 million pursuant to a consent decree for alleged antenna lighting violations related to a helicopter accident without admitting the alleged violations. Hence, in that case, unlike this one, there was no adjudicated misconduct.

<sup>5</sup> In one pleading, MOC characterized Nourse's participation as "living, breathing, integration realized." 104 FCC 2d at 591 ¶ 34. Given this record, we rejected MOC's insistence (which

MOC reiterates in its petition for reconsideration) that Nourse proposed to work at the station only after grant of MOC's renewal application. *See, e.g.*, Petition for Reconsideration at 18.

<sup>6</sup> Because MOC sought comparative credit based on its representations concerning Nourse, MOC was responsible for their accuracy. Although the ALJ ultimately ruled that MOC was not entitled to credit for Nourse's participation, this fact does not in any way diminish MOC's responsibility for any misrepresentations made in connection with its comparative case. *See* Petition for Reconsideration at 13 n.25.

<sup>7</sup> *Compare Merrimack Valley Broadcasting, Inc.*, 92 FCC 2d 506, 520 ¶ 24 (Rev. Bd. 1982), *affirming*, 92 FCC 2d 523, 563-65 ¶¶ 173-85 (I.D. 1982). There an applicant failed to report changes in its principals' employment because the changes were not deemed to affect the principals' prospective integration commitments. Upon learning that this was erroneous, the applicant filed a corrective amendment.

<sup>8</sup> MOC maintained (and continues to do so in its petition for reconsideration) that this case is less egregious than *Bay Television, Inc.*, 95 FCC 2d 181, 182-85 ¶¶ 4-10 (Rev. Bd. 1983), *modified*, FCC 85-58 (Mar. 25, 1985), in which an applicant received a substantial comparative demerit. *See also Bay Television, Inc.*, 95 FCC 2d 190, 206-14 ¶¶ 65-92 (I.D. 1983). In *Bay*, the applicant's proposed general manager accepted outside employment. The Board faulted the applicant for not timely reporting its principal's subsequent resignation as general manager of the proposed station (based on the applicant's hope that the principal would reconsider and adhere to his integration commitment) until its opponent petitioned to enlarge the issues. Although not timely reporting the principal's resignation as general manager, the applicant in *Bay*, unlike MOC, did voluntarily report the principal's outside employment, as well as his resignation as an officer and director of the applicant (but not as general manager). *Id.* at 207 ¶ 68, 209 ¶¶ 75, 77. The applicant also voluntarily disclosed the principal's letter of resignation as general manager in response to a discovery request (although the applicant did not formally report the principal's resignation of that position until the petition to enlarge was filed). *Id.* at 211 ¶ 85. Additionally, in response to the petition to enlarge issues the applicant filed an affidavit by its principal which clarified that the principal had abandoned his integration commitment. Thus, in *Bay*, although the applicant did not report all relevant facts in a timely manner, significant information was reported and the inadequacies in reporting were rectified prior to the hearing, which tended to mitigate the deception present there. In contrast, in this case, MOC concealed Nourse's outside employment entirely until MOC's opponent accidentally discovered it after the hearing. Moreover, MOC misrepresented throughout the proceeding that Nourse was its full-time station manager. We also note that, although the applicant in *Bay* received only a comparative demerit, that comparative demerit effectively resulted in the denial of its application.

<sup>9</sup> Contrary to MOC's contentions, our disagreement with the ALJ did not involve overruling any credibility findings or ignoring uncontroverted evidence. In particular, our analysis did not rely to any significant extent on the testimony of David Freeman, a witness whose testimony the ALJ questioned. Additionally, although we had occasion to disavow inappropriate comments by the Board about automobile dealers, we saw no indication that the Board's analysis of the record in any way reflected a bias against individuals in that line of business. Nor did we find it prejudicial that the Board's decision includes a discussion of "background and history" which has no decisional significance. 104 FCC 2d at 574-78 ¶¶ 3-11.

<sup>10</sup> For example, the record did not corroborate the claims that Nourse oversaw EEO compliance, that he conducted market research, that he was in charge of station public relations and station maintenance, and that he assisted in sales. *Compare* 104 FCC 2d at 606-07 ¶ 7 *with id.* at 584 ¶ 27, 614-15 ¶¶ 37, 42-43.

<sup>11</sup> The presence of continuing supervisory responsibility by a principal whose duties were roughly analogous to a business manager's warranted integration credit in *Miracle Strip Communications, Inc.*, 4 FCC Rcd 5064, 5065 ¶¶ 14-16 (1989), cited by MOC. The record here did not indicate that Nourse had the kind of continuing supervisory responsibilities that might reasonably be characterized as those of a full-time "station manager." Because MOC represented that Nourse in fact had that position, this is not a case, such as *Miracle Strip*, in which the issue was merely whether the applicant would receive credit for the claimed integration.