



Federal Communications Commission
Washington, D.C. 20554

October 6, 2010

DA 10-1921

In Reply Refer to:

1800B3-SS

Released: October 6, 2010

Mr. David Levandusky
c/o Living Waters Assembly of God
450 Davis Street
Greenfield, MA 01301

Mr. Garry Longe
c/o Greenfield Community Television
393 Main Street
Greenfield, MA 01301

In re: **WMCB-LP, Greenfield, MA**
Facility ID No. 134902
File No. BMPL-20080306ABT

Petition for Reconsideration

Dear Messrs. Levandusky and Longe:

We have before us: (1) a March 6, 2008, application for minor modification of the construction permit for low power FM ("LPFM") Station WMCB-LP, Greenfield, Massachusetts (the "Application"), filed by Greenfield Community Television, Inc. ("GCTV"); (2) an "Informal Objection" to the Application filed on April 16, 2008, by David Levandusky ("Levandusky"); and various responsive pleadings.¹ For the reasons set forth below, we treat the Informal Objection as a Petition for Reconsideration ("Petition") and deny it.

Background. GCTV, Living Waters Assembly of God ("Living Waters"), and West County Community Radio ("West County") were mutually-exclusive applicants for construction permits for new LPFM facilities in the Greenfield, Massachusetts area.² The applications of GCTV and Living Waters -- the tentative selectees in that proceeding -- were granted for equal successive license terms of four years each.³ GCTV and Living Waters subsequently reached a "share-time agreement" to divide equally the

¹ Because the Petition was not served upon GCTV, on April 24, 2009, the staff forwarded the Petition to GCTV and requested a response to Levandusky's allegations. See *Letter to Greenfield Community Television, Inc.*, ref. 1800B3-SS (rel. Apr. 24, 2009). Therefore, we have: (1) an Opposition to the Objection, filed May 27, 2009, by GCTV; and (2) a Reply filed by Levandusky on June 1, 2009.

² See File Nos. BNPL-20010614AFS (GCTV); BNPL-20010615AXU (Living Waters); and BNPL-20010611ABH (West County). These applications comprise LPFM Group No. 47.

³ See *Greenfield Community Television, Inc.*, Memorandum Opinion and Order, 20 FCC Rcd 10204, 10207 (2005).

broadcast week.⁴ On September 18, 2006, GCTV filed a minor modification application to co-locate its site with Living Water's station WLPV-LP, Greenfield, Massachusetts (the "Co-Location Application").⁵ The staff granted the Co-Location Application on September 25, 2006.⁶ On December 5, 2007, GCTV filed another minor modification application to specify a new transmitter site and technical facilities; GCTV subsequently amended that application to reflect a "recently approved board composition."⁷ The staff granted this application on December 21, 2007.⁸ GCTV then filed the Application on March 6, 2008, to address an inaccuracy in the previous filing regarding the WMCB-LP tower site's elevation above mean sea level. The staff accepted the Application for filing on March 11, 2008,⁹ and granted it on March 13, 2008.¹⁰ On April 15, 2008, Levandusky filed the Petition.

Levandusky argues in the Petition that the information GCTV submitted in the Application regarding its board members "is untrue and inaccurate" because, *inter alia*, he is listed in the Application as a board member even though he resigned on January 28, 2008.¹¹ Levandusky alleges that GCTV knew about this board member change six weeks before it filed the Application.¹² Levandusky, signing as Chief Executive Officer of Living Waters, also argues that Living Waters never gave its permission to co-locate facilities.¹³

In Opposition, GCTV claims that its failure to correctly disclose its board member changes was a "clerical error." GCTV notes that this error was identified by a GCTV staff member and it has since filed a transfer of control application regarding the change in the majority of its board members.¹⁴ GCTV also contends that it had a "good faith verbal agreement with agents of [the] Official Board of Living Waters

⁴ GCTV's station was to operate from 12:00 p.m. to 12:00 a.m. every day of the week; Living Waters' station was to operate from 12:00 a.m. to 12:00 p.m. every day of the week. Living Waters constructed its facility and was issued a license on December 7, 2005. See File No. BLL-20051206AGH.

⁵ File No. BMPL-20060918ABL.

⁶ See *Broadcast Actions*, Public Notice, Report No. 46330 (rel. Sep. 28, 2006).

⁷ File No. BMPL-20071205AAY, as amended December 6, 2007.

⁸ See *Broadcast Actions*, Public Notice, Report No. 46641 (rel. Dec. 28, 2007).

⁹ See *Broadcast Applications*, Public Notice, Report No. 26690 (rel. Mar. 11, 2008).

¹⁰ See *Broadcast Actions*, Public Notice, Report No. 46695 (rel. Mar. 18, 2008).

¹¹ Petition at 1. We note that Levandusky simultaneously served on the boards of both GCTV and Living Waters from January 2007 until July 2008. When the staff, on January 14, 2008, informed Levandusky in an e-mail of this impropriety, he states that he resigned from the GCTV board. See Reply at 1, 9-10.

¹² Petition at 2.

¹³ *Id.* We note that Levandusky contends that he is incorporating this argument from a September 25, 2006, informal objection to the Co-Location Application that he alleges he filed but was never acted upon by the staff. The Commission's electronic consolidated database has no record of the filing of this informal objection nor can the staff locate a date-stamped copy of this filing in the Commission's Reference Information Center. The ostensibly unopposed Co-Location Application was granted on September 25, 2006, and that grant is final. We therefore decline to consider the alleged September 25, 2006, informal objection.

¹⁴ See File No. BTCL-20080502ABE ("Transfer Application"). The staff granted the Transfer Application on May 12, 2008.

Assembly of God” and that it was “surprised” to receive a letter from Living Waters rejecting its proposal after GCTV had filed the Co-Location Application.¹⁵

Discussion. Procedural Matters. On April 15, 2008, after the Application had been granted, Levandusky filed the Petition, calling it an “Informal Objection.” Because of the brief time period between acceptance and grant of the Application, we will consider Levandusky’s pleading as a petition for reconsideration even though he did not participate in this application proceeding prior to grant.¹⁶

Substantive Matters. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission’s original order, or raises additional facts, not known or existing at the time of the petitioner’s last opportunity to present such matters.¹⁷ Petitions for reconsideration which rely on facts not previously presented to the Commission may be granted if the Commission determines that consideration of the facts relied on is required in the public interest.¹⁸ As discussed below, Levandusky has not met this standard.

Board Member Changes. 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.”¹⁹ Misrepresentation is “a false statement of fact made with intent to deceive.”²⁰ Lack of candor is

¹⁵ Opposition at 2. GCTV does not indicate when it received the letter denying it the authority to co-locate on Living Waters’ tower. The letter is dated September 18, 2006. See Reply at 6.

¹⁶ See *Rod Kovel and John W. Zucker, Esq.*, Letter, 23 FCC Rcd 1884 (MB 2008); see also *Max M. Leon, Inc.*, Memorandum Opinion and Order, 58 FCC 2d 114 (1976); *Barnes Enterprises, Inc.*, Memorandum Opinion and Order, 55 FCC 2d 721 (1975) (application granted three days after being accepted for filing; Commission treats informal objection as an informal request for reconsideration); *Aspen FM, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 17852, 17854 (1997) (standing awarded to file petition for reconsideration without pre-grant objection when application granted five days after Public Notice of its acceptance); and *Ted and Jana Tucker*, Memorandum Opinion and Order, 4 FCC Rcd 2816 (1989) (standing awarded to file petition for reconsideration without pre-grant objection when application granted four days after Public Notice of its acceptance).

¹⁷ See 47 C.F.R. § 1.106(c) and (d). See also *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff’d sum nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966).

¹⁸ See 47 C.F.R. § 1.106(c)(2). See also *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Scranton and Surfside Beach, South Carolina)*, Memorandum Opinion and Order, 4 FCC Rcd 2366 (MB 1989).

¹⁹ See *Commercial Radio Service, Inc.*, Order to Show Cause, 21 FCC Rcd 9983, 9986 (2006) (“*CRS Order*”) citing, e.g., *Contemporary Media, Inc. v. FCC*, 214 F.3d 187, 193 (D.C. Cir. 2000) (“*Contemporary Media*”); and *Cumulus Licensing, LLC*, Memorandum Opinion and Order and Notice of Apparent Liability, 22 FCC Rcd 13711, 13717 (MB 2007) (“[I]t is essential that licensees make full and clear disclosure of all material facts in every application. . .”).

²⁰ *CRS Order*, 21 FCC Rcd at 9986, 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 FCC 2d 1179, 1210-11 (1986) (subsequent history omitted).

“concealment, evasion, or other failure to be fully informative, accompanied by intent to deceive.”²¹ Intent to deceive is established if a licensee knowingly makes a false statement²² and can also be inferred when the surrounding circumstances clearly show the existence of intent to deceive.²³ The Commission may disqualify an applicant who deliberately makes misrepresentations or lacks candor in dealing with the agency.²⁴ Moreover, Section 1.17(a)(2) of the Rules provides that no person may provide, in any written statement of fact, “material factual information that is incorrect or omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading without a reasonable basis for believing that any such material factual statement is correct and not misleading.”²⁵ Thus, even absent an intent to deceive, a false statement may constitute an actionable violation of Section 1.17 of the Rules if it is provided without a reasonable basis for believing that the statement is correct and not misleading.²⁶

GCTV acknowledges that Levandusky’s name was listed erroneously in the Application.²⁷ GCTV claims that this was a “clerical error.”²⁸ However, LPFM applicants filing minor modification applications such as the Application here are not required to file ownership information at all.²⁹ Therefore, there is no basis to ascribe to GCTV a motive to engage in misrepresentation relating to matters which the staff would not consider when evaluating the Application. Accordingly, these erroneous submissions do not warrant reconsideration of the grant of the Application. Moreover, the change in GCTV’s board, which occurred gradually, not suddenly,³⁰ was approved by the staff in an appropriate application.³¹ Nevertheless, we caution GCTV to be more attentive to its application filings

²¹ CRS Order, 21 FCC Rcd at 9986 (citing *Fox River Broadcasting, Inc.*, Order, 93 FCC 2d 127, 129 (1983)). A false certification may also constitute a misrepresentation. *Id.* at 9986 n.15.

²² *Id.* at 9986 (citing *Leflore Broadcasting, Co., Inc. v. FCC*, 636 F.2d 454, 462 (D.C. Cir. 1980)).

²³ *Id.* (citing *American International Development, Inc.*, Memorandum Opinion and Order, 86 FCC 2d 808, 816 n.39 (1981), *aff’d sub nom. KXIV, Inc. v. FCC*, 704 F.2d 1294 (D.C. Cir. 1983)).

²⁴ *Contemporary Media*, 214 F.3d at 196.

²⁵ 47 C.F.R. § 1.17(a)(2).

²⁶ *See Amendment of Section 1.17 of the Commission's Rules Concerning Truthful Statements to the Commission*, 18 FCC Rcd at 4017 (stating that the revision to Section 1.17 is intended to “prohibit incorrect statements or omissions that are the result of negligence, as well as an intent to deceive”).

²⁷ Opposition at 2.

²⁸ *Id.*

²⁹ *See* General Instructions, Part B, page 1, of FCC Form 318.

³⁰ *Cf. Comparative Consideration of 76 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 22 FCC Rcd 6101, 6125 (2007) (“We continue to believe it would be unreasonable to penalize . . . similarly situated NCE applicants for routine and inevitable changes in their boards or other governing bodies, over the substantially longer period that the Commission was unable to act on their applications . . .”).

³¹ *See* n.14, *supra*.

in the future because, as indicated above, a false statement, even absent an intent to deceive, may constitute an actionable violation of Section 1.17 of the Rules.³²

Co-Location. Grant of the Co-Location Application is now a final action, and absent evidence of fraud on the Commission's processes, we have no authority to reconsider or review it.³³ Although in light of Living Waters' September 18, 2006, letter rejecting GCTV's request for co-location, there is a question regarding whether GCTV had a reasonable assurance that Living Waters would make its site available, there is no probative evidence in the record that GCTV engaged in any type of fraudulent activity that would justify revisiting the 2006 Co-Location Application. Accordingly, we decline to reconsider those matters here.

Conclusion/Actions. For the reasons discussed above, IT IS ORDERED, that the Petition for Reconsideration filed by David Levandusky IS DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

³² See, e.g., *Letter to Michael Couzens et al.*, 24 FCC Rcd 3697, 3703 n.33 (MB 2010).

³³ See, e.g., *American Industrial Door, Inc.*, Order on Reconsideration, 16 FCC Rcd 16300, 16302 (WTB 2001) ("Even when a proper petition for reconsideration is not filed, we will consider taking action on our own motion in cases where there is possible fraud on the Commission's processes"). There were no petitions for reconsideration of the Co-Location Application grant.