

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

In the Matter of)	
)	MB Docket No. 14-82
Patrick Sullivan)	
)	FRN: 0003749041, 0006119796,
and)	0006149843, 0017196064
)	
Lake Broadcasting, Inc.)	Facility ID No. 146162
)	
For Commission Consent to the Assignment of)	File No. BALFT-20120523ABY
License of FM Translator Station W238CE,)	
Montgomery, Alabama)	

MEMORANDUM OPINION AND ORDER

Adopted: April 20, 2018

Released: April 26, 2018

By the Commission: Commissioner O’Rielly issuing a statement.

I. INTRODUCTION

1. This Memorandum Opinion and Order denies an interlocutory appeal by Lake Broadcasting, Inc. (LBI).¹ LBI seeks review of a decision by Chief Administrative Law Judge Richard L. Sippel (ALJ) denying its Petition to Disqualify the ALJ.² We find that LBI did not make the requisite showing of bias necessary to warrant the ALJ’s disqualification from this proceeding and therefore deny its appeal.

II. BACKGROUND

2. Patrick Sullivan is the licensee of Station W238CE, Montgomery, Alabama (Station). On May 23, 2012, he filed the above-captioned application for Commission consent to the assignment of the Station license to LBI.³

3. The president, director, and sole shareholder of LBI is Michael S. Rice (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 misrepresentations to and lack of candor

¹ Appeal from Ruling Denying Motion to Disqualify Presiding Officer; Request for Oral Argument, MB Docket No. 14-82 (filed August 30, 2017) (LBI AFR).

² See Motion to Disqualify the Presiding Judge, MB Docket No. 14-82 (filed May 9, 2017); *Patrick Sullivan and Lake B’casting, Inc., Application for Consent to Assignment of License of FM Translator Station W238CE, Montgomery, Alabama*, Memorandum Opinion and Order, MB Docket No. 14-82, FCC 17M-31, at 8 (rel. August 28, 2017) (*Order on Motion to Disqualify*).

³ FCC File No. BALFT-20120523ABY.

before the Commission.⁴ On May 23, 2014, the Media Bureau initiated a hearing before the ALJ to determine whether the application for assignment should be granted.⁵

4. Pursuant to Section 309(e) of the Communications Act of 1934, as amended (the Act), the Commission is required to designate an application for evidentiary hearing if there is a substantial and material question of fact as to whether grant of an application, such as the application for assignment here at issue, would serve the public interest, convenience, and necessity.⁶ The Media Bureau's Hearing Designation Order specified four issues to be determined at the hearing: (a) whether Rice's felony convictions affect his qualifications and/or the qualifications of LBI to be a Commission licensee; (b) whether Rice's misrepresentations affect his qualifications and/or the qualifications of LBI to be a Commission licensee; (c) whether Rice and/or LBI is qualified to be a Commission licensee; and (d) whether the above captioned assignment application for the Station should be granted.⁷

5. The first prehearing conference was scheduled for June 24, 2014,⁸ and a lengthy prehearing process followed. Over the next three years, LBI and the Enforcement Bureau sought resolution of numerous discovery and evidentiary disputes from the ALJ.⁹ A hearing commenced on May 3, 2017.¹⁰ Two days later, on May 5, 2017, LBI's counsel stated that his client had decided to "withdraw his application and withdraw from the proceeding, thereby ending the case."¹¹

6. On May 8, 2017, LBI filed a Motion to Dismiss the assignment application.¹² Subsequently, Sullivan, the assignor, filed a "Further Motion to Dismiss" and declared his intention to sell the Station to a third party rather than LBI.¹³ The ALJ denied both motions on the ground that "put[ting] off the trial of [Rice's] character issues would run the risk of losing witnesses and/or their recollections, and other relevant evidence becoming stale."¹⁴

⁴ See *Contemporary Media, Inc.*, Initial Decision, 12 FCC Rcd 14254 (ALJ 1997); *Contemporary Media, Inc.*, Decision, 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).

⁵ *Patrick Sullivan and Lake B'casting, Inc., Application for Consent to Assignment of License of FM Translator Station W238CE, Montgomery, Alabama*, Hearing Designation Order, 29 FCC Rcd 5421 (MB 2014) (*Hearing Designation Order*).

⁶ 47 U.S.C. § 309(e).

⁷ *Hearing Designation Order*, 29 FCC Rcd at 5429-30, para. 22.

⁸ *Patrick Sullivan and Lake B'casting, Inc., Application for Consent to Assignment of License of FM Translator Station W238CE, Montgomery, Alabama*, Order, MB Docket No. 14-82, FCC 14M-16 (rel. May 27, 2014).

⁹ See, e.g., *infra* notes 43-45.

¹⁰ *Patrick Sullivan and Lake B'casting, Inc., Application for Consent to Assignment of License of FM Translator Station W238CE, Montgomery, Alabama*, Order, EB Docket No. 14-82, FCC 17M-22 (rel. April 27, 2017).

¹¹ *Patrick Sullivan and Lake B'casting, Inc., Application for Consent to Assignment of License of FM Translator Station W238CE, Montgomery, Alabama*, Order, EB Docket No. 14-82, FCC 17M-25, at 3 (rel. June 8, 2017) (*Order on Motion to Dismiss*) (quoting hearing transcript).

¹² Motion to Dismiss, MB Docket No. 14-82 (filed May 8, 2017) (Motion to Dismiss).

¹³ Further Motion to Dismiss, MB Docket No. 14-82 (filed May 11, 2017).

¹⁴ *Order on Motion to Dismiss* at 2-3. More specifically, during the hearing, the ALJ "asked [LBI]'s counsel whether Mr. Rice and/or [LBI] planned to file any more broadcasting applications ... in order to ascertain whether the character issues regarding Mr. Rice could recur in a future hearing should the [motions to dismiss] be granted." *Id.* at 2. LBI's Motion to Dismiss stated that it would "not file any further broadcast applications," but made no assurances as to Rice in an individual capacity. See Motion to Dismiss at 1.

7. On May 9, 2017, a day after LBI filed its Motion to Dismiss and before the ALJ's denial of that motion, LBI filed a Motion to Disqualify the Presiding Judge (Motion).¹⁵ The Motion claimed that the ALJ made "such serious errors and flagrant abuse of discretion ... that the ineluctable conclusion must be reached that the [ALJ] has become prejudiced and biased against [LBI] and [Rice]."¹⁶ LBI attached to the Motion a declaration signed by its attorney, Jerold L. Jacobs, describing the bases for its claim.¹⁷ The declaration described two fundamental bases for LBI's charge: first, that the ALJ acted in an inappropriate manner toward LBI's counsel and witnesses; and second, that the ALJ made interlocutory rulings that were not in favor of LBI.¹⁸ The ALJ declined to disqualify himself, finding that LBI "failed to meet its burden to establish a 'bent of mind' against [LBI] and/or Mr. Rice by the [ALJ] which might warrant his disqualification."¹⁹ LBI appealed the ALJ's refusal to disqualify himself.²⁰ On September 11, 2017, pursuant to Section 1.245(b)(4) of the Commission's Rules,²¹ the ALJ certified LBI's appeal to the Commission.²²

III. DISCUSSION

8. Commission Rules provide that "[a]ny party may request the presiding officer to withdraw on grounds of personal bias or other disqualification."²³ Commission precedent holds that "[i]n order to justify a request to disqualify the Presiding Judge from an adjudicatory proceeding, a party must demonstrate personal bias or prejudice impairing the Presiding Judge's ability to act in an impartial manner."²⁴ We operate under a "strong presumption that the ALJ has acted in a fair and impartial manner,"²⁵ and the burden, which past rulings have described as "a heavy one," is on the party alleging bias.²⁶

9. The Commission has held that "[o]rdinarily, '[t]he alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.'"²⁷ However, because "it is not always possible to establish an extra-judicial source of bias," Commission precedent has held that "the comments and rulings of the trier of fact may be relevant to the existence of prejudice."²⁸ While an ALJ's rulings may be relevant to establishing bias, "the *substance* of an ALJ's interlocutory rulings are not a

¹⁵ Motion to Disqualify the Presiding Judge, MB Docket No. 14-82 (filed May 9, 2017).

¹⁶ *Id.* at 2-3.

¹⁷ *Id.* at 4-7.

¹⁸ *Id.*

¹⁹ *Order on Motion to Disqualify* at 8.

²⁰ LBI AFR.

²¹ 47 CFR § 1.245(b)(4).

²² *Patrick Sullivan and Lake B'casting, Inc., Application for Consent to Assignment of License of FM Translator Station W238CE, Montgomery, Alabama*, Order, EB Docket No. 14-82, FCC 17M-33 (rel. September 11, 2017).

²³ 47 CFR § 1.245(b).

²⁴ *Family B'casting, Inc.*, 17 FCC Rcd 19332, 19333, para. 7 (2002).

²⁵ *Catalina Radio*, 5 FCC Rcd 3710, 3710, para. 7 (1990).

²⁶ *Family B'casting, Inc.*, 17 FCC Rcd at 19333, para. 7.

²⁷ *Applications of WWOR-TV, Inc. for Renewal of License of Station WWOR(TV), Secaucus, New Jersey*, 4 FCC Rcd 6155, 6155, para. 4 (1989) (quoting *United States v. Grinnel Corp.*, 384 U.S. 563, 583 (1966)).

²⁸ *KAYE B'casting, Inc.*, 35 FCC 2d 548, 548, para. 3 (1972); accord. *Liteky v. United States*, 510 U.S. 540, 551 (1994) (while an "extrajudicial source" ... is the only *common* basis, [it is] not the exclusive one, since it is not the *exclusive* reason a predisposition can be wrongful or inappropriate").

basis for disqualification because they are subject to review.”²⁹ And whenever a party claims bias based on matters arising during the proceeding, the relevant inquiry is whether the ALJ displayed a “deep-seated favoritism or antagonism that would make fair judgment impossible.”³⁰

10. We examine LBI’s claims of bias in accordance with our precedent. We understand LBI to make two general claims in support of its charge of bias. First, LBI claims that the ALJ acted in an inappropriate manner toward LBI’s counsel and witnesses.³¹ Second, LBI alleges that the ALJ made numerous interlocutory rulings that were not in its favor.³² As stated, because LBI has not alleged that the ALJ has relied on knowledge acquired outside of this proceeding, the relevant standard is whether the ALJ has displayed “favoritism or antagonism that would make fair judgment impossible.”³³ As explained below, we find that the ALJ has displayed no such favoritism or antagonism.

11. We first examine LBI’s claim of inappropriate conduct by the ALJ. LBI claims that it “and its counsel have silently withstood almost three years of bias and prejudice” by the ALJ, “culminating in a grueling three days of hearing.”³⁴ Despite its conclusory claims, nothing LBI’s counsel describes in his affidavit reflects the degree of favoritism or antagonism necessary to support disqualification. LBI’s counsel recounts three instances of alleged improper conduct on the part of the ALJ. First, he describes interruptions by the ALJ during cross-examination of Rice while he was on the stand, including “needling” of the witness and expression of “incredulity” at the witness’s statements.³⁵ Second, he describes the ALJ’s questioning of two witnesses regarding matters he believes to have been outside the scope of the hearing.³⁶ Third, LBI’s counsel states that the ALJ “showed general impatience” toward him while he was questioning a witness and cut the questioning short.³⁷ The ALJ explains that he “was only performing his duties to understand the issues, to avoid undue delay in the proceedings, and to protect witnesses from undue inconvenience.”³⁸

12. LBI’s allegations of improper ALJ conduct fall short of the standard required for disqualification. In general, “expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women ... sometimes display” do not warrant disqualification.³⁹ Further, the Commission has found that allegations that a hearing examiner—what we today call an ALJ—cut off testimony and otherwise “took over the examination of witnesses” is not grounds for disqualification.⁴⁰ LBI alleges only that the ALJ was brusque toward its witness (Rice) and its counsel, and that the ALJ managed testimony differently than LBI would have liked. These allegations do not meet the standard for disqualification.

²⁹ *WWOR-TV, Inc.*, 4 FCC Rcd at 6155, para. 4 (emphasis added).

³⁰ *Family B’casting, Inc.*, 17 FCC Rcd at 19334, para. 8 (quoting *Liteky*, 510 U.S. at 555).

³¹ LBI AFR at 7-8.

³² *Id.* at 7-9.

³³ *Family B’casting, Inc.*, 17 FCC Rcd at 19334, para. 8 (quoting *Liteky*, 510 U.S. at 555).

³⁴ LBI AFR at 2.

³⁵ *Id.* at 7.

³⁶ *Id.* at 7-8.

³⁷ *Id.* at 8.

³⁸ *Order on Motion to Disqualify* at 7.

³⁹ *Liteky*, 510 U.S. at 555-56.

⁴⁰ *KAYE B’casting, Inc.*, 35 FCC 2d at 550, para. 7 (finding disqualification was not required where party claimed hearing examiner “badgered, harassed, and cut off testimony of its witnesses, [and] refused to give reasons for sustaining objections to questions asked by [its] counsel”).

13. LBI next describes a perceived pattern of interlocutory rulings that were not in its favor. These rulings, per LBI's telling, are evidence of the ALJ's bias and his "erroneous[] conver[sion of] a simple judicial inquiry into whether Mr. Rice was rehabilitated from his previous criminal misconduct into a prurient rehash of events that took place prior to his arrest in 1990 with hardly any reference to Mr. Rice's conduct since that time."⁴¹ Specifically, LBI's counsel points to the ALJ's rulings on June 11, 2015,⁴² August 4, 2015,⁴³ April 27, 2017,⁴⁴ and his denial of LBI's Motion to Dismiss⁴⁵ as emblematic of this asserted bias.⁴⁶ The ALJ defends his interlocutory rulings and the scope of evidence admitted on the merits, and further argues that Commission precedent provides that the substance of interlocutory rulings are not grounds for disqualification.⁴⁷

14. We agree with the ALJ. LBI bases its disqualification challenge on the "substance of an ALJ's interlocutory rulings," which we have clearly held is "not a basis for disqualification."⁴⁸ Outside of its displeasure with the substance of the ALJ's interlocutory rulings, LBI gives us no reason to believe the rulings evince bias. To the contrary, we note that one of LBI's cited rulings⁴⁹ found *in its favor* on half of the disputed issues—hardly evidence of "favoritism or antagonism that would make fair judgment impossible."⁵⁰ LBI is free to raise challenges to the denial of its motions on appeal, after a final order disposing of the case has been issued.⁵¹ And "the gravamen of [LBI]'s grievance,"⁵² that the ALJ is likely to rely on evidence outside the scope of the Hearing Designation Order, can similarly be examined after the ALJ has issued an opinion.

⁴¹ LBI AFR at 3.

⁴² *Patrick Sullivan and Lake B'casting, Inc., Application for Consent to Assignment of License of FM Translator Station W238CE, Montgomery, Alabama*, Order, EB Docket No. 14-82, FCC 15M-22 (rel. June 11, 2015).

⁴³ *Patrick Sullivan and Lake B'casting, Inc., Application for Consent to Assignment of License of FM Translator Station W238CE, Montgomery, Alabama*, Order, EB Docket No. 14-82, FCC 15M-26 (rel. August 4, 2015).

⁴⁴ *Patrick Sullivan and Lake B'casting, Inc., Application for Consent to Assignment of License of FM Translator Station W238CE, Montgomery, Alabama*, Order, EB Docket No. 14-82, FCC 17M-22 (rel. April 27, 2017).

⁴⁵ *Order on Motion to Dismiss*.

⁴⁶ LBI AFR at 3, 7.

⁴⁷ *Order on Disqualification* at 4-6.

⁴⁸ *WWOR-TV, Inc.*, 4 FCC Rcd at 6155, para. 4.

⁴⁹ *Patrick Sullivan and Lake B'casting, Inc., Application for Consent to Assignment of License of FM Translator Station W238CE, Montgomery, Alabama*, Order, EB Docket No. 14-82, FCC 15M-22 (rel. June 11, 2015).

⁵⁰ *Family B'casting, Inc.*, 17 FCC Rcd at 19334, para. 8 (quoting *Liteky*, 510 U.S. at 555).

⁵¹ *Catalina Radio*, 5 FCC Rcd at 3710, para. 5.

⁵² LBI AFR at 3.

IV. ORDERING CLAUSES

15. IT IS ORDERED that Lake Broadcasting, Inc.'s Appeal from Ruling Denying Motion to Disqualify Presiding Officer; Request for Oral Argument (filed August 30, 2017, by Lake Broadcasting, Inc.) IS DENIED.⁵³

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁵³ LBI requests oral argument before the Commission on its appeal. LBI AFR at 1. We find, however, that oral argument would not assist us in resolving these matters.

**STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: *Patrick Sullivan and Lake Broadcasting, Inc. For Commission Consent to the Assignment of License of FM Translator Station W238CE, Montgomery, Alabama, MB Docket No. 14-82; William F. Crowell, Application to Renew License for Amateur Radio Service Station W6WBJ, WT Docket No. 08-20*

While I approve these items confirming that the requisite showing of bias necessary to disqualify an ALJ was not met, and therefore the appeal must be denied, I feel it is important to make a few observations.

While the bias burden may not have been met because it rightfully remains high, I am concerned that the ALJ took unnecessary actions in these situations. For example, denying a motion to dismiss in order to pursue a case on the character of someone who decided to withdraw his application to be a Commission licensee appears to me to be a questionable use of resources.

The Sullivan item also describes a “lengthy prehearing process” of over three years. Three years! This is an absurd amount of time needed to resolve such a matter and reinforces to me the need to fully weigh the costs and benefits of the ALJ process.

On a larger scale, complaints about the ALJ process are not isolated incidents but paint a picture of questionable decisions coupled with an elevated level of inefficiency. It seems to me that too often the Commission has had to reverse the decisions of the ALJ or address one ALJ decision or another. To its credit, the media bureau has begun to use paper hearings to completely avoid this bureaucratic mess. This reality only reaffirms my call to consider eliminating the ALJ process altogether.