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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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

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: The Commission

**MASS MEDIA BUREAU'S OPPOSITION TO
LICENSEES' PETITION FOR RECONSIDERATION**

1. The Mass Media Bureau hereby opposes the Petition for Reconsideration ("Petition") filed on July 27, 1998, by Contemporary Media, Inc., Contemporary Broadcasters,

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Inc., and Lake Broadcasting, Inc. (the "Licensees"). The Licensees request that the Commission reconsider its Decision, FCC 98-133, released June 25, 1998, revoking the above-captioned licenses, cancelling the above-captioned construction permits, and denying the above-captioned application for a construction permit for a new FM radio station. The Decision affirmed the Initial Decision of Administrative Law Judge Arthur I. Steinberg, 12 FCC Rcd 14254 (ALJ 1997) ("ID").

2. Reconsideration is appropriate only where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters. See WWIZ, Inc., 37 FCC 685, 686 (1964), aff'd sub nom. Lorain Journal Co. v. FCC, 351 F.2d 824 (D.C. Cir. 1965) cert. denied, 383 U.S. 967 (1966) ("WWIZ"); Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106. As the Commission has repeatedly stated, reconsideration will not be granted for the purpose of debating matters on which it has already deliberated and spoken. See, e.g., Isis Broadcast Group, 8 FCC Rcd 24 (Rev. Bd. 1992), citing WWIZ; Sandab Communications Limited Partnership II, FCC 98-131, released June 24, 1998, at para. 70. In the main, the Licensees' Petition merely reargues matters that have already been considered and resolved. Moreover, the Petition does not demonstrate a major error or omission or provide any significant new facts.

I. Criminal Convictions of Michael Rice

3. The sole stockholder of the Licensees, Michael Rice, was convicted in 1994 of felonies involving twelve instances of the sexual exploitation of five children over a period of five years. ID, 12 FCC Rcd at 14257-58. The Licensees complain of the Commission's conclusion that this conduct can be considered "egregious." However, the Licensees' contention

merely reflects a continuation of the Licensees' refusal to acknowledge the heinous nature of Rice's abuse of children, which they continue to refer to merely as "sexual misconduct." See, e.g., Petition at paragraphs 6-7.

4. The only new evidence proffered by the Licensees is a letter dated July 23, 1998, from counsel representing Rice in connection with his possible parole. The letter asserts that Rice may be released as early as April 30, 1999, and probably not later than December 29, 1999, and that he is participating in a prison sexual offender program. If he is in fact released in accordance with this schedule, he will have served at most five and a quarter years of an eight year sentence. Petition at paragraph 16. The Licensees urge that it can be concluded based on the letter that the State of Missouri does not view Rice's misconduct as serious given the duration of his actual imprisonment and that the State would view him as fully rehabilitated because of his participation in the mandatory sexual offender program. Petition at paragraphs 16 and 21.

5. The letter from Rice's parole counsel is speculative and uncorroborated. Further, the letter would not in any event support the Licensees' claims, which are merely Rice's communications counsel's interpretations. Rather, Rice's parole counsel only gives his opinion as to Rice's prospective release date. He further states that participation in the sexual offender program is a "prerequisite" to release, and that completion of the program would justify early release "based on good behavior." He does not assert, much less show, that the State of Missouri would view successful completion of the program as constituting actual rehabilitation. The letter contains nothing that would invalidate the Commission's conclusions in paragraph 15 and footnote 3 of the Decision, which rejected similar prior contentions by the Licensees.

6. The Licensees rely heavily upon Wilkett v. ICC, 710 F.2d 861 (D.C. Cir. 1983) ("Wilkett"). In addition to the distinctions cited in paragraph 13 of the Decision, it should be noted that the statute at issue in Wilkett effectively limited the ICC's review of a trucking company's qualifications to whether it was "fit, willing and able to perform the service proposed." The public interest standard was applied to the merits of the proposed service rather than the qualifications of the proposed operator. 710 F.2d at 863. The Commission's responsibilities in reviewing the qualifications of a broadcast licensee are obviously much broader under the Communications Act of 1934, as amended (the "Act"). See, e.g., Section 309(a) of the Act, 47 U.S.C. § 309(a). See also Section 308(b) of the Act, 47 U.S.C. § 308(b).

7. The Licensees are also incorrect in asserting that the Decision fails to define a nexus between Rice's misconduct and the Licensees' broadcast operations. As properly found in paragraph 16 of the Decision, the egregious nature of Rice's misconduct would undermine the ability of stations operated by him to meaningfully exercise the "wide and important discretion that this agency entrusts to licensed broadcasters."

8. The Licensees at paragraph 14 of their Petition raise the objection that the Commission has not provided adequate guidance as to the weight to be accorded to mitigating factors that it has recognized. This issue was not addressed specifically in the Decision because it was not raised by the Licensees in their Exceptions. In any event, the weight of mitigating factors is necessarily dictated by the facts of each case. In this case, the Licensees' real problem is not any ambiguity in the Commission's policy, but the fact that the egregious circumstances leave no basis for a claim of mitigation. Recognizing this, the Licensees are merely attempting to blame belatedly the law for problems that ultimately derive from the facts.

9. Remaining matters raised concerning Rice's convictions essentially reargue matters previously raised and considered. There is accordingly no basis for reconsideration.

II. Misrepresentation/Lack of Candor

10. The Licensees assert that the Commission assessed its representations in this proceeding in a hypertechnical manner. In fact, it is the Licensees that are relying upon hypertechnical constructions of their representations. Essentially, it is the Licensees' contention that they only promised that Michael Rice would not himself make decisions. Thus, they characterize their representations as limited to the proposition that Rice "had been removed from day-to-day decision-making at the stations" Petition at paragraph 27 (emphasis in original). In fact, the Licensees represented that Rice would be "completely insulated and excluded from any involvement in" decision-making. Decision at paragraph 17 (emphasis added). This language could only be construed to mean that Rice would have no input into the decision-making process, not merely that he would not be the one to ultimately make decisions. The record amply supports the conclusion that Rice had input into the decision-making process, even if the Licensees' contention that others actually made the pertinent decisions were accepted.

11. Moreover, the Licensees' initial report represented that Rice "had absolutely no managerial, policy, or consultative role in the affairs" of the Licensees. Decision, paragraph 17 (emphasis added). This clearly indicated an exclusion going well beyond exclusion from actually making decisions. Candor would have required that the Licensees specifically advise of any change allowing any degree of participation by Rice.

12. The Licensees request reconsideration of the Decision's conclusions regarding the reporting of Rice's involvement in station affairs. Petition at paragraph 40. However, nowhere

do the Licensees assert that they reported clearly the extent of Rice's activities, or that Rice was reminded by Cox, either verbally or in writing, that his "schmoozing, musings and intermeddling" could reasonably be at odds with representations to the Commission. Petition at paragraph 34. To the contrary, regarding their lack of candor, the Licensees persist in advocating "subtle" distinctions. Petition at paragraph 24. The fact that Rice may have been excluded from any number of management or decision-making chores at the stations, is not sufficient evidence that he was excluded in a manner consistent with the Licensees' §1.65 representation. Moreover, the Licensees' contention that certain phrases in their second §1.65 report should have "put the reader on adequate notice" of what was intended to be conveyed, suggests that the burden is on the Commission to read between the lines of their submission. In this regard, the Licensees' position is clearly at odds with the intent of Section 1.65, which states at the outset: "Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application, or in Commission proceedings involving a pending application." 47 C.F.R. §1.65(a). Having relied upon vague characterizations which were lacking in the requisite candor, the Licensees should not now be heard to argue that these representations were in fact continually accurate and complete.

III. Review Under the Excessive Fines Clause of the Eighth Amendment

13. Licensees, in their petition for reconsideration, continue to argue that the Commission's revocation action violates the Excessive Fines Clause of the Eighth Amendment to the U.S. Constitution.¹ Having earlier relied on Austin v. United States, 509 U.S. 602 (1993)

¹ "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Constitution, Amendment 8.

("Austin"), which involved drug trafficking offenses, the Licensees now cite United States v. Bajakajian, 118 S.Ct. 2028 (1998) ("Bajakajian"), a customs monetary reporting case. We submit that the facts and circumstances controlling in Bajakajian are as unpersuasive in this case as those in Austin. In Bajakajian, the respondent failed to report, in violation of federal law, possession of \$357,144 in currency which he sought to carry out of the country. Title 18 U.S.C. section 982(a)(1) provides that a person convicted of willfully violating this reporting requirement shall forfeit to the government "any property ... involved in such offense." The U.S. Government sought forfeiture of the entire \$357,144 as the property involved in the offense. The District Court concluded that full forfeiture would be grossly disproportionate to the offense in question and would therefore violate the Excessive Fines Clause of the Eighth Amendment. The court ordered forfeiture of \$15,000, three years' probation and the maximum fine of \$5,000. The Ninth Circuit affirmed. The U.S. Supreme Court affirmed, holding that a "punitive (emphasis added) forfeiture violates the Excessive Fines Clause if it is grossly disproportionate to the gravity of the offense that it is designed to punish." Bajakajian at 2030.

14. As an initial matter, the Licensees fail to acknowledge the Court's reasoning that in order to fall under the Excessive Fines Clause, a forfeiture must fulfill two conditions: the property forfeited must be an "instrumentality" of the crime committed, and the value of the property must be proportional to the culpability of the owner. The Court explained that the term "instrumentality" characterizes the property that "historically was subject to forfeiture because it was the actual means by which an offense was committed." Bajakajian at 2036. In the instant case, the Licensees would propound that the instrumentality is represented by the FCC licenses

and permits. We argue the contrary.² Rice's commission of the sexual offenses did not rely on his status as a licensee and permittee. The sexual crimes here are not inextricably linked with Rice's status as a broadcaster. The "property" to be forfeited, therefore, is not an instrumentality of the crime. Thus, the proportionality of the property, the second condition identified by the Court, need not be reached inasmuch as the instrumentality query fails.

15. Moreover, the licenses and permits are not in any event "property" of the Licensees. The Commission, by grant of the licenses and permits, did not convey an ownership interest to Rice. Section 301 of the Communications Act reads in pertinent part: "It is the purpose of this Act, among other things, to maintain control of the United States over the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license." Thus, the revocations are not properly scrutinized under the Eighth Amendment as seizure of Rice's property.

16. Further, the offense at issue in Bajakajian is a reporting violation. The Court opined that it was permissible to transport the currency out of the country so long as the respondent reported it. The Court held that the respondent's violation was "unrelated to any other illegal activities (emphasis added)." Bajakajian at 2038. Licensees cannot argue any such mitigation relative to the twelve counts of sexual assault. Rice's behavior was illegal, and warranted a hearing on the impact of these criminal convictions on Rice's fitness to hold a

² Instrumentality forfeitures have historically been limited to property actually used to commit an offense and no more. United States v. Bajakajian, 118 S.Ct. 2028, 2036 (1998) (Bajakajian).

broadcast license.³ We concur with the ALJ's findings in regard to Rice's fitness, and contend that the subsequent revocation of licenses and permits is not punitive, as contemplated by the Court in Bajakajian. Rather, the revocation acts as a remedy, by which the Commission may restore fully the licenses and permits to the public. The Commission may thus make future grant of the licenses and permits to an applicant who demonstrates, among other considerations, the requisite character qualifications for trusteeship.

IV. Conclusion

17. Accordingly, the Licensees' Petition for Reconsideration should be denied.

³ The Court also held in Bajakajian that the harm caused by the respondent was "minimal". Bajakajian at 2039. The Commission properly acknowledged the Second Circuit's recognition, based on medical studies, that the sexual abuse of children causes serious harm. Decision at paragraph 14, citing Doe v. Pataki, 120 F.3d 1263, 1266 (2d Cir. 1997). It properly concluded that Rice had committed "heinous crimes characterized by moral turpitude."

Respectfully submitted,
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August 11, 1998

CERTIFICATE OF SERVICE

Talya Lewis, a secretary in the Complaints and Political Programming Branch, Mass Media Bureau, hereby certifies that she has on this day of August 11, 1998, sent by regular first class U.S. mail, copies of the foregoing "Mass Media Bureau's Opposition to Licensees' Petition for Reconsideration" to:

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