



Federal Communications Commission
Washington, D.C. 20554

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In Reply Refer to:

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Re: David Ryder, Receiver
WDMC(AM), Melbourne, FL
Facility ID No. 68615
File No. BR-20050613AFB

Application for Renewal of License

Petition for Reconsideration

Dear Counsel:

We have before us: (1) a Petition for Reconsideration (the "Petition") filed by Jerry M. Evans ("Evans") on April 21, 2006; (2) an Opposition to the Petition ("Opposition") filed by David Ryder ("Receiver" or "Licensee"), on July 26, 2006; and (3) a Reply, filed August 7, 2006, by Evans. The Petition seeks reconsideration of a June 6, 2006, staff action granting the captioned license renewal application (the "Renewal Application") for Station WDMC(AM),¹ Melbourne, Florida (the "Station").² For the reasons discussed below, the Petition is granted in part and dismissed on procedural grounds in all other respects.

Background. On June 13, 2005, the Receiver filed the Renewal Application.³ Subsequently, on February 22, 2006, an application to assign the license of the Station from the Receiver to former Station licensee Twin Towers Broadcasting, Inc. ("Twin Towers") was filed (the "Assignment Application").⁴

¹ Formerly WMEL(AM).

² See *David Ryder, Receiver*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 6371 (2006).

³ File No. BR-20050613AFB.

⁴ File No. BAL-20060222ACT.

On April 21, 2006, Evans filed an Informal Objection (“Objection”) to the Assignment Application. The Renewal Application was not referenced in the caption of the Objection. However, it was referenced once in the text.⁵ Staff granted the Renewal Application without taking the Objection into consideration. Evans then filed his Petition.

Discussion. Procedural Matters. Failure to Consider Objection. As noted above, although the Objection related to both the Assignment Application and the Renewal Application, it was not associated with the Renewal Application prior to its grant. We grant the Petition to consider the arguments set forth in the Objection.⁶ We conclude that those arguments are without merit and, separately, dismiss the Petition on procedural grounds.

Standing. Section 405 of the Communications Act of 1934, as amended (the “Act”), implemented by Section 1.106(b)(1) of the Commission's Rules (the “Rules”), requires that a person seeking reconsideration have participated as a “party” during the previous stages of the proceeding, or demonstrate that he or she is “aggrieved” or “adversely affected” by the decision. A “non-party” participating earlier in the proceeding as an informal objector is without standing to seek reconsideration.⁷ Licensee argues that objector Evans has not shown how he is adversely affected by grant of the Station’s renewal.⁸ We agree. Evans does not contest the standing challenge to the Petition and has not shown how he is adversely affected by the grant of the Renewal Application. We therefore find that the Petition itself is subject to dismissal because Evans lacks standing.

Substantive Matters. Pursuant to Section 309(e) of the Act, an informal objection must provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the application would be *prima facie* inconsistent with Section 309(k) of the Act.⁹ Specifically, Section 309(k) of the Act.¹⁰ provides that if upon consideration of the application and pleadings, we find, with respect to that station, that: (1) the station has served the public interest,

⁵ On May 18, 2006, an Opposition was filed, to which Evans replied on May 31, 2006. The WDMC(AM) license renewal application was not referenced in the caption of the Objection. However, the Objection concludes as follows:

In view of the foregoing, Evans submits that the Commission should designate the above-referenced [assignment] application for hearing. The Commission should also designate the pending WMEL [now WDMC] renewal application (BR-20050613AFB) for hearing as well.

This is the only reference to the renewal application in the pleading.

⁶ See e.g., *Barnes Enterprises, Inc.*, Memorandum Opinion and Order, 55 FCC2d 721 (1975) and *Max M. Leon, Inc.*, Memorandum Opinion and Order, 58 FCC2d 114 (1976) (Commission treats petition for reconsideration as an “informal” request upon determining that the parties deserved a decision on the merits).

⁷ 47 U.S.C. § 405; 47 C.F.R. § 1.106(b)(1). See, e.g., *Sagittarius Broadcasting Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 22551, 22553-54 (2003).

⁸ Opposition at 2. We note that Licensee alleges that Evans’ motivation for his filings is “to force WMEL [now WDMC] to capitulate in a private contractual dispute.” See Opposition at 3.

⁹ See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 note 10 (1990), *aff’d sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *rehearing denied* (Sep. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986) (informal objection must contain adequate and specific factual allegations sufficient to warrant the relief requested).

¹⁰ 47 U.S.C. § 309(k).

convenience, and necessity; (2) there have been no serious violations of the Act or the 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

Evans argues that the Commission should reconsider grant of the Renewal Application and designate the renewal for hearing because “misrepresentations occurred during the WMEL [now WDMC] license term.”¹³ Evans argues that the fact that the Receiver became the Licensee pursuant to an FCC Form 316 involuntary transfer-of-control application does not “wipe out” the misdeeds of Twin Towers which occurred during the license term.¹⁴ Specifically, Evans alleges that “the ownership of Twin Towers has been historically and repeatedly misrepresented to the Commission.”¹⁵ For example, when Twin Towers acquired WDMC(AM) from Elyria-Lorain Broadcasting Company in 1993, Evans notes that Twin Towers indicated that John E. Harper (“Harper”) owned 51 per cent of Twin Towers’ stock.¹⁶ However, stock certificates issued on January 20, 1994, evidence that Twin Towers had four stockholders.¹⁷ Evans also notes that in an Ownership Report (File No. BOA-20040120AEL) filed January 20, 2004, and in a pleading filed February 28, 2005, Twin Towers asserted that Harper was its sole stockholder.¹⁸ Then, in an application¹⁹ filed on February 22, 2006, to re-assign WDMC(AM) from

¹¹ 47 U.S.C. § 309(k)(1). The renewal standard was amended to read as described 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)*, Order, 11 FCC Rcd 6363 (1996).

¹² 47 U.S.C. §§ 309(k)(2), 309(k)(3).

¹³ Petition at 3.

¹⁴ *Id.*

¹⁵ Petition at 7.

¹⁶ *Id.* *See* Application No. BAL-19930518ED, Section II, Item 4 and Attachment No. 1. The application is provided as part of Attachment G to the Objection. It was granted on July 21, 1993, and the parties consummated the transaction on August 13, 2003.

¹⁷ Evans presents as Exhibit B to the Objection photocopies of four alleged stock certificates in Twin Towers Broadcasting, Inc., evidencing the following ownership structure:

John E. Harper	250 Shares
Bruce Berkowitz	250 Shares
Richard Kleiman	250 Shares
Marshall Moore	166 10/100 Shares.

The copies provided in the Objection bear no indicia of authentication.

¹⁸ Objection at 2. Evans states that Twin Towers repeated this misrepresentation in a February 25, 2005, Petition for Reconsideration of the initial dismissal of the WDMC(AM) renewal application when it stated, “Twin Towers is a stand-alone AM station in its market and has only one stockholder.” *Id.*, citing February 25, 2006, Petition for Reconsideration at ¶ 2.

¹⁹ *See* File No. BAL-20060222ACT.

the Receiver to Twin Towers, Evans states that Twin Towers lists John A. McKinley as a 73 per cent stockholder and Harper as a 27 per cent stockholder.²⁰ Finally, Evans states that on February 9, 2006, Twin Towers filed a complaint in the Florida Circuit Court concerning certain agreements which Harper allegedly executed on behalf of Twin Towers. In that pleading, the complainant – Receiver David Ryder -- stated that Harper was, on the date the agreements were executed (February 28, 2003), a “minority shareholder in Twin Towers”²¹

According to Evans, the statement in the Florida Circuit Court complaint clearly demonstrates that the January 20, 2004, Ownership Report and the representation in the February 25, 2005, pleading were false. Evans argues that because the Commission must place complete reliance upon showings submitted by applicants and licensees to accomplish its statutory licensing duties, the agency demands complete candor from its licensees.²² Evans states that misrepresentations such as those made by Harper and Twin Towers in concealing the true ownership of Twin Towers from the Commission go to the heart of the licensing process. Therefore, he states, the requisite character qualifications expected of all Commission licensees are “plainly absent” here, and “[an evidentiary] hearing is mandated so that a full exploration of the underlying facts can be accomplished.”²³

In his Opposition, Receiver argues that Evans’ allegations are directed only against Harper, a Twin Towers principal, who neither holds an attributable interest in the Licensee nor is a party to the Renewal Application as granted by the staff.²⁴ The Receiver also -- and correctly -- claims that Evans’ Objection provides no legal support for the proposition that Receiver’s Renewal Application must be judged based on the actions of principals of former licensee Twin Towers during the prior license term.²⁵ In any event, Receiver contends in his Opposition to the Petition for Reconsideration that Harper believed in good faith that he was reporting stockholder information accurately.²⁶ Receiver references Twin Towers’ May 18, 2006, Opposition to the Objection, in which Twin Towers claims that:

²⁰ Objection at 3. The application indicates, in Exhibit 10, that the litigation underlying the receivership had been resolved. However, it states, “part of the resolution of the litigation was to bring in a new 73 per cent stockholder of Twin Towers. That 73 per cent change results in a transfer of control, which does not allow the use of FCC Form 316. See BALH-20050222ACT, Exhibit 10. Evans observes that McKinley’s 73 per cent ownership interest is the same amount of ownership previously held by Messrs. Berkowitz, Kleiman, and Moore.

²¹ *Bruce Berkowitz, Richard S. Kleiman and Marshall Moore v. John E. Harper*, Case No. 05-2005-CA-009990, Receiver’s Impleader Complaint, (Circ. Ct. Brevard County, Florida), at ¶¶ 9, 10.

²² Objection at 4, citing, *inter alia*, *FCC v. WOKO*, 329 U.S. 223, 228-29 (1946); *Swan Creek Communications v. FCC*, 39 F.3d 1217 (D.C. Cir. 1994); and *Lorain Journal Co. v. FCC*, 351 F.2d 824, 830 (D.C. Cir. 1965), *cert denied sub nom. WWIZ, Inc. v. FCC*, 383 U.S. 967 (1966).

²³ Objection at 7.

²⁴ Opposition at 5.

²⁵ *Id.* at 5. Under Florida law, Twin Towers states, wrongdoing by the principals of a corporation is not imputed to the Receiver, as such imputation would undermine the court appointment, which is to ensure the protection of innocent parties. *Id.* at 5-6, citing *Freeman v. Dean Witter Reynolds, Inc.*, 865 So. 2d 543 (Fla 2d DCA 2003). Moreover, Twin Towers states, the Commission has rescinded a Notice of Apparent Liability on finding that the Receiver was not implicated in the alleged misconduct, citing *Multimedia Development Corporation*, Memorandum Opinion and Order, 17 FCC Rcd 22649, 22653 (2002). Here, Twin Towers observes, the Receiver elected to pay the forfeiture levied for untimely filing the WDMC(AM) license renewal application rather than contest it. *Id.* at 6 and n.10.

²⁶ *Id.* at n.8.

Harper had a good reason for reporting himself as a 100% stockholder of the corporation in the 2004 ownership report.²⁷ Berkowitz, Kleiman, and Moore disagreed with Harper's position. As the matter was governed by Florida state law, it was properly brought before a state court in Florida, where it was settled. As a result of this settlement, the state court issued an order permitting the return of WMEL [now WDMC] to Twin Towers, subject to Commission consent.²⁸

Regarding whether Harper's decision to assume complete control of Twin Towers should be resolved by the Commission, Twin Towers argues that this issue was properly resolved by a Florida state court of competent jurisdiction and is not a matter for Commission resolution. Twin Towers also argues that any error by Harper in claiming that he was 100 per cent stockholder in the company should not rise to the level of a "death penalty" offense.²⁹ In his Reply, Evans cites a case where the Commission designated a television station renewal for hearing due to improprieties committed by a prior licensee during the renewal term.³⁰

The Commission and the courts have recognized that "[t]he FCC relies heavily on the honesty and probity of its licensees in a regulatory system that is largely self-policing."³¹ Misrepresentation is "a false statement of fact made with intent to deceive."³² Lack of candor is "concealment, evasion, or other failure to be fully informative, accompanied by intent to deceive."³³ Intent to deceive is established if a

²⁷ Twin Towers explains this "good reason" as follows: When Twin Towers was formed, Harper, Berkowitz, Kleiman, and Moore entered into an agreement to purchase stock in the company and elect themselves officers and directors. (Twin Towers attaches to its Opposition to Informal Objection a copy of this agreement signed by Harper, Berkowitz, Kleiman, and Moore in October and November of 1993.) When the newly formed Twin Towers purchased WDMC(AM), it gave a promissory note, secured by a mortgage, in partial payment of the purchase price. The station subsequently had difficulty meeting its operating expenses and note payments, and Harper, Twin Towers' President, asked for additional capital contributions from the stockholders. Berkowitz, Kleiman, and Moore declined to contribute. Harper said that he therefore gave up his salary and invested more money of his own to meet Twin Towers' obligations and keep WDMC(AM) on the air. Harper indicates that he "felt at that point that Berkowitz, Kleiman, and Moore had abdicated their responsibility to the corporation and, acting without legal counsel, he decided that their shares were no longer valid." Accordingly, he said that he considered and reported himself as the 100 per cent shareholder of Twin Towers. See Twin Towers Opposition to Informal Objection at 4.

²⁸ *Id.* at 3.

²⁹ *Id.* at 5.

³⁰ Reply at 2; see also *Martin W. Hoffman*, Memorandum Opinion and Order & Hearing Designation Order, 12 FCC Rcd 5224 (1997) ("*Hoffman*").

³¹ See *Commercial Radio Service, Inc.*, Order to Show Cause, 21 FCC Rcd 9983, 9986 ¶ 12 (2006) ("*CRS Order*") citing, e.g., *Contemporary Media, Inc., v. FCC*, 214 F.3d 187, 193 (D.C. Cir. 2000) ("*Contemporary Media*").

³² *CRS Order*, 21 FCC Rcd at 9986 ¶ 12, citing *Policy Regarding Character Qualifications in Broadcast Licensing Amendment of Rules of Broadcast Practice and Procedure, Relating to Written Responses to Commission Inquiries and the Making of Misrepresentation to the Commission by Applicants, Permittees, and Licensees, and the Reporting of Information Regarding Character Qualifications*, Report, Order, and Policy Statement, 102 FCC2d 1179, 1210-11 (1986) ("*1986 Character Policy Statement*").

³³ *Id.* at 9986 ¶ 12 (citing *Fox River Broadcasting, Inc.*, Order, 93 FCC2d 127, 129 (1983)). A false certification may also constitute a misrepresentation. *Id.* at 9986 n.15 (citing *San Francisco Unified School District*, Hearing Designation Order and Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 13326, 13334 ¶ 19 nn. 40-41 (2004)).

licensee knowingly makes a false statement³⁴ and can also be inferred when the surrounding circumstances clearly show the existence of intent to deceive.³⁵ The Commission may disqualify an applicant who deliberately makes misrepresentations or lacks candor in dealing with the agency.³⁶ Moreover, if the misconduct by a licensee or its principals is particularly egregious, the involuntary transfer-of-control of a station to a receiver or trustee may not shield the station of that misconduct in evaluating a license renewal application under Section 309(k) of the Act.³⁷

We find no such severity of misconduct in the actions of former licensee Twin Towers in this case. Twin Towers presented information in an Ownership Report and a subsequent pleading concerning its stock ownership that apparently was inaccurate. Nevertheless, an essential element of misrepresentation is an intent to deceive the Commission.³⁸ Evans has presented no evidence that Twin Towers submitted the erroneous information with such an intent. The record indicates that Harper was acting on circumstances which led him to conclude that he was the sole shareholder of Twin Towers. Moreover, we find that the facts and circumstances of this case do not demonstrate that Twin Towers had any motivation to mislead the Commission regarding its ownership structure.³⁹ Accordingly, Evans has not established a substantial or material question of fact to warrant further inquiry into Twin Towers' basic qualifications to hold a Commission authorization during the subject renewal term.

Concerning the matter of Twin Towers' actual ownership, the Commission refrains from making decisions based on mere allegations of misconduct, where those allegations are in the process of being adjudicated by another agency or court.⁴⁰ The now-settled civil dispute between Twin Towers' principals

³⁴ *Id.* at 9986 ¶ 12 (citing *Leflore Broadcasting, Co., Inc. v. FCC*, 636 F.2d 454, 462 (D.C. Cir. 1980)).

³⁵ *Id.* at 9986 ¶ 12 (citing *American International Development, Inc.*, Memorandum Opinion and Order, 86 FCC2d 808, 816 n.39 (1981), *aff'd sub nom. KXIV, Inc. v. FCC*, 704 F.2d 1294 (D.C. Cir. 1983)).

³⁶ *Contemporary Media*, 214 F.3d at 196.

³⁷ In *Hoffman*, for example, the licensee engaged in ongoing misrepresentations to both the Commission and to the federal courts, including the Supreme Court, concerning whether it qualified as a minority-controlled entity under the Commission's distress sale policy. The Commission found that while the assignment to a trustee was processed as a *pro forma* assignment to accommodate bankruptcy policies, the severity of the misconduct alleged by the petitioner against the licensee was such that the Commission designated the trustee's renewal application for hearing to determine whether the licensee misrepresented its status as a minority-controlled entity and whether, to protect the integrity of its processes and its minority ownership policies, the renewal application should be denied. *See Hoffman*, 12 FCC Rcd at 5229-30.

³⁸ *See San Francisco Unified School District*, Hearing Designation Order and Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 13326, 13335 (2004) and *Liberty Productions, LP*, Memorandum Opinion and Order, 16 FCC Rcd 12061, 12079-80 (2001) (substantial evidence of an intent to deceive is necessary to support a finding of misrepresentation or otherwise raise a question as to an applicant's basic qualifications). Were Harper actually to be 100% owner of Twin Towers, his acquisition of complete control should have been "passed on" by the Commission by virtue of an FCC Form 315, "Application for Consent to Transfer Control of Entity Holding Broadcast Construction Permit or License." *See, e.g.*, 47 C.F.R. § 73.3540.

³⁹ *See Secret Communications II, LLC*, Memorandum Opinion and Order, 18 FCC Rcd 9139 (2003); *Application of Bollinger*, Memorandum Opinion and Order, 16 FCC Rcd 18107 (2001); and *Marin Broadcasting Company, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability, 11 FCC Rcd 1732 (1996).

⁴⁰ *See Policy Regarding Character Qualifications in Broadcast Licensing*, Policy Statement & Order, 5 FCC Rcd 3252, 3252-53 (1990), *recon. granted in part*, Memorandum Opinion and Order, 6 FCC Rcd 3448 (1991) (citing *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC2d 1179, 1204-05 (1986)).

was best addressed by the state court and is not within the scope of this proceeding.⁴¹ The Commission has consistently declined to adjudicate allegations of breach of fiduciary duty, monetary harm, or similar disputes involving partnership and shareholder rights.⁴² Issues that relate to private transactions involving the exercise of business judgment are best resolved by courts of competent jurisdiction.⁴³ Accordingly, we will not consider the private claims raised by Evans.

Conclusion/Actions. Accordingly, it is ordered, that the Petition for Reconsideration filed by Jerry M. Evans IS GRANTED for the limited purposes described above and IS DISMISSED for lack of standing.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: David Ryder, Receiver

⁴¹ The Commission defers to courts of competent jurisdiction regarding private contractual disputes and the interpretation and enforcement of contracts for the sale of a broadcast station. *See, e.g., Kidd Communications*, Memorandum Opinion and Order, 19 FCC Rcd 13584, 13589 (2004).

⁴² *See John R. Kingsbery*, 71 FCC2d 1173, 1174 (1979) (Commission refuses to consider minority shareholder's allegation of breach of fiduciary duty); *Milford Broadcasting Co.*, Hearing Designation Order, 8 FCC Rcd 680 (1993) (Commission refuses to consider private contractual dispute); *Centel Corp.*, Memorandum Opinion and Order, 8 FCC Rcd 1829, 1831 (1993) (Commission refuses to consider limited partner's allegation of violation of partnership agreement); *Sonderling Broadcasting Co.*, 46 RR 2d 890, 894 (1979) (Commission refuses to consider shareholders' allegation of breach of fiduciary duty or monetary harm).

⁴³ *See, e.g., Transcontinent Television Corp.*, 21 RR 945 (1961); *Triangle Broadcasting Co.*, 3 RR 2d 836 (1964).