

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

In re Matter of
Michael S. Rice and his wholly owned companies,
Contemporary Media, Inc.
Contemporary Broadcasting, Inc.
Lake Broadcasting, Inc.
Petition for Equitable Relief/ Motion for Extension of
Operating Authority

MEMORANDUM OPINION AND ORDER

Adopted: February 26, 2002

Released: February 28, 2002

By the Commission:

1. The Commission has before it an August 2, 2001 Application for Review filed by Michael S. Rice and the captioned wholly owned companies ("Rice"). Rice seeks Commission review of the July 3, 2001 Public Notice (the "Public Notice") issued by the Mass Media Bureau and the Wireless Telecommunications Bureau ("Bureaus") which, among other things, dismissed Rice's June 1, 2001 "Petition for Equitable Relief/Motion for Extension of Operating Authority" ("Petition") pursuant to which Rice sought to retain his authorizations or, alternatively, that he be permitted to assign them to qualified buyers.1 For the reasons set forth below, we deny the Application for Review.

1 Public Notice, "Permanent and Interim Application Procedures Announced for Authority to Operate Stations Formerly Licensed to Entities Controlled by Michael Rice," DA 01-1441 (M.M. Bur./W.T. Bur., July 3, 2001). In this Public Notice, the Bureaus also (1) invited applications for interim authority to operate the five formerly licensed Rice stations; (2) invited applications for permanent operation of the two formerly licensed Rice facilities in Terre Haute, Indiana; and (3) granted Rice special temporary authorization to continue operations for 90 days.

2. The background of this matter has been detailed several times, most recently in our *Memorandum Opinion and Order* released October 3, 2001,² and need not be reiterated at length here. It is sufficient to note that, on August 11, 1994, Rice was convicted of four felony counts of sodomy, six felony counts of deviate sexual assault in the first degree, and two felony counts of deviate sexual assault in the second degree. He was incarcerated for these offenses between September 1994 and December 1999. In 1997, after a full evidentiary hearing,³ the presiding Administrative Law Judge held that all of Rice's authorizations should be revoked. *Initial Decision*, 12 FCC Rcd 14,254 (ALJ 1997). We affirmed that decision without oral argument in 1998, concluding that, in addition to Rice's criminal conduct, the Rice stations "misrepresented and lacked candor in reporting to the Commission that, subsequent to his arrest, Rice was completely excluded from any further involvement in the management and operation of the Licensee's radio stations." *Memorandum Opinion and Order*, 13 FCC Rcd 14,437, 14,454 (1998). We therefore revoked each of the Rice station authorizations, permitting the Rice stations to continue to operate until 12:01 AM on the ninety first day following completion of judicial review. On June 16, 2000, the Court of Appeals for the District of Columbia Circuit affirmed the Commission's decision,⁴ and on March 19, 2001, the Supreme Court denied Rice's petition for *certiorari*.⁵ Rice did not seek rehearing, and the operating authority of the Rice stations was scheduled to terminate on July 17, 2001.

3. Following finality, the Bureaus released the *Public Notice* announcing application procedures for permanent authorizations for the five formerly licensed stations and two construction permits held by Rice, granting the former licensees special temporary authorization to continue operations for a period not to exceed 90 days. The Bureaus also dismissed the Petition for Equitable Relief as "an untimely and collateral challenge to a proceeding that has been final since April 13, 2001, the deadline for seeking rehearing of the Supreme Court's denial of *certiorari*."

4. Rice raises five arguments in its application for review which, he claims, warrant both reversal of the Bureaus' dismissal of the Petition and the commencement of a supplemental hearing on Rice's qualifications to be a Commission licensee. Rice claims that: (1) the *Public Notice* exceeded the Bureaus' delegated authority under the Commission's Rules and is therefore void *ab initio*; (2) the Bureaus' action violated the "signed order" requirement in the delegated authority provisions of 47 C.F.R. §0.204; (3) the Bureaus' action is "arbitrary, capricious, and contrary to law" because it gave no consideration to the merits of the Petition; (4) the Bureaus' action failed to accord Rice a fair public interest hearing in violation of the Communications Act and the Due Process Clause of the Fifth Amendment to the United States Constitution; and (5) even if no supplemental hearing is provided, the public interest would support the alternative relief requested in the Petition. Our action here renders moot any claim regarding whether or not the Bureaus acted properly under their delegated authority.

5. Rice's Application for Review, like his Petition, assumes without discussion that there is some legal basis for permitting Rice to "retain his radio properties" (Pet. at 34), despite the fact that the

² *Memorandum Opinion and Order, Michael S. Rice and his wholly owned companies*, FCC 01-300 (released October 3, 2001) ("*October 3 Order*"), *appeal docketed*, Case No. 01-1474 (D.C. Cir., November 1, 2001).

³ The Rice authorizations were set for evidentiary hearing in the *Order to Show Cause and Notice of Apparent Liability*, 10 FCC Rcd 13,685 (1995).

⁴ *Contemporary Media, Inc. v. FCC*, 214 F.3d 187 (D.C. Cir. 2000).

⁵ *Contemporary Media, Inc. v. FCC*, ___ U.S. ___, 121 S.Ct. 1355 (2001).

Commission has revoked the licenses for those stations in an action that became final and no longer subject to judicial review before Rice filed the petition at issue here. In this regard, the application for review is contrary to well-settled principles of finality. See *Greater Boston Television Corp. v. FCC* 463 F.2d 268, 336 (D.C.Cir. 1971), *cert. denied*, 406 U.S. 950 (1972) (“The general interest of repose gains dominance, in our view, with the issuance of a ‘final’ administrative order – a term here used to designate an order which is no longer subject to appeal to the court, for which no administrative reconsideration is permitted by the regulatory statute.”); *Crosthwait v. FCC*, 584 F.2d 550, 556 (D.C.Cir. 1978)(same); *Gonzales Broadcasting, Inc.*, 14 FCC Rcd 10,951 ¶2 (1999) (“The Supreme Court has denied [the applicant’s] petition for writ of certiorari. The denial of [the] application is therefore final and, in the absence of evidence that the decision was obtained fraudulently or as a result of other misconduct affecting the integrity of the judicial process, we are not persuaded that these is a basis for the Commission to ask the court to recall the mandate in this case, or to support a further motion filed by Jelks with the court.”); see also *International Union of Mine, Mill and Smelter Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 341 (1945) (“Administrative flexibility and judicial certainty are not contradictory; there must be an end to disputes which arise between administrative bodies and those over whom they have jurisdiction.”).

6. As a result, we deny the application for review. Since the revocation of the Rice authorizations is final, Rice has nothing to “retain.” We have reviewed the numerous claims in Rice’s petition and lengthy attachments and supplements, and we are not persuaded that anything has been presented that suggests that there was any injustice or fraud in the proceedings that led to the revocation of these licenses. Indeed, we find nothing in the petition that would have warranted reopening the hearing if Rice’s claims had been timely raised. See, e.g., *Eve Ackerman*, 8 FCC Rcd 4205 ¶6 (1993)(reopening record after close of hearing requires showing of new evidence or evidence that could not have been discovered earlier that presents substantial likelihood of affecting outcome of hearing). The petition points to no evidence that was not known to Rice while this matter was still before the Commission, or could not have been easily discovered by him with reasonable diligence. Moreover, Rice’s claim that he in essence lacked effective assistance of counsel, which forms the basis for virtually all of his arguments, appears to be merely second-guessing about an unsuccessful legal strategy that Rice and his companies pursued in earlier proceedings.

7. Accordingly, the August 2, 2001 Application for Review filed by Michael S. Rice and his wholly owned companies IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary