

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

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

INITIAL DECISION

Issued: May 30, 2019

Released: May 30, 2019

Appearances: Jerold L. Jacobs, Esq., on behalf of Patrick Sullivan and Lake Broadcasting, Inc.; William Knowles-Kellet, Esq., and Gary A. Oshinsky, Esq., on behalf of the Enforcement Bureau, Federal Communications Commission

Statement of the Case

1. In May 2012, Patrick Sullivan, the licensee of FM Translator Station W238CE in Montgomery, Alabama, filed an application seeking to assign his license to Lake Broadcasting, Inc. (LBI). LBI's president, director, and sole shareholder, Michael S. Rice, is a convicted sex offender who, through LBI and other entities, previously held radio station authorizations that were revoked on the basis of his felony convictions and misrepresentation to and lack of candor before the Commission.¹ As a result, the Chief, Media Bureau, designated the assignment application for hearing.² The *Hearing Designation Order* in this proceeding specified the following issues for resolution by an Administrative Law Judge:

(a) To determine the effects, if any, of Michael S. Rice's felony convictions on his

¹ *Contemporary Media, Inc.*, Initial Decision, 12 FCC Rcd 14254 (ALJ 1997); *aff'd 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).

² *Patrick Sullivan and Lake Broadcasting, Inc., Application for Consent to Assignment of License of FM Translator Station W238CE, Montgomery, Alabama*, MB Docket No. 14-82, Hearing Designation Order, 29 FCC Rcd 5421 (MB 2014) (*Hearing Designation Order*).

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.³

2. After discovery and resolution of pretrial motions, a hearing was held at FCC Headquarters over three days, from May 3, 2017, through May 5, 2017. Testimony was presented by Mr. Rice, two mental health professionals, and a law enforcement official. On the afternoon of the third day of the hearing, counsel for Patrick Sullivan and LBI indicated that his clients had decided to withdraw the assignment application. To that end, both parties, represented by the same attorney, filed separate motions to dismiss,⁴ and LBI filed a Motion to Disqualify the Presiding Judge.⁵ The Presiding Judge denied the motions to dismiss, expressing his concern that, "given Mr. Rice's unwillingness to state whether he plans to seek another Commission license," the agency could be faced with relitigating the same issues in the future.⁶ The Presiding Judge also denied LBI's Motion to Disqualify the Presiding Judge and certified LBI's appeal of that decision to the Commission as required by section 1.245(b)(4) of the Commission's rules.⁷ The Commission denied LBI's appeal on April 26, 2018, whereupon the parties submitted their proposed findings of fact and conclusions of law.⁸

³ *Hearing Designation Order*, 29 FCC Rcd at 5429-30, para. 22.

⁴ Lake Broadcasting, Inc., Motion to Dismiss, MB Docket No. 14-82 (filed May 8, 2017), <https://ecfsapi.fcc.gov/file/105080387515195/Lake%20Motion%20to%20Dismiss%205-8-17.pdf>; Patrick Sullivan, Further Motion to Dismiss, MB Docket No. 14-82 (filed May 11, 2017), <https://ecfsapi.fcc.gov/file/10511250329937/Sullivan's%20Motion%20to%20Dismiss%205-11-17.rtf>.

⁵ Lake Broadcasting, Inc., Motion to Disqualify the Presiding Judge, MB Docket No. 14082 (filed May 9, 2017), <https://ecfsapi.fcc.gov/file/105100714503117/Lake's%20Motion%20to%20Disqualify%20the%20Presiding%20Judge.rtf>.

⁶ *Patrick Sullivan and Lake Broadcasting, Inc., Application for Consent to Assignment of License of FM Translator Station W238CE, Montgomery, Alabama*, MB Docket No. 14-82, Order, FCC 17M-25, 2017 WL 2484961, at 3 (ALJ June 8, 2017) (*Order Denying Motion to Dismiss*).

⁷ 47 CFR § 1.245(b)(4); *Patrick Sullivan and Lake Broadcasting, Inc., Application for Consent to Assignment of License of FM Translator Station W238CE, Montgomery, Alabama*, MB Docket No. 14-82, Memorandum Opinion and Order, FCC 17M-31, 2017 WL 3725840 (ALJ Aug. 28, 2017) (*Disqualification Denial Order*); *Patrick Sullivan and Lake Broadcasting, Inc., Application for Consent to Assignment of License of FM Translator Station W238CE, Montgomery, Alabama*, MB Docket No. 14-82, Order, FCC 17M-33, 2017 WL 4003834 (ALJ Sept. 11, 2017) (*Disqualification Certification Order*).

⁸ *Patrick Sullivan and Lake Broadcasting, Inc., Application for Consent to Assignment of License of FM Translator Station W238CE, Montgomery, Alabama*, MB Docket No. 14-82, Memorandum Opinion and Order, 33 FCC Rcd

Procedural Considerations

3. At the end of 2018, the Presiding Judge in this matter retired from federal service without issuing an initial decision. Section 1.274 of the Commission's rules provides that when the presiding officer in a hearing matter becomes unavailable, the Commission may direct that the record be certified to it for decision or may order that the matter continue before another presiding officer, depending on the circumstances and procedural status of the case.⁹ The Commission has not directed that this case be certified to it or otherwise indicated how to proceed.¹⁰ It is therefore left to the successor Presiding Judge to discern a way forward that is consistent with established federal administrative procedures and respects the interests of the parties, with an eye toward resolving this hearing proceeding after five years.

4. The Administrative Procedure Act provides that the employee who presides at a hearing shall make an initial or recommended decision "unless he becomes unavailable to the agency."¹¹ The statute does not specify what steps an agency should take in the event of a presiding officer's unavailability. Relevant case law indicates that in such a situation, testimony of witnesses must be reheard only where the disposition of the matter depends on first-hand evaluation of their demeanor and credibility.¹² As detailed below, it is not necessary to evaluate the testimony of any of the witnesses in this case in order to resolve this matter. Rehearing is therefore not required for the successor Presiding Judge to reach an initial decision.

4360 (2018); Patrick Sullivan and Lake Broadcasting, Inc. Findings of Fact and Conclusions of Law (filed May 10, 2018) (Sullivan and Lake Proposed Findings), <https://ecfsapi.fcc.gov/file/1051011210015/Lake%20Findings%20of%20Fact%20and%20Conclusions%20of%20Law%205-10-18.pdf>; Enforcement Bureau's Proposed Findings of Fact and Conclusions of Law (filed May 10, 2018) (EB Proposed Findings), <https://ecfsapi.fcc.gov/file/10510156619515/Lake%20Broadcasting--EB%20Proposed%20Findings%20and%20Conclusions%205%2010%2018.pdf>; Patrick Sullivan and Lake Broadcasting, Inc. Reply Findings of Fact and Conclusions of Law (filed June 11, 2018) (Sullivan and Lake Reply), <https://ecfsapi.fcc.gov/file/10611246917754/Lake's%20Reply%20Findings%20of%20Fact%20and%20Conclusions%20of%20Law%20%206-11-18.pdf>; Enforcement Bureau's Reply Proposed Findings of Fact and Conclusions of Law (filed June 11, 2018) (EB Reply), <https://ecfsapi.fcc.gov/file/1061115531208/EB%20Reply%20Proposed%20Findings%20of%20Fact%20and%20Conclusions%20of%20Law%206%2011%2018.pdf>.

⁹ 47 CFR § 1.274(b), (c).

¹⁰ See, e.g., *Tidewater Radio Show, Inc.*, 75 FCC 2d 670 (1980) (ALJ withdrew after record was closed, Commission expressly declined to order certification under 1.274(b)).

¹¹ 5 U.S.C. § 554(d). See also 47 U.S.C. § 409(a) ("In every case of adjudication (as defined in the Administrative Procedure Act) which has been designated by the Commission for hearing, the person or persons conducting the hearing shall prepare and file an initial, tentative, or recommended decision, except where such person or persons become unavailable to the Commission").

¹² *Millar v. FCC*, 707 F.2d 1530 (D.C. Cir. 1983) (observation of witnesses' demeanor by substitute hearing examiner deemed not necessary due to substantial evidence of misconduct); *New England Coalition on Nuclear Pollution v. NRC*, 582 F.2d 87 (1st Cir. 1978) (rehearing not required upon substitution of decisionmaker because credibility of conflicting expert witnesses is based on evaluation of credentials and other factors rather than observation of demeanor). See also *Gamble-Skogmo, Inc. v. FTC*, 211 F.2d 106 (8th Cir. 1954) (decision remanded where ruling of substitute official was based on credibility of testimony he didn't personally observe).

Licensee Qualifications

5. The key question to be answered in this hearing proceeding is a simple one – Does Mr. Rice, the personification of LBI, possess the requisite character to be a Commission licensee? This inquiry stems from Section 308(b) of the Communications Act, which provides that “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 financial, technical, and other qualifications of the applicant to operate the station.”¹³ The standards by which the Commission evaluates character qualifications of licensees and applicants are set forth in its *1986 Character Policy Statement*, its *1990 Character Policy Statement*, and related orders,¹⁴ which are specifically incorporated by reference into section 73.4280 of the Commission’s rules with respect to broadcast applicants.¹⁵ The crux of the Commission’s character qualifications policy is that a Commission licensee must possess a character sufficient to demonstrate that it will deal truthfully with the Commission and comply with all applicable rules and policies.¹⁶ Behavior that threatens the integrity of the Commission’s licensing process will be considered as bearing on a licensee’s character.¹⁷ A propensity to comply with the law generally is also considered relevant to an evaluation of character.¹⁸

6. The *Hearing Designation Order* identified two separate factors to consider in analyzing whether Mr. Rice possesses the qualifications to be a Commission licensee – (a) his felony convictions and (b) the misrepresentation and lack of candor of his companies, including LBI, during the *Contemporary Media* revocation proceeding.¹⁹ LBI did not introduce any evidence to address issue (b) specified in the *Hearing Designation Order* regarding “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.”²⁰ In response to the Enforcement Bureau’s proposed finding that LBI did not offer such evidence,²¹ LBI points to Lake Exhibit 2 as well as particular passages of its proposed findings and reply.²² The portions of the pleadings LBI cites, however, do not

¹³ 47 U.S.C. § 308(b). This principle is extended to applications for transfer or assignment by section 310(d) of the Act, 47 U.S.C. § 310(d).

¹⁴ *Policy Regarding Character Qualifications in Broadcast Licensing*, Gen. Docket No. 81-500, Report, Order and Policy Statement, 102 F.C.C.2d 1179 (1986) (*1986 Character Policy Statement*), recon. dismissed/denied, 1 FCC Rcd 421; *Policy Regarding Character Qualifications in Broadcast Licensing*, Policy Statement and Order, 5 FCC Rcd 3252 (1990) (*1990 Character Policy Statement*), recon. granted in part, 6 FCC Rcd 3448 (1991), further recon. granted in part, 7 FCC Rcd 6564 (1992).

¹⁵ 47 CFR § 73.4280.

¹⁶ *1986 Character Policy Statement*, 102 F.C.C.2d at 1183, para. 7.

¹⁷ *Id.* at 1211, para. 62.

¹⁸ *1990 Character Policy Statement*, 5 FCC Rcd at 3252-53, paras. 3-5.

¹⁹ See *supra* note 1.

²⁰ *Hearing Designation Order*, 29 FCC Rcd at 5429.

²¹ EB Proposed Findings at 26, para. 89.

²² Sullivan and Lake Reply at 13, para. 25 (citing Lake Exhibit 2, Lake Proposed Findings at 7-38, and Lake Reply at paras. 7-8). Lake Broadcasting, Inc., Direct Case Exhibit 2 (Lake Exhibit 2) is a narrative accompanied by the

inform issue (b) but for the most part address the question presented in issue (a) by providing a narrative of Mr. Rice's life, recounting the circumstances of the criminal case, and summarizing the testimony provided at the hearing. LBI's only attempt to address issue (b) with respect to Mr. Rice in both the pleadings and Lake Exhibit 2 is its argument that it could not present evidence on that count because LBI has not held an FCC license for many years and because "[p]aradoxically, while Mr. Rice is the physical embodiment of Lake, as its President, sole director and 100% owner, Lake was previously disqualified independently of Mr. Rice, and Mr. Rice was not held accountable for Lake's misconduct."²³

7. That contention is not a paradox but is in fact inaccurate. The *Initial Decision* in the prior proceeding, which was affirmed by the Commission and the District of Columbia Circuit, squarely found Mr. Rice responsible for the misrepresentations of his licensees:

Finally, even if [corporate officer] Cox did not know the full extent of Rice's participation in the affairs of the Licensees, Rice certainly possessed such knowledge. 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. Although, as Cox stated, "there were a lot of things going on in Mike Rice's life" at the time, those other things did not render Rice "unable to discern the truth or falsity" of the representations which the Licensees were making concerning his activities. *Pass Word, Inc.*, 76 FCC 2d 465, 506 (1980), *aff'd*, 673 F.2d 1363 (D.C. Cir. 1982).²⁴

This passage is in keeping with the longstanding principles that Commission licensees are responsible for the actions of their agents and employees, and that the behavior of persons who hold attributable interests in a corporate licensee, or are able to exert control or influence over the licensee, is relevant to the evaluation of the licensee's qualifications.²⁵ By completely focusing its case on whether Mr. Rice is now rehabilitated from his past criminal behavior, LBI failed to introduce evidence on the separate issue of Mr. Rice's propensity to deal truthfully with the Commission in light of his and LBI's past misdeeds in that regard and, accordingly, did not satisfy its burden of proof on issue (b).²⁶

8. Further, the circumstances of Mr. Rice's abandonment of the case call into question the level of respect that he has for the Commission's processes generally. The conduct at issue is Mr. Rice's failure to return to the hearing following the lunch break on the third day, having directed his counsel to cease participating and to seek dismissal of the assignment application. The reason for this truncated end

declaration of Michael Rice, under penalty of perjury, that it is "true and correct."

²³ Sullivan and Lake Proposed Findings at 16, para. 38; Lake Exhibit 2 at 1.

²⁴ *Contemporary Media*, 12 FCC Rcd at 14305, para. 195.

²⁵ See *Eure Family Limited Partnership*, 17 FCC Rcd 21861 (2002); *Gaffney Broadcasting, Inc.*, 23 FCC 2d 912 (1970); *Contemporary Media, Inc.*, Order to Show Cause and Notice of Apparent Liability, 10 FCC Rcd 13685, 13687, para. 9 (1995); *1986 Character Policy Statement*, 102 F.C.C.2d at 1205-06, para. 48.

²⁶ *Hearing Designation Order*, 29 FCC Rcd at 5430 para. 28 (burden of proceeding with the introduction of evidence and of proof with respect to all designated issues is on applicants); *accord* 47 C.F.R. § 1.254.

to the hearing, according to Mr. Rice's counsel, was that Mr. Rice believed that the hearing was not progressing in his favor: "The overall aura here has been so negative that our client just does not want to continue. He sees the handwriting on the wall, whether findings have been submitted or not."²⁷ As a result of this action, LBI declined to cross-examine the mental health professional called by the Enforcement Bureau,²⁸ did not recall its own mental health professional even though it had obtained approval from the former Presiding Judge to delay part of counsel's examination of her,²⁹ and did not recall Mr. Rice as planned.³⁰ Mr. Rice's sudden departure also left his counsel unable to respond to questions from the former Presiding Judge regarding the scope of LBI's motion to dismiss.³¹ The former Presiding Judge, in denying the motion, reasoned that Mr. Rice's refusal to agree to dismissal with prejudice as to him personally would potentially allow him to apply yet again for a license, which would in turn require relitigating the very same issues that he refused to finish litigating in this proceeding.³²

9. Mr. Rice's sudden withdrawal from the hearing proceeding when he saw "the handwriting on the wall" came after he put the Commission through not only three days of testimony but three years of extensive discovery and pre-hearing motions. The eleventh-hour abandonment of the hearing by Mr. Rice arguably justified dismissal of this matter with prejudice as to Mr. Rice personally and as to LBI for failure to prosecute.³³ This turn of events also gave rise to an additional factor to be considered as bearing on character, which is abuse of the Commission's processes.³⁴ Abuse of process "ordinarily involves an intent to gain some benefit by manipulating the Commission's procedures,"³⁵ which is precisely what Mr. Rice attempted to do by refusing to continue with the hearing. Mr. Rice sought dismissal as to his alter ego LBI while insulating himself from any outcome that could affect him negatively – whether through adjudicating to finality his qualifications to be a Commission licensee or dismissing with prejudice as to him – thus preserving his ability to again seek a license, perhaps in the name of another corporation under his total control. His effort to thwart final adjudication of his character qualifications in this proceeding is not conduct one would expect from an applicant intent upon complying with the Commission's rules and processes. Nor is it conduct that the Commission should accept from an applicant seeking to demonstrate rehabilitation from a prior finding of misrepresentation and lack of candor. Instead, his choice to proceed in this manner more strongly suggests that he views the agency's rules and procedures as obstacles to be overcome rather than operational requirements.

²⁷ Tr. 658:23 – 659:1 (May 5, 2017).

²⁸ When offered an opportunity to cross-examine the witness, LBI's counsel indicated that he was "not participating." Tr. 674:22 (May 5, 2017).

²⁹ Tr. 426:9 - 427:10 (May 4, 2017)

³⁰ Tr. 357:8-20 (May 4, 2017).

³¹ Tr. 654-56 (May 5, 2017).

³² *Order Denying Motion to Dismiss* at 2.

³³ *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962) (citations omitted) ("The authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases").

³⁴ *1986 Character Policy Statement*, 102 F.C.C. 2d at 1211, para. 62.

³⁵ *TRMR, Inc.*, 11 FCC Rcd 17081, 17087, para. 10 (1996).

Conclusion

10. In light of the foregoing findings of fact and conclusions of law, it is determined that Patrick Sullivan and LBI have not satisfied their burden of proof with respect to the issues identified in the *Hearing Designation Order* in this proceeding. In particular, because evidence has not been presented regarding the effect of the misrepresentations 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 and because of his conduct in this proceeding, a determination cannot be made that Michael S. Rice is qualified to be a Commission licensee. Accordingly, the captioned application for consent to the assignment of license for Station W238CE from Patrick Sullivan to Lake Broadcasting, Inc., is denied.³⁶

Ordering Clauses

11. **IT IS ORDERED**, pursuant to authority delegated by section 0.351(h) of the Commission's rules, 47 C.F.R. § 0.351(h), that Administrative Law Judge Jane Halprin shall serve as successor Presiding Judge in the above-entitled proceeding.

12. **IT IS FURTHER ORDERED** that the above-captioned Application for Consent to Assignment of License of FM Translator Station W238CE, Montgomery, Alabama, from Patrick Sullivan to Lake Broadcasting, Inc., IS DENIED for the reasons stated herein.³⁷

FEDERAL COMMUNICATIONS COMMISSION

Jane Halprin
Administrative Law Judge

³⁶ This Initial Decision does not reach a conclusion with respect to the inquiry posed by the Media Bureau in the *Hearing Designation Order* as to "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 a Commission licensee only in the most extraordinary and compelling of circumstances." *Hearing Designation Order*, 29 FCC Rcd at 5429 n.60 (citing *1986 Character Policy Statement*, 102 F.C.C.2d at 1205 n.60; *1990 Character Policy Statement*, 5 FCC Rcd at 3253 n.5). Subsequent to release of the *Hearing Designation Order*, the Commission indicated its inclination to make that finding by revoking the amateur license of an individual who was a convicted sex offender. *David Titus*, 29 FCC Rcd 14066 (2014). Notably, Mr. Rice continues to hold amateur licenses that are not part of this proceeding and were not part of the prior proceeding revoking his broadcast licenses. Lake Broadcasting, Inc.'s Response to Enforcement Bureau's Request for Admissions of Facts and Genuineness of Documents, MB Docket No. 14-82 at 1 (filed Aug. 15, 2014), <https://ecfsapi.fcc.gov/file/7521764624.pdf> (indicating that Mr. Rice holds FCC Amateur Radio License W0DQJ, which expires on June 1, 2023, and a General Radiotelephone Operator License, issued on January 2, 1985, which has no expiration date).

³⁷ A copy of this Initial Decision will be provided via email to LBI's counsel of record and the Enforcement Bureau. Exceptions to this Initial Decision shall adhere to the procedures of sections 1.276 and 1.277 of the Commission's rules, 47 CFR §§ 1.276 and 1.277.