

**Before the
Federal Communications Commission
Washington, DC 20554**

FCC 17M-33

| | | |
|---|---|------------------------------|
| 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) |) | |
| |) | |
| For Commission Consent to the Assignment of |) | |
| License of FM Translator Station W238CE, |) | |
| Montgomery, Alabama |) | |

ORDER

Issued: September 11, 2017

Released: September 11, 2017

On August 30, 2017, Lake Broadcasting, Inc. (Lake) appealed to the Commission the ruling of the Presiding Judge that Lake's Motion to Disqualify failed to meet the requisite standards under Section 1.245(b)(3) of the Commission's Rules. On September 5, 2017, the Enforcement Bureau (Bureau) filed its Opposition to Lake's Appeal of Ruling Denying Motion to Disqualify Presiding Judge. Accordingly, the issue of disqualification is certified to the Commission along with the Jacobs Declaration and the Presiding Judge's ruling of denial. 47 CFR § 1.245(b)(4)-(6).

Submitted herewith are Lake's original Motion to Disqualify the Presiding Judge (filed May 9, 2017), the Bureau's Response (filed May 18, 2017), and the Presiding Judge's Memorandum Opinion & Order denying Lake's Motion to Disqualify (rel. Aug. 28, 2017).

Pursuant to Section 1.245(b)(4), this hearing is suspended pending Commission ruling. However, the parties are put on notice that if the Commission denies Lake's appeal, in the interest of efficiency, the Proposed Findings of Fact and Conclusions of Law will be due **ten (10)**

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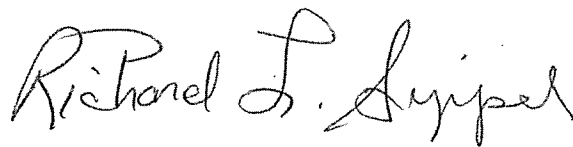
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business days following the release of the Commission's decision.

SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION¹

A handwritten signature in black ink, reading "Richard L. Sippel". The signature is written in a cursive, flowing style with a large initial 'R'.

Richard L. Sippel
Chief Administrative Law Judge

¹ Courtesy copies of this Order will be sent via email to each counsel of record on the date of issuance.

Attachment A

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

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

) MB Docket No. 14-82
)
) FRN 0003749041, 0006119796,
) 0006149843, 0017196064
)
) Facility ID No. 146162
)
) File No BALFT-20120523ABY
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To: Marlene H. Dortch, Secretary
Attention: Chief Administrative Law Judge Richard L. Sippel

MOTION TO DISQUALIFY THE PRESIDING JUDGE

Lake Broadcasting, Inc. ("Lake"), by its attorney, pursuant to Section 1.245(b) of the Commission's Rules, hereby moves that the Presiding Judge in the above-captioned proceeding should disqualify himself and withdraw from further participation in this proceeding because of demonstrated bias and prejudice against Lake and Lake's President, sole owner, and director, Michael S. Rice. In support hereof, Lake shows the following:

1. Motions to disqualify the Presiding Judge in Commission proceedings are rarely filed, and, to the best of Lake's knowledge, none has ever been granted. Applicants and their counsel are loathe to prefer such charges, and the case precedents upon which the Commission relies when adjudicating such matters raise a very "high hurdle" to justify disqualification. Thus,

Lake and its counsel have silently withstood almost three years of bias and prejudice by the Presiding Judge, culminating in a grueling three-days hearing on May 5, 2017, and they cannot remain silent any longer.

2. The basic principle in disqualification decisions is that the moving party must show personal bias or prejudice that will impair the ALJ's ability to act in an impartial way. *Barnes Enterprises, Inc.*, 66 FCC 2d 499, 501 (1977), citing *Berger v. United States*, 255 U.S. 22, 33-35 (1921). Establishing such bias or prejudice becomes difficult because, as the Commission pointed out in *WWOR-TV, Inc.*, 4 FCC Rcd 6155 Para. 4 (1989)(emphasis added), "ordinarily" the alleged bias or prejudice 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, citing *United States v. Grinnel Corp.*, 384 U.S. 563, 583 (1966). However, most importantly, the Commission also noted in *WWOR-TV, Inc.*, *supra* at 6155 Para. 4, that because "it is not always possible to establish an extra-judicial source of bias,...the comments and rulings of the trier of fact may be relevant to the existence of prejudice" (emphasis added), citing *KAYE Broadcasting, Inc.*, 35 FCC 2d 548 Para. 3 (1972).


3. The requisite centerpiece of this pleading is a Declaration under penalty of perjury, attached hereto, prepared by Lake's communications counsel, Jerold L. Jacobs. Mr. Jacobs and Judge Sippel were colleagues at the Commission when Mr. Jacobs was the senior member of the Commission's Review Board in 1980-87, a former appellate tribunal, and Judge Sippel had just joined the Office of Administrative Law Judges. Their professional paths did not cross again until the current proceeding.

4. The Declaration, which is submitted in accordance with the requirements of Section 1.245(b)(1) of the Rules, details the Presiding Judge's missteps in this proceeding, which, in totality, represent such serious errors and flagrant abuse of discretion by the

Presiding Judge that the ineluctable conclusion must be reached that the Presiding Judge has become prejudiced and biased against Lake and Mr. Michael Rice. Hence, the Presiding Judge should disqualify himself. *See KAYE Broadcasting, Inc., supra.*

WHEREFORE, in light of the foregoing, Lake Broadcasting, Inc. respectfully requests that the Presiding Judge should disqualify himself and withdraw from further participation in this proceeding.

Respectfully submitted,



Jerold L. Jacobs
Law Offices of Jerold L. Jacobs
1629 K Street, N.W. Suite 300
Washington, DC 20006
(202) 508-3383

Counsel for Lake Broadcasting, Inc.
And Patrick Sullivan

Att. (Declaration)

Dated: May 9, 2017

**DECLARATION OF JEROLD L. JACOBS, ESQ.
CONCERNING THE MOTION TO DISQUALIFY CHIEF ALJ RICHARD L. SIPPEL**

JEROLD L. JACOBS, under penalty of perjury, hereby declares:

I am counsel of record for Lake Broadcasting, Inc. ("Lake") in the Federal Communications Commission's assignment application proceeding in MB Docket No. 14-82, and I have represented Mr. Michael S. Rice, Lake's President, sole owner and director since 1987. This Declaration has been prepared in conjunction with a Motion to Disqualify Chief ALJ Sippel (referred to hereinafter as "the Judge") from serving as the Presiding Judge in MB Docket No. 14-82.

The proceeding was designated for hearing by *Hearing Designation Order (HDO)*, DA 14-703, released May 23, 2014. The *HDO* stated, at Para. 21, that the principal reason for designating for hearing Lake's application to purchase an FM Translator Station in Montgomery, Alabama, was to determine whether Mr. Rice "has been rehabilitated to an extent that the Commission is confident Rice will refrain from engaging in the kind of behavior for which he was convicted [in a Missouri state criminal proceeding in 1994]; Rice and/or LBI [Lake] 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".

Most importantly, Para. 27 of the *HDO* stated that "the Presiding Administrative Law Judge shall not...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".

On November 6, 2014, the Commission released a Decision in the *David Titus* case, FCC 14-177, and on November 20, 2014, the Judge issued an *Order*, FCC 14M-35, requesting the parties to brief him on the impact of that Decision on the issues in our case. In the *David Titus* case, the Judge had found Mr. Titus qualified to be a licensee after criminal sexual misconduct and imprisonment, but the Commission reversed the Judge and disqualified Mr. Titus.

The Enforcement Bureau filed Comments on December 8, 2014 that were shrill and mistaken in asserting that the *Titus* case was controlling in our proceeding, going so far as to assert (at Para. 7) that if the Bureau could conclusively determine that Mr. Rice was a risk to his community, the *Titus* decision would allow the Judge to expedite the trial or even grant summary decision against Lake. Genuinely frightened by these extreme pronouncements, on February 4, 2015 Lake requested a ruling by the Judge on the burden of proof in this proceeding. The Judge properly issued an *Order*, FCC 15M-8, on March 4, 2015, confirming that the *Titus* case had not changed the burden of proof in our case, which would continue to be "a preponderance of the evidence".

However, the Bureau poisoned the waters with its Comments, adding a measure of strong contentiousness to the rehabilitation analysis in this proceeding, and the Judge began to voice off-the-record concerns about not being reversed as he was in *Titus*. What followed were a number of rulings by the Judge in discovery matters (e.g., FCC 15M-22, rel. June 11, 2015), which bent over backwards to let the Bureau have its way, such as requiring Mr. Rice to disclose his Federal income tax returns from 2010 to 2014, so that the Bureau could better understand Mr. Rice's work activities – utter nonsense.

But the most serious error occurred in the Judge's *Order*, FCC 15M-26, released August 4, 2015, where the Judge completely eviscerated Paragraph 27's holding in the *HDO* that the Judge should not allow relitigation of Mr. Rice's previous criminal convictions. Under the guise of allowing the Bureau's psychologist, Dr. Kimberly Weitzl, to inquire into Mr. Rice's "mental state" prior to his imprisonment, the Judge eventually permitted the Bureau to include in the hearing record, over counsel's several objections, a number of 20-or-more-year-old untested written reports (Bureau Exhibit 4) concerning alleged sexual misconduct by Mr. Rice prior to his incarceration. These documents were allowed by the Judge to be quoted by Dr. Weitzl and Tammy Gremminger at hearing and in their direct case exhibits and were relied upon for the "truth" of their scurrilous statements about Mr. Rice, even though they were admitted into evidence only as "business records" of the Missouri Department of Corrections.

At the first day of hearing on May 3, 2017, Mr. Rice was cross-examined by the Bureau on his direct case exhibit, with several extensive *voir dire* interruptions by the Judge. The Judge kept needling Mr. Rice about his not remembering events from 1990 and earlier related to his criminal activity. Mr. Rice pleaded in vain that these events happened a very long time ago and that his mental condition at that time clouded his memory because of his then undiagnosed and untreated Bi-Polar Disorder. In response, the Judge expressed incredulity, which betrayed his bias against Mr. Rice, especially given the fact that Mr. Rice's views were corroborated by Lake Exhibit 3, the direct case testimony of Mr. Rice's psychologist, Dr. Ann Duncan-Hively.

At the second day of hearing on May 4, Tammy Gremminger, a Missouri Department of Corrections parole officer, testified as a would-be expert witness for the Bureau. Lake had filed a "Motion in Limine" to have her disqualified as an expert on April 21, 2017, but the Motion was declared premature (FCC 17M-22, rel. April 27, 2017) – to be ruled on after Gremminger testified. But no such ruling occurred at trial, and the Judge did not provide a promised searching *voir dire* of Ms. Gremminger's witness intimidation accusation against Mr. Rice, which the Bureau had interjected into the proceeding in December 2016. After this accusation was exposed as bogus in early February 2017, the Judge promised at the February 16, 2017 Prehearing Conference that he would interrogate Ms. Gremminger at length, but at the hearing he asked her only a couple of questions on this subject and then fell silent. The net effect was to make Gremminger appear to be a credible witness against Mr. Rice or maybe even an expert.

During her testimony, Ms. Gremminger made a fleeting reference to having heard from a neighbor of Mr. Rice that there were children seen coming and going to his house at some unspecified time during his parole (2000-2002). However, she could not provide a time frame, the police may have been called but did not pursue the matter, this was not reported in Mr. Rice's parole records as a violation or otherwise, Mr. Rice was not arrested, and, thus, this alleged

episode appeared to be some more “fake news” being peddled by Ms. Gremminger, as with her above-described aborted witness intimidation accusation against Mr. Rice. Nevertheless, despite the lack of substance, the Judge questioned Ms. Gremminger at length about this matter on *voir dire* and also questioned Dr. Weitzl on May 5 about it on *voir dire*. The Judge’s perseverance on this matter revealed his bias against Mr. Rice, since the Judge was obviously striving to make something out of what was factually and legally nothing, even when the Bureau sat silent.

Twice before Lake filed its Motion in Limine on April 21, 2017, Lake’s counsel asked the Judge for his advice as to when Lake could officially challenge Ms. Gremminger as an expert witness. The Judge stated at the February 16 Prehearing Conference (TR 124-125) that Lake could file “Any time you want”...[and] the Bureau has an opportunity to respond.” But when Lake actually filed, the Judge ruled in FCC 17M-22, *supra*, that Lake’s Motion was “untimely” (*i.e.*, premature) and that “The appropriate time to raise any objections is after Lake’s counsel has examined the witness during *voir dire*”. This is another instance in which the Judge denied a properly-filed Motion by Lake, apparently forgetting his earlier ruling and improperly admonishing Lake for following his earlier instructions. The Judge deferred ruling on the Motion in Limine until after the hearing ended on May 5 and has not yet ruled on it.

The final day of hearing was May 5, 2017, and Dr. Kimberly Weitzl, the Bureau’s star expert witness, took the stand. The Bureau took 30 minutes to “qualify” Dr. Weitzl as an expert. Lake objected, since Lake had previously conceded that Dr. Weitzl was an expert, but the Judge denied Lake’s objection. This was the first of a series of objections by Lake that were incorrectly denied by the Judge that day. The Judge asked Dr. Weitzl on *voir dire* a number of questions about Ms. Gremminger’s “children running in and out” accusations (see above), but Dr. Weitzl was not able to provide any information, apart from expressing her disapprobation. Here again, the Judge’s perseverance on this bogus issue betrayed his bias against Lake and Mr. Rice.

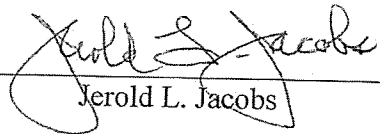
As Lake’s cross-examination of Dr. Weitzl wore on, the Judge became increasingly annoyed at Lake’s counsel for pausing between questions. He kept telling counsel to hurry up, questioned whether he was prepared, and showed general impatience, even though it was only slightly after 12 p.m., and we did not customarily break for lunch until 12:30 p.m. Finally, at about 12:15 p.m., the Judge peremptorily stated “That’s enough, Mr. Jacobs” and cut off the questioning by Lake’s counsel, even though counsel had not completed his cross-examination. This behavior by the Judge was very embarrassing to Lake’s counsel, was judicially improper, and further betrayed the Judge’s lack of a neutral hand concerning Lake’s case. Lake’s counsel had just stated that Lake was metaphorically “fighting for its life” (or words to that effect) and was entitled to a little leeway with the Bureau’s star witness, but the Judge was not having any of it.

Lake’s counsel huddled with his client and Lake’s key witness, Dr. Ann Duncan-Hively, during the lunch recess, and Lake decided to “pull the plug” on seeking approval of its assignment application as a fruitless exercise in view of the Judge’s increasing belligerence to Lake’s case and counsel on the last day of trial.

After the recess, Lake's counsel announced in open court that on Monday, May 8, Lake would file a Motion to Dismiss Lake's application and withdraw from the proceeding. The Judge inquired whether Mr. Rice might file further FCC applications in the future, and Lake's counsel replied that he did not know. The Judge then stated that Lake's Motion should be accompanied by a Declaration by Mr. Rice that he would NOT file any FCC applications in the future. However, the Judge did not have the authority to make such a request.

On May 8, Lake filed its Motion to Dismiss, with a Declaration from Lake stating that the requested dismissal should be with prejudice because Lake does not intend to file any further applications with the Commission. There is no Declaration concerning whether Mr. Rice will file any further applications. Under these circumstances, there is a possibility that the Judge will deny the Motion to Dismiss and insist that the case should proceed, even if Lake does not participate. If the Judge issues such a ruling, that will be further proof of his bias against Lake and Mr. Rice and his need to disqualify himself from this proceeding immediately. Mr. Rice is not a named party in this proceeding, and it is outrageous for the Judge to try to force him to give up his constitutional rights to file FCC applications in the future as the "price" for allowing Lake to exit this proceeding without the issuance of an Initial Decision.

The above recitations demonstrate that the Judge has NOT been a neutral entity in this proceeding but, instead, is biased and prejudiced against Lake and its President, Mr. Michael S. Rice, disrespectful to Lake's counsel, and has otherwise shown himself unfit to continue to preside over this case.


Jerold L. Jacobs

Executed on May 9, 2017

CERTIFICATE OF SERVICE

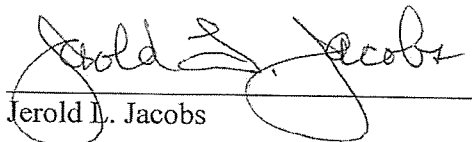
I, Jerold L. Jacobs, hereby certify that on this 9th day of May, 2017, I filed the foregoing "MOTION TO DISQUALIFY THE PRESIDING JUDGE" in ECFS and caused a copy to be sent via First Class United States Mail and via e-mail to the following:

Hon. Richard L. Sippel
Chief Administrative Law Judge
Federal Communications Commission
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Washington, DC 20554
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Jerold L. Jacobs

Attachment B

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

To: Marlene H. Dortch, Secretary
Attn: Chief Administrative Law Judge Richard L. Sippel

**ENFORCEMENT BUREAU'S RESPONSE
TO LAKE'S MOTION TO DISQUALIFY THE PRESIDING JUDGE**

1. On May 9, 2017, Lake Broadcasting, Inc. (Lake) filed a motion to disqualify the Presiding Judge in this matter, alleging, without any evidence, that the Presiding Judge has "demonstrated bias and prejudice against Lake and Lake's president, sole owner and director, Michael S. Rice."¹ Lake's untimely Motion appears to be nothing more than a last-ditch attempt to try to avoid a possible unfavorable decision against Lake and Michael Rice (Rice). As set forth below, the Acting Chief, Enforcement Bureau, through his attorneys, provides its response to Lake's Motion.

¹ Motion to Disqualify the Presiding Judge, filed May 9, 2017 (Motion); *see also* Declaration of Jerold L. Jacobs, Esq. Concerning the Motion To Disqualify Chief ALJ Richard L. Sippel, attached to the Motion (Jacobs Declaration).

Lake's Motion to Disqualify is Untimely

2. Pursuant to Section 1.245(b)(1) of the Commission's rules, a party seeking disqualification of a presiding officer must file its motion and supporting affidavit "not later than 5 days *before the commencement of the hearing* unless, for good cause shown, additional time is necessary."² Here, Lake waited to file its motion and the supporting affidavit until four days *after* the hearing concluded – and apparently only after it presupposed the Presiding Judge may rule against it.³

3. In addition, Lake failed to allege or show "good cause" why it needed additional time beyond that allowed by the Commission's rules. Indeed, many of the issues that Lake complains about as the basis for its Motion include "rulings by the Judge in discovery matters" that extend as far back as June 11, 2015. Without justification or any explanation for this delay – Lake waited until now to file its Motion. On this basis alone, Lake's Motion should be denied.

It is Improper to Consider Lake's Motion Before a Hearing Transcript is Available

4. In part, Lake's Motion challenges the Presiding Judge's conduct during the three-day hearing held May 3, 2017 through May 5, 2017. Yet, neither Lake's Motion nor the supporting affidavit from its counsel contains anything more than allegations of what it alleges occurred during the hearing and what it alleges was said. Without a transcript of the hearing, it simply reflects one party's memory of what happened during those three days without any means for verification. Respectfully, the Bureau suggests therefore that the Presiding Judge deny Lake's Motion as premature, providing Lake the opportunity to re-file after the complete hearing transcript has been made available on the Commission's electronic comment filing system

² 47 CFR § 1.245(b)(1) (emphasis added).

³ See, e.g., *Tri-State Financial, LLC v. Lovald*, 525 F.3d 649, 653 (8th Cir. 2008) (requiring a party to bring a motion to disqualify promptly is necessary to avoid the risk that a party might hold its motion as an option in the event the presiding judge rules against it).

(ECFS), as is standard at the close of a hearing. In the alternative, the Bureau respectfully requests that the Presiding Judge extend the deadline for the Bureau to fully address Lake's Motion until 5 business days after the release of the complete hearing transcript.

**The Presiding Judge's Interlocutory Rulings
Cannot Form the Basis for Lake's Motion to Disqualify**

5. The Commission has recognized that "the substance of an ALJ's interlocutory rulings" cannot form the basis for disqualification.⁴ As discussed above, Lake bases part of its Motion on "rulings by the Judge in discovery matters" that extend as far back as June 11, 2015.⁵ On this basis, as well, the Presiding Judge should deny Lake's Motion. Moreover, to the extent that Lake felt it was aggrieved by any of those interlocutory discovery rulings, it could have requested leave to file an application for review within five (5) days after the release of the Presiding Judge's orders.⁶ As the docket plainly reflects, Lake never requested permission to appeal any of the Presiding Judge's interlocutory discovery rulings.

Lake Has Not Otherwise Provided Any Basis for its Motion

6. In order to disqualify the Presiding Judge, Lake must demonstrate a personal bias or prejudice that would impair his ability to act in an impartial manner.⁷ As the Commission has recognized, ordinarily, in order to be disqualifying, "[t]he alleged bias and prejudice...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."⁸ In addition, "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings...do not constitute a basis for a bias or partiality motion unless they display a deep-

⁴ *In re Applications of WWOR-TV, Inc.*, 4 FCC Rcd 6155, 6155 ¶ 4 (1989) (citing *United States v. Grinnel Corp.*, 384 U.S. 563, 583 (1966)).

⁵ *See, e.g.*, Motion at 1-2.

⁶ *See, e.g.*, 47 CFR §§ 1.301(b) and (c).

⁷ *See id.*

⁸ *Id.* (citation omitted).

seated favoritism or antagonism that would make fair judgment impossible.”⁹ Moreover, courts have recognized that judges have “an obligation to litigants and their colleagues not to remove themselves needlessly, because a change of umpire in mid-contest may require a great deal of work to be redone...and facilitate judge shopping.”¹⁰ Lake has not demonstrated that any of the “errors” allegedly committed by the Presiding Judge rely upon knowledge he acquired outside of this proceeding.¹¹

7. In the absence of such a showing, Lake must demonstrate that the occurrences about which it complains “reveal the degree of deep-seated favoritism or antagonism” that would be otherwise required.¹² Here, again, Lake has failed to meet its burden. For example, Lake suggests that the Presiding Judge’s “most serious error” arises from his ruling on August 4, 2015, when he permitted the Bureau’s psychological expert, Dr. Weitzl, to inquire into Rice’s “‘mental state’ prior to his imprisonment.”¹³ Lake contests this ruling because it led to the eventual admission of documents, maintained by the Missouri Department of Corrections concerning Rice’s mental state before, during, and after his incarceration, into evidence at the hearing.¹⁴ Lake has failed to explain how allowing such evidence into the record demonstrates “a deep-seated favoritism or antagonism” on the part of the Presiding Judge “that would make fair judgment impossible.” Indeed, as the record reflects, it was Lake who placed at issue Rice’s

⁹ *Id.* (citing *Liteky v. U.S.*, 510 U.S. 540, 555 (1994)).

¹⁰ *See In re Matter of National Union Fire Ins. Co. of Pittsburgh, Pennsylvania*, 839 F.2d 1226, 1229 (7th Cir. 1988).

¹¹ *See* Motion and Jacobs Declaration.

¹² *See In re Family Broadcasting, Inc.*, 17 FCC Rcd 19332, 19333-34 (2002).

¹³ Jacobs Declaration at 2 (citing Order, FCC 15M-26 (ALJ, rel. Aug. 4, 2015)).

¹⁴ *See Id.*

mental state and his efforts at rehabilitation – which are also described in the Missouri Department of Corrections documents – by filing the Application.¹⁵

8. Lake also suggests that the Presiding Judge’s *voir dire* questioning of Rice on the first day of the hearing demonstrates his bias.¹⁶ Specifically, Lake suggests that “the Judge expressed incredulity” when Rice could not remember events concerning the crimes he committed.¹⁷ Without a transcript from the hearing, it is impossible to identify any such expressions of “incredulity” that Lake may be referring to or the context in which they may have been stated. Lake’s undocumented characterization of the record alone cannot form a basis to disqualify the Presiding Judge.

9. Lake further complains about the Presiding Judge’s failure to rule on the motion *in limine* it filed prior to the hearing to disqualify the Bureau’s expert witness, Tamara Gremminger.¹⁸ Instead, the Presiding Judge ruled the motion was premature until “after Lake’s counsel has examined the witness during *voir dire*.”¹⁹ Lake appears to complain that the Presiding Judge failed to conduct a sufficient *voir dire* on the issue of whether earlier in the year Ms. Gremminger had been intimidated by Rice or others working on his behalf not to assist the Bureau in this case.²⁰ Lake contends that the net effect of the Presiding Judge’s failure to rule on its motion and his incomplete questioning of Ms. Gremminger made her “appear to be a credible witness...or maybe even an expert.”²¹ Lake also suggests that the Presiding Judge’s questioning “at length” of Ms. Gremminger concerning an undocumented report of children seen coming and

¹⁵ See Order, FCC 15M-26 (ALJ, rel. Aug. 4, 2015).

¹⁶ See Jacobs Declaration at 2.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Order, FCC 17M-22 (ALJ, rel. Apr. 27, 2017).

²⁰ See Jacobs Declaration at 2.

²¹ Jacobs Declaration at 2.

going from Rice's house during his parole "revealed his bias against Mr. Rice."²² Without a transcript from the hearing, however, Lake has not – and cannot – point to any specific question which suggests the Presiding Judge's alleged bias. Moreover, Lake fails to acknowledge that, regardless of the Presiding Judge's questioning, its counsel had ample opportunity to question Ms. Gremminger concerning her background, her expertise, and the allegations of intimidation and, through that questioning, to challenge her credibility. In addition, Lake has an additional opportunity in its proposed findings and conclusions of law to challenge the weight that should be given to Ms. Gremminger's testimony.²³

10. Lastly, Lake appears to question the Presiding Judge's ability to weigh the record with impartiality because, when, at the end of the hearing counsel for Lake indicated his clients' intention to withdraw the Application and move to dismiss the case, the Presiding Judge suggested that any such motion be accompanied by a declaration from Rice that he would not file any additional applications with the Commission.²⁴ Here again, there is no transcript available from the hearing. However, as counsel for the Bureau recalls the exchange, the Presiding Judge was merely articulating the obvious result if he were to grant a motion to dismiss without such a declaration from Rice – *i.e.*, the Commission would need to spend additional public resources and time to re-litigate the same issues that had already been addressed in this proceeding. The Presiding Judge did not require Rice to provide such a declaration and has not yet ruled on Lake's motion to dismiss.²⁵ It is difficult to see, therefore, how this exchange offers any evidence of the Presiding Judge's bias against Lake or Rice justifying disqualification.

²² *Id.* at 3.

²³ *See* 47 CFR § 1.263.

²⁴ *See* Jacobs Declaration at 4.

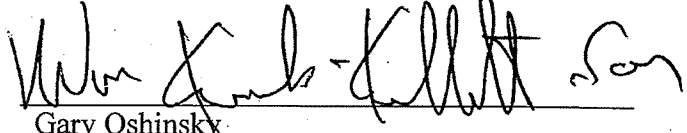
²⁵ *See, e.g., Order*, FCC 17M-23 (ALJ, rel. May 5, 2017).

Conclusion

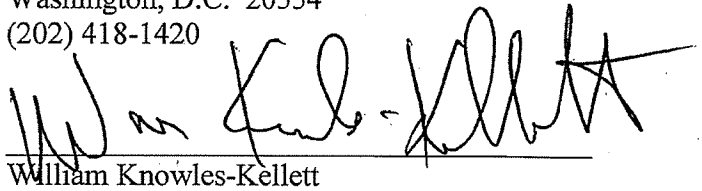
11. For the reasons set forth above, the Bureau respectfully submits that Lake has failed to meet the substantial burden of showing that the Presiding Judge has a personal bias or prejudice against either Rice or Lake that would impair his ability to act in an impartial manner. As such, the Bureau respectfully submits that Lake's motion to disqualify should be denied.

Respectfully submitted,

Michael Carowitz
Acting Chief, Enforcement Bureau



Gary Oshinsky
Attorney
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May 18, 2017

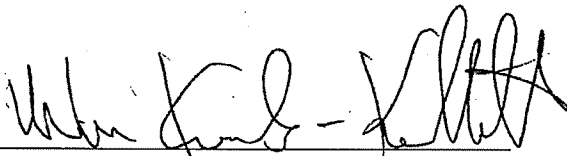
CERTIFICATE OF SERVICE

William Knowles-Kellett, an attorney in the Enforcement Bureau's Investigations & Hearings Division, certifies that he has on this 18th day of May, 2017, sent by first class United States and by email copies of the foregoing ENFORCEMENT BUREAU'S RESPONSE TO LAKE'S MOTION TO DISQUALIFY THE PRESIDING JUDGE to:

Jerold L. Jacobs, Esq.
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Counsel for Patrick Sullivan and Lake Broadcasting, Inc.

And caused a copy of the foregoing to be served via hand-delivery to:

The Honorable Richard L. Sippel
Chief Administrative Law Judge
Federal Communications Commission
445 12th Street, S.W., Room 1-C861
Washington, DC 20554



William Knowles-Kellett

Attachment C

**Before the
Federal Communications Commission
Washington, DC 20554**

FCC 17M-31

| | | |
|--|---|-----------------------------|
| In the Matter of |) | MB 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 |) | |

MEMORANDUM OPINION AND ORDER

Issued: August 28, 2017

Released: August 28, 2017

FACTUAL BACKGROUND

On May 23, 2014, the Media Bureau issued a Hearing Designation Order (*HDO*) to determine whether the application of Lake Broadcasting, Inc. (Lake) to purchase an FM Translator Station in Montgomery, Alabama from Patrick Sullivan (Sullivan) should be granted. The *HDO* set specific issues to determine, in light of the criminal convictions and misrepresentations of Lake's president and owner, Michael Rice, whether Rice and Lake possess the basic character qualifications to hold the Station authorization.¹ The issues set for hearing include:²

- a. 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. 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. 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

¹ *HDO* at 1.

² *Id.* at 9-10.

- d. 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.

A hearing was held from May 3 to May 5, 2017. On the third and final day of the hearing, Lake unexpectedly announced that it had decided to withdraw the application at issue.³ On May 8, 2017, Lake filed a Motion to Dismiss. On May 9, 2017, Lake filed a Motion to Disqualify the Presiding Judge. On May 11, 2017, Sullivan submitted his own Motion to Dismiss, declaring his intention to sell the station to a third party rather than to Lake. On June 8, 2017, the Presiding Judge denied both Motions to Dismiss.⁴

JUDICIAL DISQUALIFICATION

Procedures for disqualification of a presiding administrative law judge during the course of an adjudication are prescribed in Section 1.245 of the Commission's Rules, which provides that:

(b) Any party may request the presiding [judge] to withdraw on the grounds of personal bias or other disqualification.

(1) The person seeking disqualification shall file with the presiding [judge] an affidavit setting forth in detail the facts alleged to constitute grounds for disqualification. Such affidavit shall be filed not later than 5 days before the commencement of the hearing unless, for good cause shown, additional time is necessary.

(2) The presiding [judge] may file a response to the affidavit; and if he believes himself not disqualified, shall so rule and proceed with the hearing.

(3) The person seeking disqualification may appeal a ruling of disqualification, and, in that event, shall do so at the time the ruling is made. Unless an appeal of the ruling is filed at this time, the right to request withdrawal of the presiding [judge] shall be deemed waived.

(4) If an appeal of the ruling is filed, the presiding [judge] shall certify the question, together with the affidavit and any response filed in connection therewith, to the Commission. The hearing shall be suspended pending a ruling on the question by the Commission.

(5) The Commission may rule on the question without hearing, or it may require testimony or argument on the issues raised.

³ Tr. 653:4-11 (May 5, 2017).

⁴ See Order, FCC 17M-25 (rel. June 8, 2017).

(6) The affidavit, response, testimony or argument thereon, and the Commission's decision shall be part of the record in the case.

In order to disqualify the Presiding Judge from an adjudicatory proceeding, the party seeking disqualification must demonstrate "a personal bias or prejudice that will impair the ALJ's ability to act in an impartial manner."⁵ Courts have held that opinions do not constitute a basis for a bias or partiality motion "unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible."⁶ For instance, the judge's statements in *Berger v. United States* displayed a personal bias and prejudice against German-Americans in a World War I espionage case, which the Supreme Court determined would likely prevent or impede impartiality of judgment.⁷ The *Berger* petitioners alleged that during the proceedings, the judge stated in substance:

One must have a very judicial mind, indeed, not to be prejudiced against the German-Americans in this country. You are of the same mind that practically all the German-Americans are in this country . . . Your hearts are reeking with disloyalty. I know a safe-blower, he is a friend of mine, who is making a good soldier in France. He was a bank robber for nine years, that was his business in peace time, and now he is a good soldier, and as between him and this defendant, I prefer the safe-blower.⁸

Generally, the alleged bias or prejudice "must stem from an extrajudicial source and result in an opinion on the merits on some basis *other than what the judge has learned from his participation in the case*."⁹ Despite the Supreme Court's language in *Grinnell Corp.*, however, the Commission has opined that, given the difficulty of establishing an extrajudicial source of bias, "comments and rulings of the trier of fact may be relevant to the existence of prejudice."¹⁰ There was nothing said in court by the Judge that could be considered biased or prejudicial.

Moreover, while a heavy burden of proof is placed on a party seeking disqualification generally, motions to disqualify solely on the basis of the judge's conduct during the proceeding are granted "only in the rarest circumstances."¹¹ The reasons and facts stated in an affidavit charging a judge with bias or prejudice for the belief in such bias or prejudice "must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment."¹² In *Berger*, the petitioners' motion was granted because "the facts and reasons [the affidavit] states [i.e., the judge's comments regarding German-American hearts 'reeking with disloyalty']

⁵ *WWOR-TV, Inc.*, 4 FCC Rcd 6155, 6155 (1989) (citing *Barnes Enterprises, Inc.*, 66 FCC 2d 499, 501 (1977)).

⁶ *Family Broadcasting, Inc.*, 17 FCC Rcd 19332, 19333 (2002) (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994) (internal quotations omitted)).

⁷ *Berger v. United States*, 255 U.S. 22 (1921).

⁸ *Id.* at 28-29 (internal quotations omitted).

⁹ *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966) (emphasis added).

¹⁰ *KAYE Broadcasting, Inc.*, 35 FCC 2d 548, 548 (1972).

¹¹ *Liteky*, 510 U.S. at 555.

¹² *Berger*, 255 U.S. at 33-34.

are not frivolous or fanciful, but substantial and formidable”¹³ As discussed below, Lake has not proven through facts or reasoning that anything near the same level of prejudice exists here, and that the Presiding Judge’s alleged bias displays the same level of deep-seated favoritism or antagonism that would make a fair judgment impossible.

DISQUALIFICATION MOTION

On May 9, 2017, Lake filed a Motion to Disqualify the Presiding Judge (Motion to Disqualify). Citing Section 1.245(b) of the Commission’s Rules, Lake alleges that the Presiding Judge has “demonstrated bias and prejudice against Lake and Lake’s President, sole owner, and director, Michael S. Rice.”¹⁴ Lake argues that the following “missteps” represent the Presiding Judge’s prejudice and bias against Lake and Michael Rice.¹⁵

A. Evidence Regarding Rice’s Previous Criminal Convictions

Lake disputes the Judge’s ruling to admit into evidence records from the Missouri Department of Corrections concerning Mr. Rice, because the DOC records were “only” admitted as business records.¹⁶ Lake also disputes the Judge’s decision to allow Dr. Weigl and Tammy Gremminger to rely on these documents at the hearing and in their direct case exhibits for the same reason.¹⁷

First, under Federal Rule of Evidence 803(6), “business records” are admitted for the truth of the matters asserted therein.¹⁸ While Lake disputes the Judge’s decision to allow Dr. Weigl and Tammy Gremminger to quote these documents at the hearing because they were admitted into evidence “only” as “business records,”¹⁹ the Federal Rules of Evidence clearly explain that business and public records are *exceptions* to the hearsay rule, and as such, are admitted precisely for the truth of the matters asserted therein.²⁰ This is one example of Lake’s lack of due diligence in failing to examine the pertinent black letter law before crying foul.

Second, Rice’s criminal history was reviewed only to put the issues from the *HDO* in its proper historical context. It was necessary to review Rice’s criminal history in order to evaluate and assess his rehabilitation therefrom, since, pursuant to the *HDO*, that issue directly bears on his and Lake’s qualifications to be a Commission licensee. As the Judge made clear during the hearing, “[N]othing is being re-litigat[ed] here. . . . [The Bureau is] not putting evidence on of

¹³ *Id.*

¹⁴ Motion to Disqualify at 1.

¹⁵ *Id.* at 2-3.

¹⁶ See Declaration of Jerold L. Jacobs, Esq. Concerning the Motion to Disqualify Chief ALJ Richard L. Sippel (Jacobs Declaration) at 2.

¹⁷ *Id.*

¹⁸ See Federal Rules of Evidence 803(6) (records kept in the course of a regularly conducted business activity are exceptions to the rule against hearsay).

¹⁹ Jacobs Declaration at 2; Tr. 256:23-257:16 (May 3, 2017).

²⁰ See Federal Rules of Evidence 803(6) & (8).

each of these counts, criminal counts [to] which [Rice] had pled guilty. That's not happening. And I don't want to waste time going through that kind of an objection."²¹

Lake also argued: "We would feel that the playing field were a little bit more even if we had questions about Mr. Rice's rehabilitation activities, not what happened 25 years ago."²² In other words, Lake expected the Judge and Bureau to adopt counsel's bidding and essentially argue Lake's case. But the legal system functions differently and effectively because of its adversarial nature originating in the *Magna Carta*. Thus, it is not the Bureau's responsibility to assist Lake in its fact-finding process or any other duty to its client. Each party is responsible for investigating the facts and making its case. Rice's previous criminal convictions are necessary to determine Rice's qualifications to be a Commission licensee. As the Presiding Judge reminded Lake's counsel, Lake has the burden of proving rehabilitation.²³ Thus, Lake, and not the Bureau, was responsible for presenting preponderant evidence of Rice's rehabilitation in order to prove the issues in favor of Lake.²⁴

Arguendo, even accepting Lake's charge, the Commission has expressly held that "the substance of an ALJ's interlocutory rulings are not a basis for disqualification because they are subject to review."²⁵ Clearly, the Commission rules governing appeals of interlocutory rulings "are designed to ensure orderly procedure in adjudicatory proceedings and to avoid the disruption which would take place if proceedings were interrupted every time a party was dissatisfied with the ALJ's ruling"²⁶

B. Other Interlocutory Rulings

Lake argues that the Judge incorrectly ruled that Lake's Motion in Limine to have Tammy Gremminger disqualified as an expert was premature.²⁷ Lake even suggests bias by rulings made in discovery matters, including one on June 11, 2015, two *years* before the hearing.²⁸ As noted above, interlocutory rulings are not a basis for disqualification because they are subject to review, and the rules governing appeals of interlocutory rulings are designed to ensure orderly procedure in adjudicatory proceedings.²⁹ Moreover, with regard to the Motion in Limine, the Judge had not yet ruled on the merits of the Motion in Limine when Lake filed the instant motion to disqualify the ALJ, but had simply ruled that it was too early because

²¹ Tr. 216:4-12 (May 3, 2017).

²² Tr. 545:23-25 (May 4, 2017).

²³ Tr. 545:5-9 (May 4, 2017) ("JUDGE SIPPEL: I want to be clear about this. You have the burden of proof So you have the burden of proving rehabilitation.")

²⁴ Tr. 545:17-21 (May 4, 2017) ("JUDGE SIPPEL: What the Bureau does is none of your concern, unless they're bringing in false evidence, of course. But if . . . the Bureau is falling down on their part of that issue, that's not your problem. So I don't understand what this is all about. That's what I'm getting at.")

²⁵ *WWOR-TV, Inc.*, 4 FCC Rcd 6155, 6155 (1989).

²⁶ *Id.* at 6156.

²⁷ See Jacobs Declaration at 3.

²⁸ See *id.* at 2.

²⁹ *WWOR-TV, Inc.*, 4 FCC Rcd 6155, 6155-56 (1989).

Gremminger had not yet been *voir dire*d on the witness stand.³⁰ As to the discovery rulings, as the Bureau correctly notes, to the extent that Lake felt it was aggrieved, it could have requested leave to file an application for review within five (5) days after the release of the Presiding Judge's orders.³¹ However, the Bureau asserts, and Lake does not contest, that Lake never made such a request.³²

C. Presiding Judge's Conduct

Lake alleges that the Judge's conduct displayed a level of bias or prejudice which warrants disqualification.³³ First, Lake asserts that the Judge interrupted and questioned Mr. Rice during his cross-examination by the Bureau on Mr. Rice's written testimony.³⁴ Second, Lake believes that the Judge's persistence on the matter regarding evidence of children going to and from Mr. Rice's house during his parole reveals his bias against Mr. Rice, assuming that the Judge was "striving to make something out of what was factually and legally nothing."³⁵ Third, Lake argues that in its cross-examination of Dr. Weitzl, the Judge "became increasingly annoyed at Lake's counsel for pausing between questions," "[told] counsel to hurry up, questioned whether he was prepared, and showed general impatience," which was "very embarrassing to Lake's counsel"³⁶

Nothing Lake alleges warrants the Presiding Judge's disqualification. The Supreme Court held that expressions of "impatience, dissatisfaction, annoyance, and even anger" do not establish bias or partiality and are "within the bounds of what imperfect men and women, even having been confirmed as federal judges, sometimes display."³⁷ Lake's argument is similar to the petitioner's in *Liteky*, which was rejected for failing to establish the requisite burden of proof. In *Liteky*, the petitioners argued that the judge "limit[ed] defense counsel's cross examination; question[ed] witnesses; periodically caution[ed] defense counsel to confine his questions to issues material to trial;" and interrupted a defense closing argument.³⁸ The Court concluded that neither the rulings and statements made by the trial judge nor the judge's "admonishment" of petitioner's counsel and co-defendants justified disqualifying the judge.³⁹ Here, the Presiding

³⁰ See Order, FCC 17M-22 (rel. April 27, 2017). The Judge did ultimately deny Lake's Motion in Limine, though he had not yet ruled at the time Lake filed its Motion to Disqualify the Presiding Judge. See Order, FCC 17M-29 (rel. Aug. 15, 2017).

³¹ See 47 CFR §§ 1.301(b) & (c); Enforcement Bureau's Response to Lake's Motion to Disqualify the Presiding Judge (Bureau's Response) at 3.

³² See Bureau's Response at 3.

³³ See Jacobs Declaration at 4.

³⁴ See *id.* at 2.

³⁵ *Id.* at 2-3.

³⁶ *Id.* at 3.

³⁷ *Liteky*, 510 U.S. at 555-56.

³⁸ *Id.* at 542-43. Cf. *Butz v. Economou*, 438 U.S. 478, 513 (1978) (federal administrative law judges are comparable to federal trial judges).

³⁹ *Id.* at 556.

Judge was only performing his duties to understand the issues, to avoid undue delay in the proceedings, and to protect witnesses from undue inconvenience.⁴⁰

The same arguments for disqualification were presented and rejected again in *KAYE Broadcasters, Inc.* There, the petitioner argued that the presiding officer “badgered, harassed, and cut off testimony of its witnesses,” “refused to give reasons for sustaining objections to questions asked by KAYE’s counsel,” “precluded KAYE from making an offer of proof,” and “took over the examination of witnesses.”⁴¹ Yet the petitioner’s motion to disqualify was denied because the trier of fact’s “reasonable and proper attempt” to conduct the hearing in an expeditious manner and his characterization of defense counsel’s conduct did not “reflect any improper prejudice or bias.”⁴²

Lake has failed to meet its substantial burden of showing that the Presiding Judge has a personal bias or prejudice against Lake that would impair his ability to act in an impartial manner. The Judge’s questioning during *voir dire* was nothing more than an attempt to understand the issues raised during cross-examination, move the case forward, and accommodate witnesses on travel. It is only in the rarest of circumstances that a Presiding Judge’s statements or conduct during the proceedings will display the level of bias or prejudice necessary to warrant disqualification. Clearly, Lake has not made the requisite showing here to require disqualification.

D. Judge’s Inquiry Regarding Future Applications

Lake argues that the Judge made an improper request for a declaration by Rice that he would not file any applications in the future. Such declaration was to be submitted with Lake’s Motion to Dismiss. As the Judge had stated in his June 8, 2017 *Order*, he was concerned that Mr. Rice and/or Lake might file future broadcasting applications after the character issues were dismissed.⁴³ As pointedly explained in the *Order*, “to put off the trial of these character issues [until a future application] would run the risk of losing witnesses and/or their recollections, and other relevant evidence becoming stale.”⁴⁴

CONCLUSION

Lake must demonstrate that the Presiding Judge has some “deep-seated favoritism or antagonism that would make fair judgment impossible.”⁴⁵ Lake has failed to meet that burden.

⁴⁰ Lake also asserts that the Judge “voice[d] off-the-record concerns about not being reversed as he was in *Titus*.” See Jacobs Declaration at 2. The Judge may have made a comment about *Titus* off the record. But disqualification is not warranted if the Presiding Judge’s statements merely displayed an accidental departure from “requisite judicial gravity.” See *KAYE Broadcasters, Inc.*, 35 FCC 2d 548, 554 (1972) (citing *United States v. Dennis*, 183 F.2d 201, 225-26 (1950)).

⁴¹ *KAYE*, 35 FCC 2d at 550.

⁴² *Id.* at 549.

⁴³ See *Order*, FCC 17M-25, at 2.

⁴⁴ See *id.* at 2-3.

⁴⁵ See *Family Broadcasting, Inc.*, 17 FCC Rcd at 19333 (quoting *Liteky*, 510 U.S. at 555 (internal quotations omitted)).

Moreover, Lake participated in the case for three years, yet it was not until the final day of the hearing, after lunch when the Bureau's witness had returned to the stand, that Lake's counsel announced that Mr. Rice had decided to "withdraw his application and withdraw from the proceeding, thereby ending the case."⁴⁶ Lake's hurried, unexpected, and untimely attempt to withdraw from the case at the finale of litigation gives an appearance of a litigant attempting to forum shop for a different judge. The D.C. Circuit expressly warned that "[t]he Commission is not required to play games with applicants."⁴⁷ To permit disqualification would allow Mr. Rice to do an end run around Commission procedure and force a time-wasting relitigation of the same issues before a new presiding judge, who would also be subject to challenge at any time convenient to a Rice applicant.

Finally, since Lake failed to meet its burden to establish a "bent of mind" against Lake and/or Mr. Rice by the Presiding Judge which might warrant his disqualification, Lake's Motion to Disqualify the Presiding Judge must be and **IS DENIED**.

SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION⁴⁸



Richard L. Sippel
Chief Administrative Law Judge

⁴⁶ Tr. 653:4-11 (May 5, 2017).

⁴⁷ *Fischer v. FCC*, 417 F.2d 551, 555 (D.C. Cir. 1969).

⁴⁸ Courtesy copies of this Order will be sent on issuance by email to all counsel.