

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re: Patrick M. Sullivan and  
Lake Broadcasting, Inc.

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No. 14-1025

**OPPOSITION OF THE FEDERAL COMMUNICATIONS COMMISSION  
TO PETITION FOR A WRIT OF MANDAMUS**

The Court should deny the joint petition for a writ of mandamus filed by Patrick M. Sullivan and Lake Broadcasting, Inc. (“Petition”). Mandamus is a “drastic” remedy available only in “extraordinary” situations. *Oglala Sioux Tribe of Pine Ridge Indian Reservation v. U.S. Army Corps of Eng’rs*, 570 F.3d 327, 333 (D.C. Cir. 2009). Petitioners have not come close to showing that such circumstances are present here or that they have a “clear and indisputable” right to such rarely granted relief. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988). There has been no unreasonable administrative delay in this case – much less the “egregious” delay required to justify mandamus. *In re Monroe Commc’ns Corp.*, 840 F.2d 942, 945 (D.C. Cir. 1988).

The Commission’s typical timeframe for acting on a license application is not applicable in this case, which requires the agency to determine whether Michael S. Rice, the president, director, and sole shareholder of Petitioner Lake Broadcasting, Inc. (“LBI”), has the basic character qualifications required to hold a Commission license. The Commission previously revoked Rice’s radio licenses in

response to his criminal conviction for child molestation and his misrepresentation and lack of candor before the agency. This Court affirmed the license revocations. *Contemporary Media, Inc. v. FCC*, 214 F.3d 187 (D.C. Cir. 2000).

Against that backdrop, Rice now contends that he has been rehabilitated and asks the Commission to consent to the assignment of a license for an FM translator station in Montgomery, Alabama from Sullivan to LBI. This Court has observed that “it is to be expected that consideration of [complex] matters will take longer than might rulings on more routine items.” *Monroe Commc’ns*, 840 F.2d at 946. Here, upon review of Petitioners’ application, the Commission’s subordinate Media Bureau found substantial and material questions of fact as to whether Rice, and therefore LBI, possesses the requisite character qualifications to be a Commission licensee. To determine whether Rice will refrain from further misconduct, the Media Bureau has now commenced a hearing proceeding before an administrative law judge. Because the agency’s actions here have been reasonable – and do not approach the extreme level of delay required for mandamus – the petition should be denied.

## **BACKGROUND**

1. The Communications Act establishes a system for licensing the use of radio spectrum and vests in the Commission the exclusive authority to grant radio licenses. 47 U.S.C. § 301. Under Section 310(d) of the Act, any assignment of a

radio license requires the Commission's consent. 47 U.S.C. § 310(d). If the Commission finds that the "public interest, convenience, and necessity would be served," it will consent to the assignment. 47 U.S.C. § 309(a). However, if there is "a substantial and material question of fact presented or the Commission for any reason is unable to make [that] finding," the agency will "formally designate the [assignment] application for hearing on the ground or reasons then obtaining." 47 U.S.C. § 309(e).

Under the Communications Act, an important part of the public-interest inquiry is the potential licensee's character. Section 308(b) of the Communications Act provides that "[a]ll applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, ... and other qualifications of the applicant to operate the station." 47 U.S.C. § 308(b); *see also Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986) ("*1986 Policy Statement*") (subsequent history omitted). In evaluating character, the Commission focuses on "misconduct which violates the Communications Act or a Commission rule or policy, and ... certain specified non-FCC misconduct which demonstrate[s] the proclivity of an applicant to deal truthfully with the Commission and to comply with [its] rules and policies." *Id.* at 1190.

“Truthfulness” is one of the “key elements of character necessary to operate a broadcast station in the public interest.” *1986 Policy Statement*, 102 FCC 2d at 1210. As the Commission has explained, “[t]he integrity of [its] processes cannot be maintained without honest dealing ... by licensees.” *Id.*, 102 FCC Rcd at 1211. Hence, the Commission “view[s] misrepresentation and lack of candor in an applicant’s dealing with the Commission as serious breaches of trust,” *id.*, and will “treat even the most insignificant misrepresentation” as misconduct that disqualifies an applicant from holding a radio license. *Id.* at 1210.

Felony convictions are another type of misconduct that the Commission considers when analyzing an applicant’s character. *See Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd 3252 (1990) (“*1990 Policy Statement*”) (subsequent history omitted). “Because all felonies are serious crimes, any conviction provides an indication of an applicant’s or licensee’s propensity to obey the law” and to conform to the requirements of the Communications Act and the Commission’s rules and policies. *Id.* Indeed, conviction for felonies involving “misconduct so egregious as to shock the conscience and evoke almost universal disapprobation ... might, of its own nature, constitute *prima facie* evidence that the applicant lacks the traits of reliability and/or truthfulness necessary to be a licensee.” *1986 Character Policy Statement*, 102 FCC 2d at 1205 n.60.

While prior misconduct calls into question whether an applicant has the requisite character to hold a radio license, the Commission also considers certain “mitigating factors.” *See 1990 Policy Statement*, 5 FCC Rcd at 3252. These include “the willfulness of the misconduct, the frequency of the misconduct, the currentness of the misconduct, the seriousness of the misconduct, ... efforts made to remedy the wrong, overall record of compliance with FCC rules and policies, and rehabilitation.” *Id.* With respect to the last factor, the Commission has explained that any rehabilitation determination is fact-specific, and must include these relevant considerations:

(1) whether the applicant has not been involved in any significant wrongdoing since the alleged misconduct occurred; (2) how much time has elapsed since the misconduct; (3) the applicant’s reputation for good character in the community; and (4) meaningful measures taken by the applicant to prevent the future occurrence of misconduct.

*Id.*, 5 FCC Rcd at 3253 n.4. When determining whether a reoccurrence of misconduct is likely, the Commission may take into account the deterrent effect of its prior denial of an application in response to misconduct. *Id.*

Finally, “as a general matter,” the “time period relevant to character inquiries” is subject to a “ten year limitation.” *1986 Policy Statement*, 102 FCC 2d at 1229. The Commission imposed this limitation because of the “inherent inequity and practical difficulty involved in requiring applicants to respond to allegations of greater age.” *Id.* (internal citation omitted).

2. On August 11, 1994, Michael S. Rice was convicted of four counts of forcible sodomy, six counts of deviate sexual assault in the first degree, and two counts of deviate sexual assault in the second degree, all of which were felonies. *Contemporary Media*, 214 F.3d at 191. The offenses for which Rice was convicted involved five children over a four-year period. *Id.*, 214 F.3d at 190. His sentences on the various counts totaled 84 years in prison. *Id.* at 191. However, because his sentences ran concurrently, Rice was incarcerated for approximately five years. *In the Matter of Patrick Sullivan, Assignor, and Lake Broadcasting, Inc., Assignee, Application for Consent to Assignment of License of FM Translator Station W238CE, Montgomery, Alabama*, DA 14-703 (¶ 6) (MB rel. May 23, 2014) (“*Hearing Designation Order*”) (attached as Exhibit A).

In response to Rice’s conviction, the Commission issued an order to show cause why the broadcast radio licenses and construction permits held by licensees in which Rice was a shareholder (Contemporary Media, Inc., Contemporary Broadcasting, Inc., and Lake Broadcasting, Inc.<sup>1</sup>) should not be revoked. *See Order to Show Cause and Notice of Apparent Liability, Contemporary Media, Inc.*, 10 FCC Rcd 13685 (1995). Following an administrative hearing that lasted several

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<sup>1</sup> At the time of his conviction, Rice was a 67.5 percent shareholder in LBI, which was the licensee of Station KBMX(FM), Eldon, Missouri, the permittee of unbuilt Station KFXE(FM), Cuba, Missouri, and the applicant for a new FM broadcast station at Bourbon, Missouri. *Hearing Designation Order* ¶ 4. Rice subsequently became and remains the owner of all issued shares of LBI’s stock. *Id.*

days, the presiding administrative law judge concluded that the licenses should be revoked given the egregious nature of Rice's adjudicated misconduct and misrepresentation by the licensees regarding Rice's post-conviction involvement in the management and operation of the radio stations. Initial Decision, *Contemporary Media, Inc.*, 12 FCC Rcd 14254, 14306 (¶ 198) (ALJ 1997). Both the Commission and this Court affirmed the license revocations.<sup>2</sup>

3. On May 23, 2012, Patrick M. Sullivan, the holder of the license for FM Translator Station W238CE in Montgomery, Alabama, filed an application to assign that license to LBI (the "Assignment Application"). In the application, Sullivan and LBI acknowledge Rice's criminal history, but argue that Rice is qualified to be a Commission licensee because he has been sufficiently rehabilitated. According to LBI, Rice is entitled to a "clean slate" because his felony convictions occurred more than 20 years ago, he has completed his parole, and he has had all rights of citizenship restored by the State of Missouri. *See Pet.*,

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<sup>2</sup> *See Decision, Contemporary Media, Inc.*, 13 FCC Rcd 14437 (1998), *recon. denied*, Order, 14 FCC Rcd 8790 (1999), *aff'd sub nom., Contemporary Media, Inc. v. FCC*, 214 F.3d 187 (D.C. Cir. 2000), *cert. denied*, 532 U.S. 920 (2001). Rice subsequently petitioned the Commission to reexamine its revocation decision, contending that it was the result of ineffective assistance of counsel. The Commission was "not persuaded that ... there was any injustice or fraud in the proceedings that led to the revocation of these licenses," and denied his request. *Michael S. Rice*, 17 FCC Rcd 4111, 4113 (¶ 6) (2002), *aff'd, Rice v. FCC*, 60 Fed. Appx. 332 (D.C. Cir. 2003).

Exhibit A, Combined Exhibits 12 and 13 to Application at pp. 7-8.<sup>3</sup> LBI attached several “Character Exhibits” to the application, including four letters of reference from Rice’s neighbors and colleagues, to demonstrate that Rice has been a productive citizen since his release from prison. *Id.*, pp. 24-27. In addition, LBI filed a two-page letter, dated October 31, 2011, from Rice’s long-time psychiatrist, Wayne A. Stillings, M.D. In the letter, Dr. Stillings asserts that Rice is “fully recovered and rehabilitated from [the] psychiatric condition” that “led to the conduct that resulted in his criminal conviction,” and that “[t]here is no evidence that he will relapse.” *Id.*, pp. 13-14. Attached to that letter was Dr. Stillings’s eight-page declaration under penalty of perjury, dated May 17, 2001, in which he clarified that his diagnosis is conditional: as Dr. Stillings explained, there is “absolutely no reason to anticipate that any of [Rice’s] disorders will again become active, so long as Rice continues to take his prescribed medications and to pursue the appropriate therapy.” *Id.*, p. 19.

4. Petitioners, on February 28, 2014, filed a petition for a writ of mandamus asking this Court to compel the Commission to rule on the merits of the Assignment Application within a reasonable period of time. Pet. 6.

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<sup>3</sup> Exhibit A to the Petition lacks page numbers. For ease of reference, the Commission designates page numbers, with the first unnumbered page as “page 1,” and so forth.

5. On May 23, 2014, the Commission's Media Bureau, acting on delegated authority,<sup>4</sup> commenced a hearing proceeding to determine whether the Assignment Application for FM Translator Station W238CE should be granted. *Hearing Designation Order* ¶ 1. In designating the application for hearing, the Media Bureau explained that "Rice's felony convictions and misrepresentation and lack of candor before the Commission" create "[s]ignificant and material questions" as to whether LBI possesses the basic character qualifications to hold a radio license – questions that are not answered by the record currently before the Commission. *Id.*

At the outset, the Media Bureau held that it would take into consideration Rice's prior felony convictions, even though they occurred more than ten years ago. *Id.* ¶ 12. As the Media Bureau explained, while "the passage of time is relevant to the issue of whether Rice has been rehabilitated," it "has no bearing on the question of whether the underlying allegations of misconduct can be proved or disproved." *Id.* Because "[t]he facts here," concern "felony convictions, adverse character determinations, and a set of license revocations that are *res judicata* and therefore not subject to retrial in this hearing," the Media Bureau found the ten-year limitation does not foreclose consideration of Rice's prior misconduct. *Id.*;

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<sup>4</sup> See 47 C.F.R. § 0.61(a) (setting forth the Media Bureau's functions, which include "[p]rocess[ing] applications for authorization, assignment, transfer and renewal of media services"); 47 C.F.R. § 0.283 (providing that the "Chief, Media Bureau, is delegated authority to perform all functions of the Bureau, described in § 0.61").

*see also* Order of Revocation, *Robert D. Landis*, 22 FCC Rcd 19979, 19982 (¶ 7) (EB 2007) (“Although the *1986 Character Policy Statement* provides a ten-year limitation on considerations of *allegations* of misconduct, it does not limit consideration of *adjudicated* misconduct that has already been litigated.”).

The Media Bureau then expressed reservations about the probative value of the facts contained in LBI’s primary Character Exhibit – Dr. Stillings’s letter and declaration – noting that the latter was prepared in 2001, 11 years prior to the submission of the Assignment Application. *Hearing Designation Order* ¶ 16. The Media Bureau further noted that Dr. Stillings’s declaration “goes beyond being an objective medical assessment of Rice’s actions and prognosis, reading more as a pleading advocating the ultimate legal result of this proceeding.” *Id.* As such, the Media Bureau found that it does little to inform the Commission’s assessment of whether Rice has been rehabilitated. *Id.*

The Media Bureau also found that none of the Character Exhibits submitted with the Assignment Application “deals in any meaningful way” with “Rice’s lack of candor and misrepresentation regarding [his] participation in the management and operations of his stations following his arrest.” *Id.* ¶ 17. The Media Bureau explained that “Rice’s or LBI’s qualifications to be a Commission licensee must include a determination regarding Rice’s candor and truthfulness before the Commission” – a determination that the Media Bureau could not make based on a

record that “is almost exclusively devoted to Rice’s criminal convictions.” *Id.*

¶ 18.

Finally, the Media Bureau questioned the probative value of the letters submitted on Rice’s behalf attesting to his honesty and good character in the community. *Id.* ¶ 19. As the Media Bureau explained, “[e]ach of the letters suffers from a deficiency” noted by the presiding administrative law judge in the earlier license revocation proceeding – specifically, “they make no mention of Rice’s criminal convictions, or otherwise indicate whether the writer is familiar with those aspects of Rice’s background that led to his license revocations.” *Id.*, citing *Contemporary Media, Inc.*, 12 FCC Rcd at 14294; *Contemporary Media*, 214 F.3d at 195 (“We cannot fault the FCC for concluding that those who vouched for Rice’s character while evidencing little if any knowledge of his egregious acts cannot be regarded as credible on the subject.”).

Because the Media Bureau was “unable to make a determination on the record currently before [it] that grant of the Assignment Application would serve the public interest, convenience and necessity,” *Hearing Designation Order* ¶ 1, it designated the Assignment Application for hearing before an administrative law judge, as required by section 309(e) of the Act. *Id.* ¶ 2. That hearing will be used:

- (a) To determine the effects, if any, of Michael S. Rice’s felony convictions on his qualifications and/or the qualifications of Lake Broadcasting, Inc., to be a Commission licensee;

- (b) To determine the effects, if any, of the misrepresentation and lack of candor by Michael S. Rice's broadcast companies on his qualifications and/or the qualifications of Lake Broadcasting, Inc., to be a Commission licensee;
- (c) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether Michael S. Rice and/or Lake Broadcasting, Inc., is qualified to be a Commission licensee; and
- (d) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether the captioned Application for consent to the assignment of license for Station W238CE should be granted.

*Id.* ¶ 22.

On May 27, 2014, the presiding administrative law judge issued an order scheduling a pre-hearing conference in this proceeding for June 24, 2014. *See* Exhibit B.

## ARGUMENT

### THE COURT SHOULD DENY THE PETITION BECAUSE PETITIONERS HAVE NOT SHOWN A CLEAR AND INDISPUTABLE RIGHT TO MANDAMUS

“[M]andamus is ‘drastic;’ it is available only in ‘extraordinary situations;’ it is hardly ever granted; those invoking the court’s mandamus jurisdiction must have a ‘clear and indisputable’ right to relief; and even if the plaintiff overcomes all these hurdles, whether mandamus relief should issue is discretionary.” *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005) (en banc). Petitioners have failed to show that this case is “one of the exceptionally rare cases,” *In re Barr Labs.*, 930 F.2d 72, 76 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 906 (1991), that warrants a

judicial decree directing agency action.

Petitioners' basic argument for mandamus is that the Commission has taken too long to act on its Assignment Application. This Court will order mandamus, however, only where delay is "egregious," and the Court has made clear that the determination whether an "agency's delay is so egregious as to warrant mandamus," must be "governed by a 'rule of reason.'" *Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70, 79-80 (D.C. Cir. 1984) ("TRAC"). The "rule of reason" cannot be applied "in the abstract, by reference to some number of months or years beyond which agency inaction is presumed to be unlawful." *Mashpee Wampanoag Tribal Council v. Norton*, 336 F.3d 1094, 1102 (D.C. Cir. 2003). Rather, "[r]esolution of a claim of unreasonable delay is ordinarily a complicated and nuanced task requiring consideration of the particular facts and circumstances before the court." *Id.* at 1100. Thus, before determining whether an agency's delay is sufficiently unreasonable to justify extraordinary relief, the Court must consider (among other things) "the complexity of the task at hand." *Id.* at 1102. This factor weighs overwhelmingly against a finding of unreasonable delay in this case.

The Assignment Application has been pending before the Commission for approximately two years. This Court routinely finds such a time period insufficient to warrant mandamus. *See, e.g., Her Majesty the Queen in Right of*

*Ontario v. EPA*, 912 F.2d 1525, 1534 (D.C. Cir. 1990) (delay of “more than nine years” not unreasonable); *Monroe Commc’ns*, 840 F.2d at 945-47 (delay of several years did not warrant mandamus); *TRAC*, 750 F.2d at 81 (delays of two and five years did not warrant mandamus); *Oil, Chemical and Atomic Workers Int’l Union v. Zegeer*, 768 F.2d 1480, 1487-88 (D.C. Cir. 1985) (dismissing mandamus petition upon showing, after five-year delay, that agency would complete rulemaking within two years). Even if this case presented straightforward issues, two years does not justify drastic relief in the ordinary course, particularly in light of the “considerable deference” afforded to the Commission in “establishing a timetable for completing its proceedings.” *Cutler v. Hayes*, 818 F.2d 879, 896 (D.C. Cir. 1987).

But this is anything but a straightforward case. Contrary to Petitioners’ claim, this is not a garden-variety application to assign an FM translator station license that takes “15-30 minute[s]” to process. Pet. 2. Michael S. Rice, the president, director, and sole shareholder of assignee LBI, is a convicted child molester. In affirming the Commission’s earlier revocation of Rice’s licenses on that ground, this Court opined that “[i]t is hardly irrational [for the Commission] to conclude that if an individual is unwilling to obey the law with respect to such patently criminal behavior as sexual assault on children, he will be equally unwilling to obey FCC rules that require openness and honesty with the

Commission.” *Contemporary Media*, 214 F.3d at 193. Separate and apart from his criminal conviction, Rice “misrepresented facts and lacked candor in reporting to the Commission the nature and extent of [his] role in the management, operations, and affairs” of the radio stations subsequent to his arrest. *Contemporary Media*, 12 FCC Rcd at 14293 (¶ 154). In this Court’s view, that lack of truthfulness provided the Commission a second, independent basis for revoking Rice’s licenses. *Contemporary Media*, 214 F.3d at 198; *see also id.* at 193 (explaining that “[t]he FCC relies heavily on the honesty and probity of its licensees in a regulatory system that is largely self-policing.”).

Thus, unlike a typical request to assign an FM translator station, *see* Pet. 3, the Commission has before it an applicant whose licenses were revoked in response to serious misconduct. The Commission therefore must weigh mitigating factors – primarily, whether Rice has been sufficiently rehabilitated – before it can determine whether he has the character qualifications to once again hold a Commission license. *Hearing Designation Order* ¶ 11; *see also 1990 Policy Statement*, 5 FCC Rcd 3252 n.4. Upon review of the record, the Commission’s Media Bureau reasonably concluded that it could not make that determination. *Hearing Designation Order* ¶¶ 12-19. Among other significant shortcomings, the Assignment Application (like the Petition before this Court) failed to “deal[] in any

meaningful way with ... Rice's [prior] lack of candor and misrepresentation" before the agency. *Id.* ¶ 17.

Where there is a "substantial and material question of fact" that prevents the Commission from finding that grant of an application serves "the public interest, convenience and necessity," the Communications Act requires the agency to designate the application for hearing. *See* 47 U.S.C. §§ 309(a), (e). "[G]iven the seriousness" of Rice's prior adjudicated misconduct and the Media Bureau's conclusion that the "record evidence regarding Rice's character" is "lacking in probative value," *Hearing Designation Order* ¶ 21, the Media Bureau properly designated the Assignment Application for hearing consistent with the statute. In doing so, the Media Bureau took a concrete and necessary step to address the Assignment Application. In these circumstances, there is no credible basis to claim that the Commission has engaged in unreasonable delay. *See Monroe Commc'ns*, 840 F.2d at 946 (denying mandamus where the agency was acting to complete its proceeding); *Grand Canyon Air Tour Coalition v. FCC*, 154 F.3d 455, 477 (D.C. Cir. 1998) (same), *United Steelworkers of Am. v. Rubber Mfgs. Assn.*, 783 F.2d 1117, 1120 (D.C. Cir. 1986) (same).

Indeed, when the Commission discovers that an applicant for a license, or a current licensee, has been convicted of sexually assaulting children, it routinely

designates the matter for hearing before an administrative law judge.<sup>5</sup> This is because administrative hearings are the best forum to develop the facts necessary to evaluate whether the applicant or licensee has the requisite character qualifications to hold a Commission license. *Hearing Designation Order* ¶ 21. It is reasonable for the Commission to take the time necessary to develop a complete record in this proceeding, particularly in light of the “egregiousness” of Rice’s prior crimes. *Contemporary Media*, 214 F.3d at 193. Mandamus is inappropriate in such circumstances because “it is to be expected that consideration of such [complex] matters will take longer than might rulings on more routine items.” *Monroe Commc’ns*, 840 F.2d at 946; *see also Cutler*, 818 F.2d at 898 (“complexity of the task confronting the agency” is relevant to ascertaining reasonableness of delay); *Sierra Club v. Thomas*, 828 F.2d 783, 799 (D.C. Cir. 1987) (in light of “the complexity of the issues” and the “highly controversial nature of the proposal, agency deliberations for less than three years – little more than one year since the close of the public comment period – can hardly be considered unreasonable.”).

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<sup>5</sup> *See, e.g.*, Order to Show Cause, *David L. Titus*, 22 FCC Rcd 1638 (EB 2007) (designating for hearing an amateur radio license held by an individual convicted of child molestation); Order to Show Cause, *Lonnie L. Keeney*, 22 FCC Rcd 19975 (EB 2007) (same); Order to Show Cause, *Robert D. Landis*, 21 FCC Rcd 8741 (EB 2006) (same); Hearing Designation Order, *Application of George E. Rodgers, Downingtown, Pennsylvania*, 10 FCC Rcd 3978 (WTB 1995) (designating for hearing an application for renewal of an amateur radio license held by an individual convicted of four counts of corruption of minors and four counts of indecent assault).

In these circumstances, Petitioners can show no “transparent violations of a clear duty to act.” *In re Bluewater Network*, 234 F.3d 1305, 1315 (D.C. Cir. 2000).

For similar reasons, Petitioners have not demonstrated any harm that would warrant grant of their Petition. *TRAC*, 750 F.2d at 80 (“[I]n assessing claims of agency delay” the Court “take[s] into account the nature and extent of the interests prejudiced by delay.”). The essence of Petitioners’ claim of harm is that the private contract underlying the assignment application is now subject to termination by either party because the Commission did not grant the application by November 13, 2012 – a “closing” deadline established *by Petitioners* in the purchase agreement for FM Translator Station W238CE. Pet. 2, 4. While Petitioners contend that their self-imposed deadline “clearly fits within the 2-3 month average processing time for Commission action on these types of applications,” Pet. 4, Rice’s egregious misconduct takes the Assignment Application outside the realm of “typical” applications that can be acted upon within that timeframe. *Id.* at 2. Petitioners could have no reasonable expectation that the Commission would act on the Assignment Application by their invented “deadline” of November 13, 2012. As such, any “harm” that ensues from the agency’s failure to meet that arbitrary deadline is of Petitioners’ own making.

## CONCLUSION

“A writ of mandamus is an ‘extraordinary remedy, to be reserved for extraordinary situations.’” *In re Brooks*, 383 F.3d 1036, 1041 (D.C. Cir. 2004) (quoting *Cobell v. Norton*, 334 F.3d 1128, 1137 (D.C. Cir. 2003)). Because Petitioners have failed to demonstrate that such circumstances are present here, the Court should deny the petition for a writ of mandamus.

Respectfully submitted,

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May 29, 2014

# EXHIBIT A

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

In the Matter of	)	MB Docket No. 14-82
	)	
<b>PATRICK SULLIVAN</b>	)	FRN 0003749041, 0006119796,
(Assignor)	)	0006149843, 0017196064
	)	
and	)	Facility ID No. 146162
	)	
<b>LAKE BROADCASTING, INC.</b>	)	File No. BALFT-20120523ABY
(Assignee)	)	
	)	
Application for Consent to Assignment of License	)	
of FM Translator Station W238CE,	)	
Montgomery, Alabama	)	

**HEARING DESIGNATION ORDER**

**Adopted: May 23, 2014**

**Released: May 23, 2014**

By the Chief, Media Bureau:

**I. INTRODUCTION**

1. This Order commences a hearing proceeding before an Administrative Law Judge to determine whether the application of Patrick Sullivan (“Sullivan”) for Consent to Assignment of the License of FM Translator Station W238CE, Montgomery, Alabama (“Assignment Application”) to Lake Broadcasting, Inc. (“LBI”) should be granted. As discussed below, LBI’s president, director, and sole shareholder, Michael S. Rice (“Rice”), is a convicted felon who previously held radio station authorizations, through LBI and other entities, which were revoked on the basis of Rice’s felony convictions and misrepresentation to and lack of candor before the Commission.<sup>1</sup> Significant and material questions exist as to whether, on the basis of Rice’s criminal convictions and misrepresentations, Rice and, hence, LBI possess the basic character qualifications to hold the Station authorization. Because we are unable to make a determination on the record currently before us that grant of the Assignment Application would serve the public interest, convenience and necessity, we hereby designate the Assignment Application for hearing.

2. The Chief, Media Bureau (“Bureau”), issues this Hearing Designation Order pursuant to Section 309(e) of the Communications Act of 1934, as amended (the “Act”), and the Bureau’s delegated authority.<sup>2</sup>

<sup>1</sup> See *Contemporary Media, Inc.*, Initial Decision, 12 FCC Rcd 14254 (ALJ 1997) (“*CMI ID*”); *Contemporary Media, Inc.*, Decision, 13 FCC Rcd 14437 (1998) (“*CMI Decision*”), recon. denied, Order, 14 FCC Rcd 8790 (1999), *aff’d sub nom.*, *Contemporary Media, Inc. v. FCC*, 214 F.3d 187 (D.C. Cir. 2000) (“*Contemporary Media*”), cert. denied, 532 U.S. 920, 121 S.Ct. 1355 (2001).

<sup>2</sup> See 47 C.F.R. §§ 0.61 and 0.283.

## II. BACKGROUND

3. In November 1990, Rice was arrested in St. Charles County, Missouri, and was charged with eight counts of deviate sexual assault of children who were between 14 and 16 years old, and four counts of sodomy of children who were under 14 years old. The alleged activities took place between December 1985 and October 1990. On July 5, 1994, Rice was convicted of four counts of sodomy, six counts of deviate sexual assault in the first degree, and two counts of deviate sexual assault in the second degree, all of which were felonies.<sup>3</sup> The misconduct for which Rice was convicted involved five children. Rice was sentenced to a total of 84 years in prison.

4. At the time of his conviction in 1994, Rice held a 67.5 percent ownership interest in LBI, then the licensee of Station KBMX(FM), Eldon, Missouri; permittee of unbuilt Station KFXE(FM), Cuba, Missouri; and applicant for a new FM broadcast station at Bourbon, Missouri. Rice subsequently became and remains the owner of all issued shares of LBI's stock. Rice also was the sole shareholder at the time of Contemporary Media, Inc. ("CMI"), licensee of Stations WBOW(AM), WZZQ(AM), and WZZQ(FM), Terre Haute, Indiana; and Contemporary Media, Inc. was the parent company of Contemporary Broadcasting, Inc., licensee of Station WFMZ(FM), Columbia, Missouri; and the permittee of Station KAAM-FM, Huntsville, Missouri.

5. By Order to Show Cause and Notice of Apparent Liability,<sup>4</sup> the Commission directed the three Rice-owned broadcast companies to show cause why their licenses and construction permits should not be revoked. The Order to Show Cause specified issues (a) to determine the effect of Michael Rice's convictions on the basic qualifications of his companies to be and remain Commission licensees; (b) to determine whether the companies misrepresented to the Commission that subsequent to his arrest, Michael Rice had been excluded from the management and operation of his radio stations; and (c) to determine whether Michael Rice had engaged in an unauthorized transfer of control of his broadcasting companies. Following a full and complete evidentiary hearing, the Presiding Administrative Law Judge concluded that, while there was no unauthorized transfer of control, Rice's felony convictions and his companies' misrepresentation and lack of candor constituted independent grounds for disqualification of the licensees and revocation of their authorizations. The conclusions reached in the Initial Decision of the Presiding Administrative Law Judge were affirmed through all administrative and judicial appeals.<sup>5</sup>

6. Because his sentences ran concurrently, Rice was incarcerated for just over five years. He was released from prison in December 1999. On May 23, 2012, Sullivan filed the captioned application for Commission consent to the assignment of license for Station W238CE to LBI.

7. In the Application, Sullivan and LBI acknowledge Rice's criminal history, but argue that Rice is now qualified to be a Commission licensee because he has been sufficiently rehabilitated. In this regard, LBI claims, among other things, that the felonies of which Rice was convicted occurred over twenty years ago, Rice has paid his debt to society and had his rights restored, and he has been a productive and respected citizen since his release from prison. In addition, LBI argues that although Rice suffered from severe, undiagnosed, and untreated mental illnesses at the time of his arrest and conviction, he is "fully recovered and rehabilitated from his psychiatric condition," and that "[t]here is no evidence that he will relapse."<sup>6</sup>

8. The Application was accepted for filing on May 24, 2012. On December 20, 2012, Child Protect, a Children's Advocacy Center serving Montgomery, Autauga, Elmore, and Chilton Counties in

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<sup>3</sup> *State v. Michael Steven Rice*, Case No. 11R019001787 (11<sup>th</sup> Judicial Circuit Court, St. Charles County, Missouri).

<sup>4</sup> 10 FCC Rcd 13685 (1995).

<sup>5</sup> See *supra* note 1.

<sup>6</sup> Combined Exhibits 12 and 13 to Application ("Character Exhibits") at fifth and sixth unnumbered pages.

Alabama, filed an informal objection to the Application (“Informal Objection”).<sup>7</sup> The Informal Objection is based, first, on Rice’s prior convictions for deviate sexual assault and sodomy;<sup>8</sup> and second, on the Commission’s prior findings that Rice and LBI lacked candor with the Commission in misrepresenting the extent of his involvement with LBI and other companies owned by Rice.<sup>9</sup> With regard to the latter allegation, Child Protect alleges that Rice has lacked candor with the Commission since the revocation of his companies’ authorizations on the basis that he has unlawfully managed the operations of Station WRBZ(AM), Wetumpka, Alabama, under a Local Marketing Agreement (“LMA”).<sup>10</sup> Previously, the WRBZ(AM) (then-WAPZ(AM)) licensee applied to assign the license to Rice’s CMI, but the initial application was dismissed under the Commission’s “red light” rules.<sup>11</sup> CMI filed, and subsequently dismissed, a second assignment application.<sup>12</sup> Child Protect alleges that Rice entered into the LMA after dismissal of the first assignment application in order to program the station after being unable to purchase it.<sup>13</sup> Child Protect further alleges that Johnny Roland, the owner of WRBZ(AM), is an absentee owner who now resides in Arizona, and thus Rice is “manag[ing] the station as the controlling owner of the licensee . . . .”<sup>14</sup>

9. In a Joint Opposition to Informal Objection (“Opposition”), Sullivan and LBI challenge the Informal Objection on numerous grounds. First, they note that the Informal Objection was initially not served on Sullivan or LBI, was untimely as a petition to deny, and was not supported by an affidavit or declaration of personal knowledge.<sup>15</sup> Second, Sullivan and LBI claim that while they have not denied Rice’s past criminal conduct referenced in the Informal Objection, they have adequately documented Rice’s rehabilitation in an exhibit to the Application.<sup>16</sup> Third, Sullivan and LBI state that the LMA for WRBZ(AM) was a “standard initial step in [CMI’s] proposed purchase” of the station, noting that the dismissal of the initial assignment application was without prejudice, and contained “no prohibitions on Mr. Rice’s conduct going forward.”<sup>17</sup> Finally, Sullivan and LBI deny that Rice is managing WRBZ(AM), stating that he is a full-time resident of St. Charles, Missouri, some 615 miles from Wetumpka, Alabama; that Rice typically makes four “brief visits” to Wetumpka in a calendar year; and that he has no managerial role or voice at the station other than to provide programming, and has exerted no influence on personnel matters or financing.<sup>18</sup> The parties also state that Johnny Roland is, in fact, a resident of Creve Coeur, Missouri, since leaving Arizona in 2003, and “runs WRBZ with its local full-time General Manager, Patrick Sullivan.”<sup>19</sup>

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<sup>7</sup> The Informal Objection was originally filed October 24, 2012, but was re-filed because the original filing was not served on Sullivan and Rice.

<sup>8</sup> Informal Objection at 1.

<sup>9</sup> *Id.* at 1-2.

<sup>10</sup> *Id.*

<sup>11</sup> File No. BAL-20040715ADJ. See *J.W. Promotions, Inc.*, Letter (MB Jan. 12 2005) (dismissing the application pursuant to 47 C.F.R. §§ 1.1910(b)(3) and 0.283).

<sup>12</sup> File No. BAL-20050610AGS.

<sup>13</sup> Informal Objection at 2.

<sup>14</sup> *Id.*

<sup>15</sup> Opposition at 1-2.

<sup>16</sup> *Id.* at 2.

<sup>17</sup> *Id.* at 3 (emphasis in original).

<sup>18</sup> *Id.* at 4 and Exhibit E (Declaration of Michael S. Rice).

<sup>19</sup> *Id.* at 4.

### III. DISCUSSION

10. *Rice's Character Qualifications.* Under the Commission's Character Qualifications Policy Statement,<sup>20</sup> non-FCC misconduct may raise a substantial and material question of fact concerning a licensee's character. In assessing character qualifications in broadcast licensing matters, the Commission considers, as relevant, "evidence of any conviction for misconduct constituting a felony."<sup>21</sup> In particular, we have found that "[b]ecause all felonies are serious crimes, any conviction provides an indication of an applicant's or licensee's propensity to obey the law" and to conform to provisions of both the Act and the agency's rules and policies.<sup>22</sup> In addition, conviction of certain felonies involving "misconduct so egregious as to shock the conscience and evoke almost universal disapprobation . . . might, of its own nature, constitute *prima facie* evidence that the applicant lacks the traits of reliability and/or truthfulness necessary to be a licensee. . . ."<sup>23</sup> In affirming the Commission's revocation of Rice's prior authorizations, the U.S. Court of Appeals for the District of Columbia Circuit opined that with regard to sexual offenses involving minors:

whatever the issue with respect to crimes that might be regarded as being on the boundary of "egregiousness," the reasonableness of the FCC's decision in the instant case is clear. There is no question but that the crimes at issue here are, as the FCC found, "characterized by moral turpitude" to such an extent that they "fall[] in the category of those that 'shock the conscience' and summon almost universal disapproval," (citation omitted) a category that the FCC expressly warned would be the subject of special agency concern.<sup>24</sup>

11. In keeping with these findings and principles, we must here weigh whether Rice has been sufficiently rehabilitated and, therefore, is qualified to hold the Station's license. In the *1990 Character Policy Statement*, the Commission stated:

Rehabilitation is generally a factor when misconduct occurred prior to the filing of the application in question. Whether an applicant has been rehabilitated will necessarily turn on the facts of each case. Among other factors, the Commission will consider: (1) whether the applicant has not been involved in any significant wrongdoing since the alleged misconduct occurred; (2) how much time has elapsed since the misconduct; (3) the applicant's reputation for good character in the community; and (4) meaningful measures taken by the applicant to prevent the future occurrence of misconduct. (citation omitted) Further, where previous Commission consideration of the misconduct resulted in the denial of an application, the deterrent impact of our previous action may provide a basis for concluding that a recurrence of misconduct is unlikely.<sup>25</sup>

12. We find that substantial and material questions remain regarding whether Rice has been rehabilitated. First, although Rice was convicted more than a decade ago, the ten-year period that the Commission generally considers as relevant is not a "statute of limitations for character inquiry," as LBI

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<sup>20</sup> See *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 Misrepresentations to the Commission by Permittees and Licensees*, Report, Order, and Policy Statement, 102 F.C.C.2d 1179 (1986) ("*1986 Policy Statement*"), *recon. dismissed/denied*, 1 FCC Rcd 421 (1986). See also *Policy Regarding Character Qualifications in Broadcast Licensing*, Policy Statement and Order, 5 FCC Rcd 3252 (1990) ("*1990 Policy Statement*"), *modified*, Memorandum Opinion and Order, 6 FCC Rcd 3448 (1991), *further modified*, Memorandum Opinion and Order, 7 FCC Rcd 6564 (1992).

<sup>21</sup> See *1990 Policy Statement*, 5 FCC Rcd at 3252.

<sup>22</sup> *Id.*

<sup>23</sup> *1986 Policy Statement*, 102 F.C.C.2d at 1205 n.60.

<sup>24</sup> *Contemporary Media*, 214 F.3d at 193 (citing *1990 Policy Statement*, 5 FCC Rcd at 3252 n.5).

<sup>25</sup> *1990 Character Policy Statement*, 5 FCC Rcd 3252 n.4.

characterizes it.<sup>26</sup> Indeed, the passage of time has no bearing on the question of whether the underlying allegations of misconduct can be proved or disproved. Here, we are presented with felony convictions, adverse character determinations, and a set of license revocations that are *res judicata* and therefore not subject to retrial in this hearing. Thus, while the passage of time is relevant to the issue of whether Rice has been rehabilitated, “it does not limit our consideration of *adjudicated* misconduct that has already been litigated.”<sup>27</sup> Our view is consistent with Commission precedent. As but one example, the Enforcement Bureau revoked a license held by an amateur radio operator convicted more than 13 years earlier of sexual felonies involving minors.<sup>28</sup> In revoking the license, the Enforcement Bureau noted that, regardless of the lapse of time, the nature of the criminal misconduct was such that it called into serious question whether the licensee possessed the requisite character qualifications to retain his authorization.<sup>29</sup> As noted above by the Court of Appeals for the D.C. Circuit, it is without question that the nature of the criminal misconduct for which Rice was found guilty involved areas “of special agency concern.”<sup>30</sup> Thus, without other compelling evidence of rehabilitation, we find that a rote application of the Commission’s general ten-year time limitation policy would not serve the public interest in this instance.

13. Our review of the materials submitted in each of the Character Exhibits leads us to conclude that the testimonials therein are of limited probative value, i.e., they fall short of establishing material propositions.<sup>31</sup> The two-page introduction to the Character Exhibits, and the three-page Biographical Sketch that follows, are self-serving and, as would be expected, cast Rice in the best possible light. However, they lack critical information and provide little to no context. For example, LBI states, for example, that “[b]ased on his full rehabilitation, the State of Missouri has fully restored Mike Rice to his rights as a citizen.”<sup>32</sup> Rice offers no documentation and does not detail the scope or meaning of full restoration of his rights by the State of Missouri. Moreover, the requirement by the State of Missouri that Rice remain listed on an official Sex Offender Registry as a consequence of his conviction undercuts this argument.<sup>33</sup> Without evidence of his ability to be removed from the Sex Offender Registry, his contention that the State of Missouri has fully restored his rights or deems him fully rehabilitated is dubious.

14. The primary Character Exhibit upon which Rice relies is a two-page letter, dated October 31, 2011, from psychiatrist Wayne A. Stillings, M.D. (“Stillings”), who states he has treated Rice for 20 years.<sup>34</sup> Attached to the two-page letter is an eight-page Declaration from Stillings that was itself

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<sup>26</sup> Character Exhibits at first unnumbered page, citing *1986 Policy Statement*, 102 F.C.C.2d at 1229. There, the Commission stated, “As to the time period relevant to character inquiries, we find that, as a general matter . . . even as to consideration of past conduct indicating ‘a flagrant disregard of the Commission’s regulations and policies,’ a ten year limitation should apply. The ‘inherent inequity and practical difficulty’ (citation omitted) involved in requiring applicants to respond to allegations of greater age suggests that such limit be imposed.” *Id.*

<sup>27</sup> *Robert D. Landis*, Order of Revocation, 22 FCC Rcd 19979, 19982 (EB 2007) (“*Landis*”) (emphasis in original).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*, 22 FCC Rcd at 19982.

<sup>30</sup> *Contemporary Media*, 214 F.3d at 193.

<sup>31</sup> See, e.g., *Liberty Productions, a Limited Partnership, et al.*, Memorandum Opinion and Order, 16 FCC Rcd 12061, 12099 n.15 (2001) (Commissioner Tristani, dissenting) (citing *U.S. v. Bagley*, 473 U.S. 667 n.5 (1985) (Marshall, J., dissenting) (citing E. Cleary, *McCormick on Evidence* § 185 (3d ed. 1984); 1 J. Wigmore, *Evidence* § 2 (P. Tillers rev. 1982))).

<sup>32</sup> Character Exhibits, second unnumbered page.

<sup>33</sup> See generally Mo. Rev. Stat. §§ 589.400 – 589.425 (2014). The requirement to register as a sex offender is a lifetime requirement, absent certain narrow circumstances, such as reversal or vacation of the offenses, that do not exist here. Mo. Rev. Stat. § 589.400(3) (2014). See Missouri Highway Patrol Sex Offender Registry, searchable at <http://www.mshp.dps.mo.gov/CJ38/Search> (accessed May 21, 2014).

<sup>34</sup> Character Exhibits, sixth-seventh unnumbered pages.

executed more than ten years prior to the letter.<sup>35</sup> Stillings states that Rice's conduct that led to his criminal convictions was the result of a combination of psychiatric illnesses, specifically Bipolar Affective Disorder, Mixed; Dissociative Disorder, NOS; Dysthymia; and alcohol abuse.<sup>36</sup> Stillings opines that each of these illnesses is physiological in nature; that these physiological illnesses caused the conduct that led to Rice's criminal convictions; that Rice had no control over his conduct during episodes of mania and dissociation during which he engaged in his criminal activities; that Rice was unaware that he had these diseases prior to commencing treatment in 1991; and that he is neither a pedophile nor "in any sense a typical 'sex offender.'"<sup>37</sup> Stillings thus disputes the conclusion, from the fact of Rice's criminal convictions, that Rice is of bad character or unfit to be trusted to discharge his fiduciary responsibilities as a radio station licensee.<sup>38</sup> He states that each of Rice's disorders has been in remission for approximately ten years; that there is "absolutely no reason to anticipate that any of [Rice's] disorders will again become active, so long as [Rice] continues to take his prescribed medications and to pursue the appropriate therapy"; and that Rice is an "excellent patient, diligent and dedicated to his recovery and to maintaining his state of wellness" for the ten years prior to the 2001 declaration date.<sup>39</sup> Stillings also states that radio is Rice's "driving passion" and the "love of his life," and that to take his involvement with the radio business away from Rice would be "both tragically misguided and exceedingly harmful."<sup>40</sup>

15. We find Stillings's letter and declaration to be, in substantial part, in contradiction of the record in this case or beyond the scope of expert medical testimony.<sup>41</sup> While Stillings opines that Rice's criminal conduct was the result of a combination of physiological illnesses over which Rice had no volitional control, and that he should not be considered a "typical sex offender," it is clear that the sentencing court found Rice to be sufficiently responsible for his actions to be sentenced to a total of 84 years in prison, as well as to a 12-month sex offender program.<sup>42</sup> Stillings further states, in his covering letter, that "[i]t is [his] opinion, to a reasonable degree of medical and psychiatric certainty, that Mr. Rice is qualified for FCC licensure."<sup>43</sup> This, however, is a conclusion of law, not of medicine or psychiatry.<sup>44</sup>

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<sup>35</sup> Declaration of Wayne A. Stillings, M.D., dated May 17, 2001, Character Exhibits at eighth through fifteenth unnumbered pages ("Stillings Declaration").

<sup>36</sup> Stillings Declaration, ¶¶ 3, 6-7.

<sup>37</sup> *Id.*, ¶ 8.

<sup>38</sup> *Id.*, ¶ 9.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*, ¶ 10.

<sup>41</sup> The Commission's evidentiary rules for applications and pleadings outside of a designated hearing do not follow the Federal Rules of Evidence. *See* 47 C.F.R. §§ 73.3540 and 73.3584. In a designated hearing, however, such rules, including Fed. R. Evid. 702 ("Testimony By Expert Witnesses"), do apply, except to the extent that there is a determination that relaxation of such rules will better serve the ends of justice. *See* 47 C.F.R. § 1.351.

<sup>42</sup> *See CMI Decision*, 13 FCC Rcd at 14439; Character Exhibits, fourth unnumbered page ("Mr. Rice's medical treatment . . . also included Mr. Rice's successful completion of a 12-month Missouri Sexual Offender Program, which began on April 20, 1998.").

<sup>43</sup> Character Exhibits, seventh unnumbered page.

<sup>44</sup> We reiterate that Stillings's opinion regarding Rice's remission from his various illnesses is stated as a conditional: there is no reason to expect his disorders to return, *so long as* he continues taking his medication and participating in therapy. Stillings Declaration, ¶ 9. We note that the Bureau, which has application and licensing responsibilities for over 15,000 full-power broadcast stations and over 6,000 translator and booster broadcast stations, lacks both the expertise and the manpower to monitor any individual's compliance with medication and therapy programs.

In fact, Stillings does not limit himself to these areas of medical opinion, but rather argues forcefully for his patient's return to the broadcasting business.<sup>45</sup>

16. Viewed in its entirety, the Stillings declaration goes beyond being an objective medical assessment of Rice's actions and prognosis, reading more as a pleading advocating the ultimate legal result of this proceeding. Moreover where, as here, the declaration is 13 years old, there are questions regarding the probative value of any facts contained therein. A determination as to whether Rice is *presently* qualified to serve the public interest, convenience, and necessity should be based on a current and thorough assessment of his medical condition or, at the very least, on an assessment that is more recent than one that was prepared more than a decade ago. As such, Stillings's testimony does not assist us in reaching the ultimate legal and factual conclusions regarding the Application.

17. Of equal or perhaps greater importance, neither Stillings's letter or declaration, nor the other materials submitted, deals in any meaningful way with the second independent ground underlying the revocation of LBI's and the Rice Companies' prior authorizations, namely, Rice's lack of candor and misrepresentation regarding Rice's participation in the management and operation of his stations following his arrest. The Administrative Law Judge found, and both the Commission and the U.S. Court of Appeals for the District of Columbia Circuit affirmed, that LBI and the other Rice Companies lacked candor and made misrepresentations to the Commission regarding Rice's role in the management of his various stations as he awaited trial and sentencing.<sup>46</sup> As stated in the *CMI ID*,

As the sole shareholder of CMI and CBI, the (then) 67.5 percent shareholder of LBI, and an officer and director of all three corporations, Rice had the ultimate responsibility and duty to ensure that the Licensees' submissions to the Commission were complete, accurate, and truthful. This was especially important here since those reports related to his own activities. However, there is no record evidence that Rice made any attempt whatsoever to live up to his obligations in this regard.<sup>47</sup>

18. As the Commission found, the court affirmed, and Rice himself conceded, misrepresentation and lack of candor are sufficient grounds for revocation of licenses.<sup>48</sup> The misrepresentations and lack of candor were cited along with Rice's criminal convictions as separate and independent grounds for revoking the Rice Companies' authorizations.<sup>49</sup> However, LBI's rehabilitation showing is almost exclusively devoted to Rice's criminal convictions. Any determination regarding Rice's or LBI's qualifications to be a Commission licensee must include a determination regarding Rice's candor and truthfulness before the Commission. The Application does not present us with a sufficient record on which to make that determination.

19. Rice submits four letters in the Character Exhibits, each supporting his qualifications as a broadcast licensee. Each of the letters suffers from a deficiency noted by the Administrative Law Judge in the *CMI ID* with regard to character statements submitted on Rice's behalf during that proceeding, in

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<sup>45</sup> For example, Stillings asserts that "[s]ociety has a pressing moral responsibility to end such discrimination against the mentally ill," and that "[t]he Federal Communications Commission can discharge an important element of that responsibility by supporting Mike Rice's continued mental and physical health and by reconsidering its decision regarding his radio stations." *Id.*, ¶ 13. According to Stillings, "[t]o take on that responsibility would be an act of honor and courage" and "[t]o abrogate that responsibility would be ... a travesty." *Id.*

<sup>46</sup> See *CMI ID*, 12 FCC Rcd at 14295-14305; *CMI Decision*, 13 FCC Rcd at 14454-59; *Contemporary Media*, 214 F.3d at 196-98.

<sup>47</sup> *CMI ID*, 12 FCC Rcd at 14305. We note also that these activities took place after Rice's hospitalization and while he was being treated by Stillings, yet Stillings insists that Rice "has always been truthful." Stillings Declaration, para. 11.

<sup>48</sup> See, e.g., *Contemporary Media*, 214 F.3d at 196.

<sup>49</sup> *CMI Decision*, 13 FCC Rcd at 14459.

that they make no mention of Rice's criminal convictions, or otherwise indicate whether the writer is familiar with those aspects of Rice's background that led to his license revocations.<sup>50</sup> The closest such indication is in a letter from Frank Utley, a Rice neighbor since 1988, who states only that Rice "is a good person, and in my opinion fully recovered from the demons of his past."<sup>51</sup> This, however, falls short of evidencing any familiarity with the specifics of either Rice's criminal convictions or of the grounds for revocation of his radio station licenses. Kenny L. Robertson, who states he has known Rice for 25 years, speaks to Rice's election to the boards of a homeowners' association and a condominium association, states that based on his observation, Rice has "the respect of his neighbors," and is "always willing to help others in need."<sup>52</sup> Teddy Booker, who does not disclose how long he has known Rice, states that Rice exhibited honest dealings with him, that he finds Rice to be "an honorable honest person," and that he never noticed or heard any accusations against Rice.<sup>53</sup> Kevin Berlen, a former employee of Rice's radio stations who states he is currently the local manager of a Rice-owned communications tower, testifies only to the "extemporary (sic) operation" of Rice's stations, and that Berlen never noticed any violations of FCC regulations. Berlen characterizes the former Rice stations as "the finest technical facilities in the area."<sup>54</sup> The Berlen letter speaks exclusively of the technical facilities of the Rice Companies and Rice's qualities as a radio station operator, rather than addressing Rice's character qualifications. The other three letters consist primarily of vague platitudes concerning Rice's honesty, his positions with non-broadcast associations (that do not carry the same responsibilities for truthfulness and acting in the public interest that broadcast licensees do), and his personal kindness and willingness to help others in need. Such statements shed little light on Rice's character as a potential Commission licensee, particularly given that, as noted above, there is no indication that the declarants are aware of the details of Rice's background or his prior criminal acts, and could therefore speak to his rehabilitation from those past acts. While each of the four letters evinces the writer's favorable disposition toward Rice, we are unable to find on the basis of these letters that Rice possesses the requisite good character to become a Commission licensee.

20. *Informal Objection.* With regard to Child Protect's Informal Objection,<sup>55</sup> we believe the above discussion addresses Child Protect's first concern regarding Rice's past criminal convictions and potential rehabilitation. With regard to the WRZB(AM) LMA, however, Child Protect does not set forth facts sufficient to raise a substantial and material question of fact regarding Rice's alleged control over WRZB(AM). LMA's are not precluded by any Commission rule or policy, as long as our ownership rules are not violated and the participating licensee maintains ultimate control over its facilities.<sup>56</sup> The licensee maintains such control when it holds ultimate responsibility for essential station matters such as

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<sup>50</sup> See *CMI ID*, 12 FCC Rcd at 14294; *CMI Decision*, 13 FCC Rcd at 14446. See also *Contemporary Media*, 214 F.3d at 195 ("We cannot fault the FCC for concluding that those who vouched for Rice's character while evidencing little if any knowledge of his egregious acts cannot be regarded as credible on the subject.").

<sup>51</sup> Character Exhibits, nineteenth unnumbered page (Letter from Frank James Utley, Jr.).

<sup>52</sup> *Id.*, sixteenth unnumbered page (Letter from Kenny L. Robertson).

<sup>53</sup> *Id.*, seventeenth unnumbered page (Letter from Teddy Booker).

<sup>54</sup> *Id.*, eighteenth unnumbered page (Letter from Kevin Berlen).

<sup>55</sup> While Child Protect requests that we accept its filing as "an objection to and petition to deny" the Application, it was filed more than 30 days after public notice of the Application's acceptance for filing. *Broadcast Applications*, Public Notice, Report No. 27747 (MB May 29, 2012) at 3. Because it was untimely filed, it may not be considered as a petition to deny. 47 C.F.R. § 73.3584(a). Consistent with the Bureau's practice, we will consider the filing on its merits as an informal objection.

<sup>56</sup> *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rule Making, 18 FCC Rcd 13620, 13743 (2003) (subsequent history omitted).

programming, personnel, and finances.<sup>57</sup> Child Protect does not set forth specific facts, supported by the affidavit of a person with personal knowledge,<sup>58</sup> demonstrating that WRZB(AM)'s licensee abrogated its responsibility for station functions. Child Protect therefore does not make out a *prima facie* case of any statutory or rule violation, nor does Child Protect provide evidence to counter LBI's rebuttal of its allegations.<sup>59</sup> We thus decline to designate an issue regarding CMI's LMA of WRZB(AM).

#### IV. CONCLUSIONS

21. In light of the foregoing, we believe that there remain substantial and material questions of fact as to whether Rice, and therefore LBI, possesses the requisite character qualifications to be a Commission licensee. Having examined all of the record evidence regarding Rice's character and finding it lacking in probative value, and given the seriousness of the criminal behavior in which Rice engaged, we believe that a hearing before an Administrative Law Judge is warranted. In this regard, such a hearing will provide the best forum to evaluate whether Rice has been rehabilitated to an extent that the Commission is fully confident Rice will refrain from engaging in the kind of behavior for which he was convicted; Rice and/or LBI can be relied upon to be truthful, candid, and forthcoming in their dealings with the Commission; and Rice and/or LBI will comply in all other respects with the Commission's Rules, regulations, and policies.<sup>60</sup> Consequently, appropriate issues will be designated for hearing.

#### V. ORDERING CLAUSES

22. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(e), the captioned Application IS DESIGNATED FOR HEARING in a proceeding before an FCC Administrative Law Judge, at a time and place to be specified in a subsequent Order, upon the following issues:

- (a) To determine the effects, if any, of Michael S. Rice's felony convictions on his qualifications and/or the qualifications of Lake Broadcasting, Inc., to be a Commission licensee;
- (b) To determine the effects, if any, of the misrepresentation and lack of candor by Michael S. Rice's broadcast companies on his qualifications and/or the qualifications of Lake Broadcasting, Inc., to be a Commission licensee;

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<sup>57</sup> 47 U.S.C. § 310(d); 47 C.F.R. § 73.3540(a). *See also Solar Broadcasting Co., Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 5467, 5486 (2002) ("Although a licensee may delegate certain functions to an agent or employee on a day-to-day basis, ultimate responsibility for essential station matters, such as personnel, programming and finances, is nondelegable."); *Radio Moultrie, Inc.*, EB Docket No. 02-367, Order to Show Cause and Notice of Opportunity for Hearing, 17 FCC Rcd 24304, 24306-07 (2002) (stating that "the Commission looks not only to who executes the programming, personnel, and finance responsibilities, but also to who establishes the policies governing those three areas"); *Choctaw Broadcasting Corp.*, Memorandum Opinion and Order, 12 FCC Rcd 8534, 8538-39 (1997) ("[A] licensee involved in an LMA is not relieved of its responsibility to retain ultimate control.").

<sup>58</sup> Child Protect states only that it is its understanding, "on information and belief," that Rice manages WRZB(AM) as the controlling owner of the licensee. Informal Objection at 3.

<sup>59</sup> The LMA did not provide Rice with an ownership interest in WRZB(AM). Had it provided Rice with a cognizable ownership interest in the station, that would have raised a question as to the licensee's qualifications to remain a licensee. *See 1990 Policy Statement*, 5 FCC Rcd at 3252.

<sup>60</sup> In evaluating the evidentiary record in this proceeding, the Presiding Administrative Law Judge should consider whether crimes involving child sex abuse are so egregious, so utterly shocking to the conscience, and so patently inconsistent with the public interest, that a person so convicted, regardless of when the conviction took place, may be determined to be qualified to be a Commission licensee only in the most extraordinary and compelling of circumstances. *See 1986 Policy Statement*, 102 F.C.C.2d at 1205 n.60; *1990 Policy Statement*, 5 FCC Rcd at 3253 n.5.

(c) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether Michael S. Rice and/or Lake Broadcasting, Inc., is qualified to be a Commission licensee; and

(d) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether the captioned Application for consent to the assignment of license for Station W238CE should be granted.

23. IT IS FURTHER ORDERED that to avail themselves of the opportunity to be heard and the right to present evidence at a hearing in these proceedings, pursuant to Section 1.221 of the Commission's Rules, Lake Broadcasting, Inc., and Patrick Sullivan, in person or by their attorneys, SHALL FILE, within 20 days of the mailing of this Hearing Designation Order, written appearances in triplicate stating their respective intentions to appear on the date fixed for hearing and to present evidence on the issues specified in this Hearing Designation Order.

24. IT IS FURTHER ORDERED, pursuant to Section 1.221 of the Commission's Rules, that if Lake Broadcasting, Inc., or Patrick Sullivan fails to file a written appearance within the time specified above, or has not filed prior to the expiration of that time a petition to dismiss without prejudice, or a petition to accept, for good cause shown, such written appearance beyond expiration of said 20 days, the Presiding Administrative Law Judge shall expeditiously dismiss the captioned application with prejudice for failure to prosecute.

25. IT IS FURTHER ORDERED that the Chief, Enforcement Bureau, IS MADE A PARTY to this proceeding without the need to file a written appearance.

26. IT IS FURTHER ORDERED, that a copy of each document filed in this proceeding subsequent to the date of adoption of this Hearing Designation Order SHALL BE SERVED on the counsel of record appearing on behalf of the Chief, Enforcement Bureau. Parties may inquire as to the identity of such counsel by calling the Investigations & Hearings Division of the Enforcement Bureau at (202) 418-1420. Such service copy SHALL BE ADDRESSED to the named counsel of record, Investigations & Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12<sup>th</sup> Street, S.W., Washington, DC 20554.

27. IT IS FURTHER ORDERED, that the Presiding Administrative Law Judge shall not, in the context of this hearing proceeding, relitigate any of the findings of fact and/or conclusions of law contained in any order or opinion relating to the state court proceeding in which Michael S. Rice was determined to be a convicted felon or in any order or opinion relating to the Commission proceeding in which Michael S. Rice and/or the broadcast companies in which he held an interest were previously determined to be unqualified.

28. IT IS FURTHER ORDERED, that, in accordance with Section 309(e) of the Communications Act of 1934, as amended, the burdens of proceeding with the introduction of evidence and of proof with respect to all issues designated herein SHALL BE upon the parties to the captioned application.

29. IT IS FURTHER ORDERED that, given the very serious questions that exist as to whether Michael S. Rice and/or Lake Broadcasting, Inc. is qualified to hold a Commission license and operate a radio facility in the public interest, the Presiding Administrative Law Judge shall, to the fullest extent possible, ensure that each of the issues designated herein is thoroughly explored and his Initial Decision is predicated on a full and complete evidentiary record.

30. IT IS FURTHER ORDERED, that the parties to the captioned application shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended,<sup>61</sup> and Section 73.3594 of the

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<sup>61</sup> 47 U.S.C. § 311(a)(2).

Commission's Rules,<sup>62</sup> GIVE NOTICE of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Commission's Rules.<sup>63</sup>

31. IT IS FURTHER ORDERED that the December 20, 2012, letter filing of Child Protect IS DISMISSED as a Petition to Deny. IT IS FURTHER ORDERED that the December 20, 2012, letter filing of Child Protect IS DENIED as an Informal Objection as to the allegations therein regarding an unlawful transfer of control of station WRZB(AM) to Contemporary Media, Inc. and/or Michael S. Rice.

32. IT IS FURTHER ORDERED that copies of this Hearing Designation Order SHALL BE SENT *via* Certified Mail, Return Receipt Requested, and by regular first class mail to the following:

Jerold L. Jacobs, Esq.  
Cohn and Marks LLP  
1920 N Street, N.W.  
Suite 300  
Washington, DC 20036-1622  
(Attorney for Patrick Sullivan and Lake Broadcasting, Inc.)

Patrick Sullivan  
22932 Abrolat Road  
Wright City, MO 63390

Lake Broadcasting, Inc.  
P.O. Box 1268  
St. Peters, MO 63376

Jannah M. Bailey, Executive Director  
Child Protect  
935 S. Perry Street  
Montgomery, AL 36104

33. IT IS FURTHER ORDERED that the Secretary of the Commission shall cause to have this Hearing Designation Order or a summary thereof published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake  
Chief, Media Bureau

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<sup>62</sup> 47 C.F.R. § 73.3594.

<sup>63</sup> 47 C.F.R. § 73.3594(g).

# EXHIBIT B

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

FCC 14M-16

In the Matter of	)	MB Docket No. 14-82
	)	
<b>PATRICK SULLIVAN</b>	)	FRN 0003749041, 0006119796,
(Assignor)	)	0006149843, 0017196064
	)	
and	)	Facility ID No. 146162
	)	
<b>LAKE BROADCASTING, INC.</b>	)	File No. BALFT-20120523ABY
(Assignee)	)	
	)	
Application for Consent to Assignment of	)	
License of FM Translator Station W238CE,	)	
Montgomery, Alabama	)	

**ORDER**

Issued: May 27, 2014

Released: May 27, 2014

**IT IS ORDERED** that Chief Administrative Law Judge Richard L. Sippel shall serve as Presiding Judge in the above-entitled proceeding.<sup>1</sup>

**IT IS FURTHER ORDERED** that a prehearing conference will be held in Hearing Room A, TW-A363 at Commission Headquarters, located at 445 12th Street, S.W., Washington, D.C. 20554, on **June 24, 2014, commencing at 10:00 a.m.**, at which a hearing date shall be set.

**IT IS FURTHER ORDERED** that all hearing proceedings shall take place in the Headquarters of the Commission at that same location.

**IT IS FURTHER ORDERED** that all parties shall file timely Notices of Appearance in accordance with Commission’s hearing proceeding rules.<sup>2</sup> All parties are put on notice that they

<sup>1</sup> Courtesy copies of Notices of Appearance, Pleadings, and Motions that do not exceed twenty-five (25) pages in length are to be e-mailed or faxed to the Office of Administrative Law Judges, fax number (202) 418.0195. E-mail is preferred in providing copies to the Presiding Judge and to all counsel.

<sup>2</sup> 47 C.F.R. 1.221. See also *Patrick Sullivan and Lake Broadcasting, Inc.*, Hearing Designation Order, MB Docket No. 14-82 at 10 ¶¶ 23-24 (2014) (“HDO”).

are expected to be fully cognizant of Part 1 of the Commission's rules concerning Practice and Procedure.<sup>3</sup>

FEDERAL COMMUNICATIONS COMMISSION<sup>4</sup>

A handwritten signature in black ink, appearing to read "Richard L. Sippel". The signature is written in a cursive style with a large, prominent initial "R".

Richard L. Sippel  
Chief Administrative Law Judge

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<sup>3</sup> 47 C.F.R. Part 1, Subparts A and Subpart B.

<sup>4</sup> Courtesy copies of this *Order* will be sent via U.S. mail on issuance to parties listed in the HDO (DA 14-703), released May 23, 2014.

14-1025

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE: PATRICK M. SULLIVAN,  
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION

**CERTIFICATE OF SERVICE**

I, Maureen K. Flood, hereby certify that on May 29, 2014, I electronically filed the foregoing Opposition Of The Federal Communications Commission To Petition For A Writ Of Mandamus with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Jerold L. Jacobs  
Law Office of Jerold L. Jacobs  
1629 K Street, NW  
Suite 300  
Washington, D.C. 20006  
*Counsel for: Patrick M. Sullivan &  
Lake Broadcasting, Inc.*

*/s/ Maureen K. Flood*