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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of) MM DOCKET NO. 95-154

CONTEMPORARY MEDIA, INC.)

Licensee of Stations WBOW(AM), WBFX(AM), and)
WZZQ(FM), Terre Haute, Indiana)

Order to Show Cause Why the Licenses for Stations)
WBOW(AM), WBFX(AM), and WZZQ(FM), Terre Haute,)
Indiana, Should Not be Revoked)

CONTEMPORARY BROADCASTING, INC.)

Licensee of Station KFMZ(FM), Columbia, Missouri, and)
Permittee of Station KAAM-FM, Huntsville, Missouri (unbuilt))

Order to Show Cause Why the Authorizations for Stations)
KFMZ(FM), Columbia, Missouri; and KAAM-FM, Huntsville,)
Missouri, Should Not be Revoked)

LAKE BROADCASTING, INC.)

Licensee of Station KBMX(FM), Eldon, Missouri, and)
Permittee of Station KFXE(FM), Cuba, Missouri)

Order to Show Cause Why the Authorizations for Stations)
KBMX(FM), Eldon, Missouri; and KFXE(FM), Cuba,)
Missouri, Should Not be Revoked)

LAKE BROADCASTING, INC.)

File No. BPH-921112MH

For a Construction Permit for a New FM Station on)
Channel 244A at Bourbon, Missouri)

To: Administrative Law Judge
Arthur I. Steinberg

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MASS MEDIA BUREAU'S REPLY

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SECRET
FEDERAL COMMUNICATIONS COMMISSION

1. On September 9, 1996, Contemporary Media, Inc. ("CMI"), Contemporary Broadcasting, Inc. ("CBI") and Lake Broadcasting, Inc. ("LBI") (collectively "Contemporary") filed their Proposed Findings of Facts and Conclusions of Law (PFCs). The Bureau hereby replies to Contemporary's PFCs. The Bureau's failure to reply to any particular finding or conclusion contained in Contemporary's PFCs should not be construed as a concession to its accuracy or completeness. The Bureau submits that its findings of fact are an accurate and complete presentation of the relevant record evidence and that its conclusions of law properly apply Commission precedent in light of the record.

Proposed Findings

2. At para. 15, of its findings, Contemporary erroneously states that Rice was sentenced to eight years in prison. In fact, Rice was sentenced to eight years in prison on each of four sodomy counts, seven years in prison on each of six deviate sexual assault in the first degree counts and five years in prison on each of two deviate sexual assault in the second degree counts. (MMB Ex. 1, p. 3 (admission 11)). Thus, Rice was sentenced to a total of 84 years in prison, not eight. Because his sentences run concurrently, he will serve a maximum of eight years in prison.

3. Contemporary, at paras. 58 through 68, proffers the testimony of its three general managers, Leatherman, Hauschild and Brown, to the effect that all of their contacts with corporate management are with Cox. This is not inconsistent with the Bureau's view that Cox was a puppet whose strings were pulled by Rice. Indeed, Hanks testified that when he

overheard Rice giving Cox instructions regarding station personnel, Rice confided in him that he and Cox had these little meetings all the time. (Tr. 386-88).

4. At para. 78, Contemporary makes findings concerning personnel complaints made against Rhea by station employees. As the Presiding Judge noted, this testimony would only be relevant to the question of whether Rhea had "an axe to grind against the station." Tr. 518. The record does not reveal that Rhea had any such "axe to grind" as a result of the complaints and, therefore, Contemporary's proposed findings on this matter are irrelevant and should be ignored.

5. At para. 83, Contemporary cites transcript pages 404-05 for the proposition that Hanks testified that it was Rice's idea to let Todd Hohlman go. In fact, Hanks' testimony, at Tr. 404-05, was only that Rice did not agree with him about Hohlman's skills. Hanks did not testify that it was Rice's idea to let Hohlman go. It does appear that Hanks' passing remark that Hohlman "was let go at WZZQ" (Tr. 405), to the extent that it implies that Hohlman was fired, was incorrect. See Rhea's recollection on this point at Tr. 483.

6. At para. 87, Contemporary contends that at Tr. 444-45, Hanks "recanted his testimony" that Steel's termination was precipitated by his change in the R&R reporting and subsequent change in the station's format. At Tr. 445, Hanks testified that the "primary reason" that Steel was fired was the change in reporting. He did not testify that the change in reporting was the only reason for Steel's firing. That the change in reporting, with the

concomitant format change, resulted in Steel's loss of employment appears clear.

7. Also, at para. 87, Contemporary notes that Rhea testified that he had fired Steel at the direction of Cox. What Contemporary fails to note is Rhea's testimony that Cox told him that Rice "went ballistic" over the change in reporting and "wanted him (Steel) out of there immediately." Tr. 485. Thus, the evidence is that Cox was acting at Rice's direction in ordering Rhea to fire Steel.

8. At para. 88, Contemporary relies on the testimony of Cox for the proposition that Steel had resigned and not been fired as claimed by Rhea. Cox's testimony, however, was not based on her personal knowledge. Rather, it was based solely on a termination slip contained in station files that purportedly had Rhea's signature on it. This document, which was in Contemporary's possession when Rhea testified, was never shown to him for verification. The termination slip itself was withdrawn by Contemporary and, thus, never received in evidence. Moreover, on the termination slip the word "terminated" was crossed out and the word "resigned" written in. Tr. 567.¹ The record does not reveal who made this change or why the change was made or even when the change was made. In light of these facts (or lack thereof), the Bureau moved at hearing that Cox's testimony on this matter be stricken from the record. Tr. 639. The Bureau hereby renews that motion. By permitting testimony to remain in the record that was based on a withdrawn document which

¹ Because the termination slip was not received in evidence, anyone reviewing the record of this proceeding will be compelled to rely on descriptions of the document by counsel. This could be avoided by simply striking Cox's testimony.

was not shown to the witness who could have authenticated it and testified regarding the ambiguity, the Presiding Judge is condoning what can only be described as trial by ambush tactics on the part of Contemporary.

9. At paras. 93-94, Contemporary dwells at length on the difference in testimony between Rhea and Hanks as to who went with Cox to fire Savage while totally ignoring Rice's roll in the firing. Rhea and Hanks are in agreement that it was Rice who ordered Savage fired. Who performed the ministerial act of informing Savage that he was fired is irrelevant. See Bureau's findings, para 39.

10. At para. 104, Contemporary cites Hanks' testimony given in the wrongful termination case for the proposition that Janice Pratt was not fired on Rice's instructions but rather because of her poor work habits. Contemporary, however, ignores Hanks' explanation for delaying implementation of Rice's instructions to fire Pratt. See para. 45 of the Bureau's findings which establish that Hanks used Pratt's poor work habits as a pretext for firing Pratt.

11. At para. 106, Contemporary contends that Hanks' testimony that he fired Kinneson on Rice's instructions, is contradicted by the testimony of Hauschild. According to Hauschild, Hanks fired Kinneson at his (Hauschild's) direction for not following the station's format. The fact that Hauschild may have instructed Hanks to fire Kinneson does not contradict Hanks' testimony that he (Hanks) was instructed by Rice to fire him. Hanks

never testified that he fired Kinneson based on Rice's instructions. In fact, Hanks was under the impression that Kinneson voluntarily left to take a job with another station.

Bureau's findings para. 45.

Conclusions

12. At paras. 114 through 130, Contemporary urges the Presiding Judge to declare the Commission's 1986 Character Policy Statement, 102 FCC 2d 1179 and 1990 Character Policy Statement, 5 FCC Rcd 3252, "arbitrary, capricious, and unlawful." Such a declaration would be beyond the Presiding Judge's delegated authority. Anax Broadcasting Incorporated, 87 FCC 2d 483 (1981). Cf. Goodlettsville Broadcasting Company, Inc., and cases cited therein, where the Review Board declined to consider exceptions focusing on the constitutionality and appropriateness of the Commission's diversification policy because such considerations were "beyond the pale of the Board's delegated authority." 8 FCC Rcd 57, 58 (1992).

13. To the extent that Contemporary contends in paras. 121 and 140, that the Commission has in two recent cases, Hara Broadcasting, Inc., 8 FCC Rcd 3177 (Rev. Bd. 1993) and The Kravis Co., 11 FCC Rcd 4740 (1996), concluded that felonious behavior has no bearing on a party's fitness to be a licensee, Contemporary is in error. In Hara, an applicant's principal had been convicted of a "crime against nature," a felony in North Carolina. The Board, affirming the Presiding Judge's denial of a petition to enlarge issues based on the conviction, noted the Judge's observation that the Commission had never disqualified an applicant on the basis of such a crime. In the instant case, however, the

Commission specifically designated an issue to determine the effect of Rice's convictions on Contemporary's basic qualifications. Thus, it is obvious that the Commission considers felony convictions to have a bearing on a party's fitness to be a licensee. The Kravis case can also easily be distinguished from the instant case. In Kravis there was no final adjudication of guilt. See Attachment A to Contemporary's PFCs.

14. At para. 128, Contemporary cites The Petroleum V. Nasby Corp., 9 FCC Rcd 6072 (ALJ 1994), aff'd in part and modified in part, 10 FCC Rcd 6029, recon. granted in part, 10 FCC Rcd 9964 (Rev. Bd. 1995), remanded on divestiture requirement, 11 FCC Rcd 3494 (1996), for the proposition "that a corporate licensee should not be punished for the non-broadcast crimes of a principal who is not involved in the day-to-day operations or corporate affairs of the licensee." The Nasby case, however, did not involve a principal who was the licensee's sole principal or majority owner as is the case with Rice. In Nasby the Commission remanded the case to facilitate a determination of whether the wrongdoer could "potentially influence the licensee's affairs" in the event the license was renewed. 11 FCC Rcd 3495. The potential for influence always exists where the wrongdoer is the licensee's majority owner.

15. At para. 135, Contemporary cites four testimonial letters as evidence of Rice's "excellent local reputation." In doing so, Contemporary ignores other record evidence that shows how Rice was viewed by the community. Rhea, for example, testified that Rice's indictment put the station's sales staff at a disadvantage. He told Cox that a lot of accounts

would not buy time from Rice "[i]f he's the last man on earth...." Tr. 500. Cox also noted the public relations problem that Rice's indictment caused the stations: "[G]iven the circumstances of [the] pending criminal trial, I suggested that it would be in the best interest of the Licensees from both a public relations and from a regulatory standpoint that he remain uninvolved in the oversight and management of the Licensees' operations...." Tr. 222. Also, she testified that, as a result of Rice's criminal problems, "it wasn't a real easy job to find a general manger, you know." Tr. 246. It is clear from the testimony of Rhea and Cox that Rice's reputation in the local community is not "excellent," as claimed by the licensees.

16. At para. 136, Contemporary relies on Alessandro Broadcasting Co., 99 FCC 2d 1 (Rev. Bd. 1984), for the proposition that a second degree murder conviction did not disqualify an applicant where there was evidence that the individual had been completely rehabilitated. In the instant case, Contemporary claims, Rice will be rehabilitated because Missouri law requires that imprisoned sex offenders successfully complete a rehabilitative program prior to release. Contemporary, however, fails to distinguish between successfully completing a rehabilitation program and actually being rehabilitated. In Alessandro, the applicant had been issued a Certificate of Rehabilitation by the Superior Court of the State of California. Here, of course, no court has declared Rice rehabilitated.

17. At paras. 143-46, Contemporary contends that revocation of its licenses would violate the excessive fines clause of the Constitution. In effect, Contemporary is asking that the Presiding Judge find that the Commission's designation order in this proceeding was

unconstitutional insofar as it included a provision for revocation of Contemporary's licenses. As noted at para. 13, supra, determinations of this kind are beyond the Judge's authority to make.

18. At para. 156, Contemporary characterizes both Hanks and Rhea as disgruntled employees and notes Hanks' admission that he has a tendency to exaggerate. Contemporary, however, does not specify any testimony that may have been affected by any grievance either witness may have against the licensees or that was subject to exaggeration. Furthermore, while Hanks may have said that he wanted to get everything the law would allow him in connection with his wrongful discharge suit, this does not demonstrate a willingness on his part to be less than candid in either this case or his wrongful discharge suit.

19. Contemporary's claim, at para. 158, that in comparison to Rhea and Hanks, Cox has no bias, is ludicrous. Not only is Cox employed by Contemporary, but so are her son and her daughter. Even Cox's husband's company, which does business with Contemporary, shares in the largess. See para. 15 of the Bureau's findings. If Contemporary's licenses are revoked, the Cox family gravy train would be derailed. No witness in this proceeding has more reason to be biased than Cox and the Presiding Judge should so conclude.

20. At para. 158, Contemporary sets up a false standard for evaluating the evidence in this proceeding. Contemporary correctly notes that just because one action follows

another it cannot be concluded that the first was the cause of the second. From this Contemporary correctly argues that just because certain events occurred subsequent to conversations Rice had with either Rhea or Hanks it cannot be concluded that those events necessarily happened because of those conversations. What this ignores (or obfuscates) is that the Bureau does not have to prove its case to a logical necessity standard. "In a revocation proceeding the Bureau has the burden of establishing by a preponderance of the evidence that serious misconduct has occurred. [footnote omitted]" Silver Star Communications-Albany, Inc., 6 FCC Rcd 6905, 6906 (1991). (Contemporary recognizes that the preponderance of the evidence is the standard at para. 173 of its conclusions). Here, on occasion after occasion, after Rice gave instructions, actions consistent with those instructions occurred, i.e., people were hired or fired or programming was changed. The preponderance of the evidence establishes that station employees (including Cox) followed Rice's instructions and that he was involved in making decisions at the stations after Contemporary had informed the Commission that he been insulated from such decision making.

21. At paras. 161 - 169, of its conclusions, Contemporary attempts to explain away each of the instances where Rice was involved in the firing of a station employee. In doing so, however, Contemporary ignores pertinent testimony. For example, as noted, supra at para. 11 , Contemporary ignores Hanks' reason for firing Pratt on the pretext of her poor work habits. Contemporary also ignores Hanks' testimony that before he could act on Rice's instructions and fire Madden, Madden resigned to take another job. Bureau's findings at

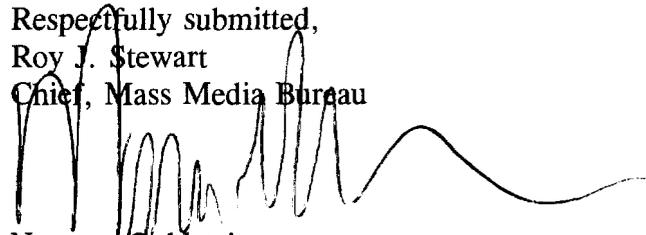
para 46. Similarly, with regard to Jeff Davis (Presley), Contemporary ignores the fact that based on his conversation with Rice, Hanks informed Davis that he would be let go at an agreed upon future date. Bureau's findings para 57. Contemporary also ignores Rhea's and Hanks' testimony about the firing of Savage and Ramsey. Bureau's findings paras. 33 and 38-39.

22. At paras. 174 and 175, Contemporary argues that, even should the Presiding Judge conclude that Rice's activities "were not fully accurately reported to the Commission and contained 'false statements,'" he should not conclude that Contemporary misrepresented facts to the Commission because there is no evidence of an intent to deceive. An intent to deceive, however, can be inferred from the facts of this case. Contemporary told the Commission that Rice was to be excluded from the stations' day-to-day decisions. He was not. This was no innocent blunder. Even reading Contemporary's findings and conclusions in the light most favorable to the licensees, it is clear that Rice was involved in day-to-day station activities when the licensees had assured the Commission that he was not. Contemporary had to know that it was deceiving the Commission with its claims to the contrary.

Summary

23. In sum, the Bureau recommends that the Presiding Judge adopt the Bureau's Proposed Findings of Fact and Conclusions of Law.

Respectfully submitted,
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October 4, 1996

CERTIFICATE OF SERVICE

Natalie Moses, a secretary in the Complaints and Political Programming Branch,
Mass Media Bureau, certifies that she has on this 4th day of October 1996, sent by regular
United States mail, copies of the foregoing "**Mass Media Bureau's Reply**" to:

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A handwritten signature in black ink, appearing to read "Natalie Moses", written over a horizontal line.

Natalie Moses