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August 21, 1998

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Washington, D.C. 20554

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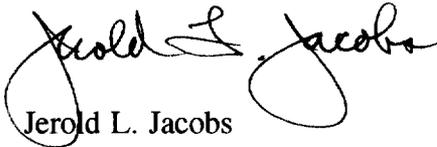
Re: MM Docket No. 95-154

Dear Ms. Salas:

On behalf of our clients, Contemporary Media, Inc., Contemporary Broadcasting, Inc., and Lake Broadcasting, Inc., enclosed herewith for filing are an original and 14 copies of their REPLY TO MASS MEDIA BUREAU'S OPPOSITION TO LICENSEES' PETITION FOR RECONSIDERATION in the above-referenced matter.

Please direct any inquiries or communications concerning this matter to the undersigned.

Very truly yours,



Jerold L. Jacobs

Enc.

cc: As on Certificate of Service (all w/enc.)

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FEB 1998

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

RECEIVED

AUG 21 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

MM DOCKET NO. 95-154)

CONTEMPORARY MEDIA, INC.)
Licensee of Stations WBOW, WZZQ, and)
WZZQ-FM, Terre Haute, Indiana)

Order to Show Cause Why the Licenses for)
Stations WBOW, WZZQ, 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 New FM Station on)
Channel 244A at Bourbon, Missouri)

To: The Commission

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

Contemporary Media, Inc. ("CMI"), Contemporary Broadcasting, Inc. ("CBI"), and Lake Broadcasting, Inc. ("LBI," and together with CMI and CBI, the "Licensees"), by their attorneys, pursuant to §1.106(h) of the Commission's Rules, hereby replies to the Mass Media Bureau's "Opposition" to the Licensees' Petition for Reconsideration ("Petition") in this proceeding. As the Licensees will now demonstrate, the Opposition is littered with errors and is mistaken about key substantive matters. It is therefore necessary for the Licensees to bluntly "set the record straight" to ensure that justice is done. In support whereof, the following is shown:

1. Contrary to the Opposition (¶2), the Licensees' Petition identifies numerous material errors and omissions in the Commission's Decision, FCC 98-133, released June 25, 1998, in this proceeding. There are four basic areas of error or omission, in which the Decision reached incorrect conclusions or failed to address a matter adequately, or in which the Licensees are now presenting new evidence or case precedents that were not available when the Licensees filed their Exceptions in October 1997. The four subject areas are: (1) whether the Commission's Character Policy Statements ("CPS-1&2") are arbitrary, capricious, and unlawful in general and as applied to the Licensees; (2) whether, if CPS-1&2 are lawful, the Licensees have proffered sufficient mitigation evidence to remain qualified; (3) whether the Licensees misrepresented facts or lacked candor concerning whether Michael Rice was excluded from any decision-making role at the stations; and (4) whether revocation of the Licensees' authorizations violates the Eighth Amendment.

A. CPS-1&2, Nexus, and Mitigation Factors

2. The Bureau's Opposition (¶¶s 3-9) mixes subject areas (1) and (2) above and fails to address many salient objections raised by the Licensees' Petition. Rather than repeat the uncontested points, the Licensees will address only the Opposition's responses. First, the Licensees note with dismay that the Opposition (¶3 and n.3) chastises the Licensees for their "refusal to acknowledge the heinous nature of Rice's...[criminal offenses]" and asserts that the Decision properly concluded that Mr. Rice committed "heinous crimes characterized by moral turpitude". There is no place in this proceeding for such inflammatory prose or the requested "acknowledgement". Rather, the proper legal questions before the Commission are whether CPS-1&2 or the Decision presents any concrete criteria for measuring "egregious" misconduct and whether the Decision (¶11) can legitimately hold, without any further policy elaboration, that there is a lack of character qualifications and five broadcast licenses should be revoked

without also specifically finding a nexus between the non-FCC criminal misconduct of the licensee's principal and the licensee's broadcast activities and, where the criminal behavior is allegedly egregious, without finding a specific relationship to the applicant's truthfulness. The answer should be a resounding "No".

3. However, instead, the Opposition attempts to find a "nexus" holding in the Decision, even though the Commission itself stated that no nexus between Mr. Rice's misconduct and the Licensees' broadcast operations needed to exist. According to the Opposition (¶7), Paragraph 16 of the Decision "defines" the nexus as follows: "[T]he 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'". This purported nexus definition does not parse and is plainly erroneous. How can the "nature" of Mr. Rice's past non-broadcast misconduct undermine the ability of a station not presently operated by Mr. Rice to exercise its discretion? And how can the Commission revoke a license at the present time because Mr. Rice might (or might not) become directly involved with station operations in the future? The fact is that the Decision erred in providing no detailed justification for its ipse dixit that the Licensees' authorizations could legally be revoked without a showing of nexus, and the Opposition has failed to show that there is any nexus.

4. Similarly, the Opposition (¶6) is clearly mistaken in its attempt to show that the character fitness inquiry in Wilkett v. ICC, 710 F.2d 861 (D.C. Cir. 1983), was less rigorous or broad than the Commission's character fitness standard. Indeed, the very pages of Wilkett cited by the Bureau say the exact opposite! The Court of Appeals summarized and reversed the ICC's erroneous refusal to issue a license to Wilkett Trucking (the "Company"), using the following language (710 F.2d at 863-64) (emphasis added):

Finding that the proprietor's fitness could not be separated from that of the Company, the Commission concluded that Wilkett's convictions [for second degree murder and conspiracy to distribute drugs] demonstrated a disregard for the law indication of one who is unfit to hold a Commission authorization....

[T]he Commission was called upon to assess fitness where there was no record of Company misdeeds; rather, fitness was at issue only because the sole-proprietor had been convicted of nontransportation related crimes. Notwithstanding the fact that the grant of authority will be issued to the Company, the Commission focused solely upon the fitness of the individual proprietor, James Wilkett. Such an inquiry is misdirected. While the proprietor's fitness may be relevant, the primary focus should be upon the Company's record of operations...There is no record evidence to suggest that the company would operate unlawfully in the future...The Commission based its conclusion that the Company was unfit solely upon its view that James Wilkett's convictions were indicative of a predisposition on the part of the Company to violate trucking statutes and regulations. That conclusion is unreasonable.

The Licensees submit that the Decision's nexus error is essentially identical with the ICC's – just substitute Michael Rice's name for James Wilkett's. Upon reconsideration, the Licensees ask the Commission to directly address the Court of Appeals' substantive administrative law holdings in Wilkett and abandon its previous efforts to distinguish Wilkett on its facts or because of artificial differences in the ICC's licensing mandate.

5. Next, the Opposition (¶¶s 4-5) misreads and misinterprets the “new evidence” submitted by the Licensees as Exhibit A of their Petition. That evidence – a July 23, 1998 letter to the Commission from Donald L. Wolff, Esq., Mr. Rice's parole counsel -- states that, under Missouri law, Mr. Rice is scheduled to be released from prison no later than December 29, 1999 and perhaps as early as April 30, 1999. However, the Opposition (¶5) mischaracterizes Mr. Wolff's statements as “speculative and uncorroborated”. A closer reading of his letter shows that Mr. Wolff was reporting the contents of official correspondence from the Missouri Department of Corrections and Human Resources Board of Probation and Parole, which stated that Mr. Rice's conditional release date was December 29, 1999. There is no speculation there. Mr. Wolff then added the fact that upon the April 1999 completion of the Missouri Sexual

Offender Program (“MOSOP”) in which Mr. Rice is currently enrolled, he will be entitled to an earlier release based on good behavior, so that Mr. Rice “may be released from confinement as early as April 30, 1999 but I expect not later than December 29, 1999”. Thus, Mr. Wolff is quite certain that Mr. Rice will be released no later than December 29, 1999, and his uncertainty focuses on how much earlier Mr. Rice’s release may come.

6. Finally, the Opposition (¶8) incorrectly asserts that the Decision did not need to specifically address the weight to be given to mitigating factors in its character analysis because “[t]his issue...was not raised by the Licensees in their Exceptions”. To the contrary, the Licensees’ Exceptions (n.3) fully raised the “weight” issue as follows: “[N]either in CPS-1&2 nor thereafter has the Commission ever provided any guidance as to the weight to be given to each mitigating factor it recognizes, or a formula for determining what constitutes sufficient mitigation to overcome the potential adverse effects of a principal’s felonious misconduct on a licensee’s character qualifications”. Moreover, the Bureau is obviously mistaken in its view that “the weight of mitigating factors is necessarily dictated by the facts of each case” (Opp. ¶8). Such a standard represents the height of arbitrariness. What is clearly needed is an enunciated and detailed weighing standard that is objectively applied to the unique facts of each case. Under such a standard, the Licensees maintain that their good record of FCC compliance, the substantial passage of time since Mr. Rice’s felonious misconduct occurred, the fact that no other principal knew of, or was involved in, such activity, the reputation of Mr. Rice and the Licensees’ stations in their communities, Mr. Rice’s rehabilitation, and the Licensees’ remedial efforts are all substantial mitigation factors that should overcome the undefined and imprecise

weight given by the Decision to the seriousness of Mr. Rice's misconduct.¹ Their combined consideration fully warrants a conclusion upon reconsideration that the Licensees should not be disqualified because of Mr. Rice's prior criminal misconduct.

B. Misrepresentation/Lack of Candor

7. Turning to subject area (3), the Petition (¶¶s 23-24) brought into sharp focus the essence of the Licensees' disagreement with the Decision's conclusion that the Licensees misrepresented facts or lacked candor concerning Mr. Rice's conduct at the Licensees' stations. Simply stated, the Decision (¶17) mischaracterized and then incorrectly decided the "misrepresentation" issue because (1) the Licensees never undertook to completely exclude Mr. Rice from having any involvement in their stations' activities, only to exclude him from having any involvement in the management, policy, and day-to-day decisions involving the stations, and (2) the conduct that Mr. Rice is accused of performing without adequate notice to the Commission was not decision-making conduct.

8. The Opposition (¶10) criticizes the Licensees' position on Mr. Rice's lack of a decision-making role by claiming that the Licensees undertook that Mr. Rice "would have no input into the decision-making process, not merely that he would not be the one to ultimately

¹ Since Mr. Rice began his incarceration on September 30, 1994, it now appears that he will actually be incarcerated for a total of no more than five and one-quarter years. Thus, Mr. Wolff's letter (see Paragraph 5 above) importantly supports the Licensees' contention that, as to the "seriousness" mitigation factor in the Commission's character analysis under CPS-1&2, some practical meaning must be ascribed to the sentencing judge's issuance of concurrent sentences in Mr. Rice's case and to the fact that the actual time served will be less than six years. Moreover, Mr. Wolff's letter is also probative under the "rehabilitation" mitigation factor, where the Decision (n.3) incorrectly affirmed the ALJ's refusal to admit evidence that Mr. Rice is required by Missouri law to complete MOSOP before his release. As stated by Mr. Wolff, and corroborated by Exhibit B of the Petition, Mr. Rice is now participating in MOSOP, which he is scheduled to complete in April 1999. That rehabilitation evidence is now timely and probative, and it should be received into evidence and fully credited.

make decisions”. The Bureau is straining to find improprieties where they do not exist. The Licensees must again asseverate that they never undertook to completely exclude Mr. Rice from having any involvement in their stations’ activities. Yet, such total exclusion would have been necessary in order to satisfy the Bureau’s latest (mis)construction of what the Licensees said in their §1.65 reports to the Commission.

9. The Opposition (¶10) mischaracterizes the record when it states that “[t]he record amply supports the conclusion that Rice had input into the decision-making process” (emphasis added). The Licensees do not deny that Mr. Rice spoke to station employees and managers. However, there is clear record evidence that the Licensees’ CEO, Janet Cox, and its General Managers, Richard Hauschild, Daniel Leatherman, and Kenneth Brown, made their management decisions wholly independent of what Mr. Rice may have said – sometimes consistent with his comments and at other times inconsistent therewith. Indeed, the testimony of the three General Managers firmly supports the conclusion that they managed their respective stations without any input from Mr. Rice and reported exclusively to Mrs. Cox. Moreover, the record shows that Mr. Rice had no communications at all with either Mr. Brown or Mr. Hauschild concerning their station operations. Tr. 136, 142, 155-60, 168-77, 179-83, 216-18, 261-62, 341, 605, 606, 609, 611-12, 622; Lic. Exh. 1, p. 14; Lic. Exh. 2, pp. 1-3; Lic. Exh. 3, pp. 2-3; Lic. Exh. 4, pp. 1-3.

10. In short, as the record shows, to the best of the Licensees’ knowledge, Mr. Rice’s alleged “input into” the decision-making process was politely ignored by the Licensees’ CEO and General Managers, so that Mr. Rice’s talk did not really qualify as “input” -- just as a tree falling in an empty forest does not make a sound. Or, as the Petition (¶34) summarized the record, Mr. Rice’s schmoozing, musings, and intermeddling at the stations – assuming all of the stated activities even occurred – did not rise to the level of reportability to the Commission because they did not affect the independent decision-making being done by others. Put

differently, the I.D., the Decision, and the Opposition measure Mr. Rice's station activities by an entirely unrealistic and unreasonable standard, which should be overturned upon reconsideration. Since Mr. Rice was not banished from the Licensees' stations, no one could reasonably expect that Mr. Rice would be present but would not speak to anyone for fear that such conversations would be construed as "having input".

11. Of course, the real legal issue is not whether any conversations occurred but, rather, whether the Licensees' top managers were aware of such activities, whether they had any effect on actual decision-making, and whether the Licensees' §1.65 reports intentionally misrepresented facts or lacked candor concerning those matters. The Opposition concedes (¶12) that "Rice may have been excluded from any number of management or decision-making chores at the stations," but the Bureau wants to be sure that the Licensees reported every single aberrant word in their §1.65 reports. However, by its very title, §1.65 of the Rules only requires the reporting of "substantial and significant changes in information furnished". The Opposition clearly is not talking about "substantial and significant changes" here. The fact that the I.D., the Decision, and the Opposition have to grasp at these straws to try to eke out a misrepresentation or lack of candor finding demonstrates how the record evidence in this case has been blown completely out of proportion in order to "convict" the Licensees. A calmer reexamination of the record upon reconsideration should lead to the conclusion that the Licensees neither misrepresented nor lacked candor in their §1.65 reports.

C. Revocation Violates Excessive Fines Clause

12. As to whether revocation of the Licensees' authorizations would violate the Excessive Fines Clause of the Eighth Amendment to the U.S. Constitution (subject area (4)), the Opposition tries to distinguish on its facts the recent Supreme Court decision in U.S. v. Bajakajian, 66 U.S.L.W. 4514, 4518-19 (U.S. June 22, 1998), that a civil forfeiture of \$357,144

for a currency reporting offense was unconstitutional because it is “grossly disproportional to the gravity of the defendant’s offense”.

13. The Licensees concede that the facts of this case are somewhat different from Bajakajian, and they endorse the Opposition’s concessions (¶15) that Mr. Rice’s criminal misconduct was not “inextricably linked with Rice’s status as a broadcaster” and that the license “properties” to be forfeited through the license revocation process are not “an instrumentality of the crime”. However, the Licensees sharply disagree with the Opposition (¶16) that the Commission’s “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”.

14. The Opposition’s punitive/remedy rhetoric is familiar, but it is hardly persuasive in 1998 in the face of Supreme Court decisions such as Bajakajian and Austin v. United States, 509 U.S. 602 (1993). The Commission’s revocation authority has consistently been held by the Commission and the courts as an appropriate civil “penalty,” punishing various misconduct. So it is ludicrous to blandly call it a “remedy” here or to pretend that the Licensees’ stations are in need of being “restored” when the Commission has conceded that the stations have excellent records of FCC compliance. See, e.g., CBS, Inc. v. FCC, 453 U.S. 367, 378 (1981) (license revocation is “penalty” under §312(a)(7) of the Act); Renewal/ Revocation Approach, 93 FCC 2d 423, 432 (1983) (same); Broadcast Hoaxes, 7 FCC Rcd 4106, 4107 (1992) (license revocation and non-renewal are “penalties” for perpetration of broadcast hoaxes); Theodore E. Sousa, 92 FCC 2d 173, 179 (1982) (revocation is appropriate “penalty” under §312(a)(2) of the Act).

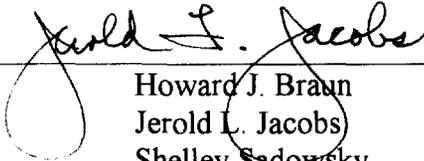
15. Thus, given the punitive nature of revocation, the Commission’s actions herein clearly must be scrutinized under the Excessive Fines Clause and the Austin and Bajakajian cases to determine constitutional propriety. Cf. United States v. Reveille, 21 F.3d 1118, 1994

WL 118068 (9th Cir. 1994) (unpublished opinion) (forfeiture of radio broadcast equipment may be "punishment" subject to scrutiny under Excessive Fines Clause). Revocation of any of the Licensees' licenses or permits under Issue 1 plainly would be wholly punitive, given the Licensees' record of exemplary Commission compliance. And, considering that a Missouri court already has punished Mr. Rice by imposing on him a prison term of eight years, revocation of the Licensees' authorizations would be clearly excessive under the Eighth Amendment and, thus, unconstitutional. Likewise, under Issue 2, where the evidence does not support a conclusion that the Licensees misrepresented facts, lacked candor, or acted with an intention to deceive the Commission in their §1.65 reports, revocation of the Licensees' authorizations is unduly punitive and represents an improper and excessive exercise of the Commission's discretion, contrary to the public interest. At most, a monetary forfeiture may be levied.

WHEREFORE, in light of the foregoing, the Licensees respectfully urge that reconsideration should be granted, and this proceeding should be terminated without the revocation of any licenses or construction permits.

Respectfully submitted,

CONTEMPORARY MEDIA, INC.
CONTEMPORARY BROADCASTING, INC.
LAKE BROADCASTING, INC.

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Dated: August 21, 1998

CERTIFICATE OF SERVICE

I, Dolly M. LaFuenta, a secretary in the law offices of Rosenman & Colin LLP, do hereby certify that on this 21st day of August, 1998, I have caused to be hand-delivered or sent by U.S. mail, postage prepaid, a copy of the foregoing "Reply to Mass Media Bureau's Opposition to Licensees' Petition for Reconsideration" to:

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Washington, DC 20554

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