

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

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)

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).

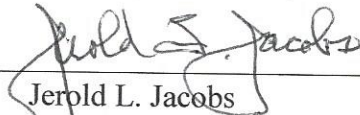
3. The requisite centerpiece of this pleading is a Declaration under penalty of perjury, attached hereto, prepared by Lake's communications counsel, Jerold L. Jacobs. Mr. Jacobs and Judge Sippel were colleagues at the Commission when Mr. Jacobs was the senior member of the Commission's Review Board in 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,



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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.

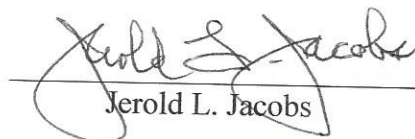
As Lake’s cross-examination of Dr. Weitzl wore on, the Judge became increasingly annoyed at Lake’s counsel for pausing between questions. He kept telling counsel to hurry up, questioned whether he was prepared, and showed general impatience, even though it was only slightly after 12 p.m., and we did 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:

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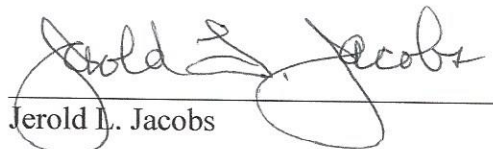
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