

FEDERAL COMMUNICATIONS COMMISSION

FCC 99-81

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DISPATCHED
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 KFEXE(FM), Cuba,)	
Missouri)	
)	
Order to Show Cause Why the Authorizations for)	
Stations KBMX(FM), Eldon, Missouri, and)	
KFEXE(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)	

ORDER

Adopted: April, 22, 1999

; Released: April 28, 1999

By the Commission:

1. This Order denies a Petition for Reconsideration of a Commission Decision that affirmed an Initial Decision revoking the licenses and construction permits held by Contemporary Media, Inc., Contemporary Broadcasting, Inc., and Lake Broadcasting, Inc. (collectively, "Licensees"), and denying the Licensees' application for a new station. The Commission agreed with the ALJ that the Licensees should be disqualified because of violations of law relating to repeated sexual abuse of children by the stations' sole owner and misrepresentations by the Licensees. Contemporary Media, Inc., 13 FCC Rcd 14437 (1998).

2. Michael Rice, who is the Licensees' sole shareholder, the corporate president and treasurer, and a director, was convicted in 1994 of twelve felonies, including eight counts of deviate sexual abuse and four counts of sodomy. These crimes involved five children. As a consequence of his criminal acts, Rice is currently incarcerated serving a maximum prison term of eight years.

3. In our Decision, we addressed first the effect of Rice's convictions on the Licensees' basic qualifications. In response to the Licensees' argument that the Commission's governing character policy is arbitrary and capricious as applied in this case, we reviewed the Commission's policy on character qualifications in broadcast licensing, as set forth in Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179 (1986), recon. denied, 1 FCC Rcd 421 (1986), appeal dismissed sub nom. NABB v. FCC, No. 86-1179 (D.C. Cir. June 11, 1987) ("1986 Character Policy Statement"), modified, 5 FCC Rcd 3252 (1990) (subsequent history omitted) ("1990 Character Policy Statement"). We concluded that our character policies are validly applied to the Licensees, and that Rice's convictions involving the repeated sexual abuse of children adversely affected their qualifications to remain Commission licensees. We further found that the Licensees did not make any significant showing of mitigation under this issue. Contemporary Media, Inc., 13 FCC Rcd at 14439, 14441 ¶¶ 4-5, 9. In addition to our findings regarding the impact of Rice's criminal behavior, we concluded that the Licensees misrepresented and lacked candor in repeatedly reporting to the Commission that, subsequent to his arrest, Rice was completely excluded from any involvement in the management and operation of the Licensees' radio stations. We held that Rice's criminal acts and the Licensees' deceit constituted separate and independent grounds for disqualification of the Licensees, and that the Licensees lacked the requisite character qualifications to deal truthfully with the Commission and to comply with our rules and policies. Id. at 14454-59 ¶¶ 34-41.

4. In their Petition for Reconsideration, the Licensees renew their contention that the Commission's 1986 and 1990 Character Policy Statements are arbitrary, both in general and as specifically applied to the Licensees, because there is no nexus between Rice's sexual misconduct and the Licensees' broadcast activities or propensity for truthfulness and reliability. The Licensees also argue that the Commission has not explained how it weighs the mitigation factors it applies in assessing the impact of criminal behavior and that, in any case, the

Licenseses' showing of mitigation was sufficient to warrant a conclusion that they are qualified. In this regard, the Licensees submit a July 23, 1998 letter from Donald L. Wolff, who is described as "Rice's parole counsel," which states that Rice is scheduled to be released from prison no later than December 29, 1999, and perhaps as early as April 30, 1999. The Licensees argue that this information indicates that the Commission overstated the seriousness of Rice's crimes because he will "serve less than six years." Petition at 10.

5. With regard to the misrepresentation finding, the Licensees contend that the Commission mischaracterized the Licensees' statements because they never claimed to remove Rice from all station activities but only management, policy, and day-to-day decisions. Insofar as Rice performed the activities attributed to him in the record, the Licensees aver, this conduct was not decision-making and, accordingly, the Licensees' reports were not inaccurate. Although these "distinctions are subtle" (Petition at 13), the Licensees argue that they are supported by the record. The Licensees submit that the evidence establishes only that Rice "made unsolicited comments" to various station officials (Petition at 17), and engaged in "shmoozing, musings, and intermeddling" (Petition at 19), but not decision-making activities. Finally, the Licensees argue, as they did in their exceptions, that revocation of their authorizations violates the Excessive Fines Clause of the Eighth Amendment, and they cite U.S. v. Bajakajian, 118 S. Ct. 2028 (1998), for the proposition that revocation is a grossly disproportionate penalty.

6. It is well established that the Commission does not grant reconsideration simply for the purpose of debating matters on which it has already deliberated and spoken. See WWIZ, Inc., 37 FCC 685 (1964), aff'd sub nom. Lorain Journal C. v. FCC, 351 F. 2d 824 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966). To be successful, a petition for reconsideration must rely on new facts, changed circumstances, or material errors or omissions in the underlying opinion. See Sandab Communications Limited Partnership II, FCC 98-131, released June 24, 1998, ¶ 70; Isis Broadcast Group, 8 FCC Rcd 24 (Rev. Bd. 1992), rev. denied, 8 FCC Rcd 7040 (1993). Here we agree with the Mass Media Bureau's position in its opposition that the Licensees' Petition does not meet this test but largely reiterates arguments that we previously considered and rejected. Illustrative of the Licensees' overall approach is the fact that the four principal arguments and three sub-categories of arguments listed in its Table of Contents are an almost identical verbatim repetition of the same arguments listed in the Table of Contents of its original exceptions. That is an insufficient basis for reconsideration.

7. On the violations of law issue, with respect to the application of our character policies to the Licensees, we affirmed our view that where, as here, there is a record of felony convictions involving "egregious crimes against society" that demonstrates a "callous disregard for the welfare of fellow citizens," we need not find the specific link or nexus the Licensees demand. We explained that the violations themselves are so serious that we have legitimate reason for concern about the Licensees' propensity to conform to our rules and policies, and to be truthful with us. Contemporary Media, Inc., 13 FCC Rcd at 14442, 14446 ¶¶ 11, 16.

8. In addition, we carefully reviewed the mitigation evidence in the record and concluded, contrary to the Licensees' view, that all but one of the factors we traditionally consider weighed against the Licensees. We found that Rice's crimes were extremely serious, willful, repeated over an extended period of time, recent, and committed by the sole owner of the stations. Furthermore, the Licensees failed to take adequate remedial measures, as they claimed, by removing Rice from involvement in station management after the charges were brought against him, and did not establish rehabilitation. The Licensees' good overall record of rule compliance alone did not overcome the cumulative adverse impact of all this other evidence. Id. at 14444-46 ¶¶ 14-15. Thus, we perceive no ambiguity in our policy or its application here because, whatever "weighing" or order of preference we might assign to these individual factors, as urged by the Licensees, the overwhelming preponderance of record evidence in this case still would warrant a resolution adverse to the Licensees.

9. The only new information submitted by the Licensees with respect to mitigation is the Wolff letter. The letter states that Rice's "conditional release date" is December 29, 1999; that following completion of a 12-month Missouri Sexual Offender Program, he could be released earlier "based on good behavior"; and that Wolff "expect[s]" release will be no later than December 29. As this letter indicates, the actual date of Rice's release from confinement has not yet been determined by prison authorities and is far from certain. But even if his time served ultimately is "less than six years," instead of eight, we do not see how this in itself reduces the seriousness of the nature of Rice's crimes or their negative impact on the Licensees' qualifications. Id. at 14444-46 ¶ 15.¹

10. With regard to our findings of misrepresentation and lack of candor, we disagree with the Licensees that the "subtle distinctions" they are drawing between evidence of decision-making and other station activities warrant reconsideration. First, these purported distinctions do not undermine our conclusion that the Licensees lacked candor because they never directly informed the Commission in their reports that Rice was involved in consultative activities at the stations, even though their initial reports represented to the Commission that he had "no consultative role in the affairs" of the stations and a later report claimed that there was "no change in Mr. Rice's status," even after he had taken on such a role. The Licensees did not attempt to clarify this matter in any of their reports, even though their initial reports clearly purported to exclude Rice from more than just decision-making. Id. at 14454-55 ¶ 35.

¹We also disagree with the Licensees that we incorrectly affirmed the ALJ's refusal to credit the four "character statements" submitted on Rice's behalf. These statements do not carry great weight for the intended purpose because they do not discuss Rice's character in light of his criminal activities, but only his business record and ability, and one even disavows familiarity with Rice's criminal prosecution. Id. at 14444-46 ¶ 15; Licensees Exh. 5. Hence the letters afford little or no evidence of Rice's good character or rehabilitation.

11. Second, quite apart from the evidence of Rice's consultative activities, we also found extensive testimonial and documentary evidence that Rice was openly involved in the operation of the stations, contrary to the Licensees' representation to the Commission that, from the time Rice was formally charged with criminal behavior, he was "excluded from involvement" in "day-to-day decisions and operations." In spite of the Licensees' overt claim in their initial reports that Rice was being "completely insulated and excluded from any involvement in . . . day-to-day decisions involving any" of the stations, the record disclosed detailed evidence of his involvement in specific programming matters at the stations as well as numerous decisions to hire and fire station personnel. *Id.* at 14448-50, 14451 ¶¶ 21-24, 27. Notwithstanding the Licensees' characterization in their Petition, these were undoubtedly decision-making activities. Indeed programming and personnel are two areas traditionally associated with station control. See *Bennett Gilbert Gaines*, 8 FCC Rcd 1405 (Rev. Bd. 1993), *rev. denied*, 9 FCC Rcd 533 (1994).² Although other management officials may have had an independent role in these decisions, and Rice may have been excluded from other management decisions, as the Licensees' maintain, there is no question that Rice's involvement in the important station affairs described in the record was inconsistent with the Licensees' report that he was completely excluded from the "customary" management and operation of the stations and had "no managerial or policy role in the affairs" of the Licensees. Rice's activities went well beyond the Licensees' current assertion that he was merely making "unsolicited comments" or "shmoozing."³ In fact, he gave various instructions to station officials that were carried out, and employees he wanted fired were let go. *Contemporary Media, Inc.*, 13 FCC Rcd at 14455-56, 14457-58 ¶¶ 36-37, 39. Moreover, the Licensees never amended their reports to disclose the extent of Rice's involvement at the stations.

12. We also reject the Licensees' strained contention (Petition at 18-19) that evidence of Rice's involvement in station management in the form of three letters he wrote to officials of two radio stations rejecting offers to purchase one of the Licensees' construction permits, inviting an offer to purchase a station once it is on the air, and suggesting an exchange of existing stations, is insignificant because it shows involvement in ownership, rather than management and operation. We find that this distinction is not persuasive. The only case support cited by the Licensees is the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395-96 (1995), which discusses the Commission's former ownership integration

²The Licensees did not except to the ALJ's conclusion that Rice did not abandon or relinquish ultimate control over the Licensees because "Rice was never totally isolated and excluded from the management, operations, and affairs of the Licensees' stations." *Contemporary Media, Inc.*, 12 FCC Rcd 14254, 14305 ¶ 197 (ALJ 1997).

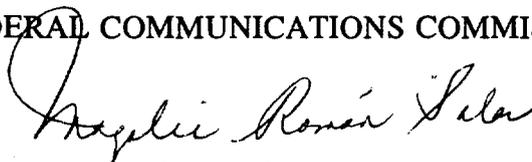
³According to Rosten, *The Joys of Yiddish* 300 (1968), "shmooz means a friendly, gossipy, prolonged, heart-to-heart talk." This hardly describes Rice's persistent and extensive involvement in important day-to-day decisions and operations at the stations.

criterion. That comparative licensing policy, however, has no bearing on the issue here or the factual record of Rice's involvement in significant managerial decisions at the stations. We affirm our original conclusion that the decision to sell a broadcast property is a fundamental management-level activity. *Id.* at 14457-58 ¶39. But even if we were to disregard this aspect of Rice's involvement, the other corroborative evidence cited in ¶39 supports our conclusions. Finally, contrary to the Licensees' contention (Petition at 19), it is clear from the record that a number of high-level management officials had personal knowledge of Rice's decision-making activities; yet the Licensees never disclosed these activities by correcting or clarifying the representations made in their reports to the Commission. *Id.* at 14458-59 ¶ 40.

13. Finally, we continue to believe that the revocation ordered in this proceeding does not violate the Eighth Amendment. *U.S. v. Bajakajian*, relied on by the Licensees, which involved a forfeiture of currency for violating a federal statute requiring the reporting of the transportation of more than \$10,000 outside the country, appears to have little bearing on the Commission's revocation authority. The court held that a "punitive forfeiture" violates the Excessive Fines Clause if it is "grossly disproportional" to the gravity of the offense. *Id.* at 2036. Revocation, however, is intended to ensure that stations will be operated in the public interest and does not involve seizure of the Licensees' property. Moreover the Licensees' argument (Petition at 24) that Rice has already been punished for his crimes by the state of Missouri misses the point of the Commission's character inquiry, and their further contention that they did not engage in intentional deceit that would warrant revocation is not supported by the record. We reaffirm that revocation is appropriate in this case.

14. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration filed July 27, 1998 by Contemporary Media, Inc., Contemporary Broadcasting, Inc., and Lake Broadcasting, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary