

**Federal Communications
Commission**

JUL 11 2019

Office of the Secretary

**ENFORCEMENT BUREAU'S REPLY BRIEF IN RESPONSE TO EXCEPTIONS AND
BRIEF OF PATRICK SULLIVAN AND LAKE BROADCASTING, INC.**

DOCKET FILE COPY ORIGINAL

No. of Copies rec'd 041
List ABCDE

SUMMARY

The Chief, Enforcement Bureau (Bureau), through her attorneys, respectfully submits the following reply brief in response to the exceptions filed by Patrick Sullivan and Lake Broadcasting, Inc. (Lake) to the Initial Decision in the above-captioned hearing matter.

The Initial Decision properly concluded that Lake failed to meet its burden of demonstrating, by a preponderance of the evidence, that Michael S. Rice (Rice) – Lake’s president, director and sole shareholder – can be relied upon to be truthful, candid, and forthcoming in his dealings with the Commission. In its Exceptions, Lake failed to identify any evidence demonstrating that, despite Rice’s companies’ previous misrepresentations to, and lack of candor with, the Commission, he can deal truthfully with the Commission. As a result, Lake failed to establish that Rice (and therefore, Lake) is qualified to hold a Commission license. On this basis alone, the Commission should affirm the Initial Decision.

The Initial Decision also properly considered Lake’s eleventh-hour abandonment of the hearing and Rice’s subsequent refusal to agree not to file additional applications with the Commission. As the Presiding Judge noted, Rice’s attempt to avoid a final (and what he believed would be a negative) adjudication on his character – whether he succeeded or not – demonstrates his lack of respect for the Commission’s processes and procedures. This abuse of process provides yet another basis on which to conclude that Rice (and therefore, Lake) lacks the qualifications to be a Commission licensee. On this basis, as well, the Commission should affirm the Initial Decision.

The Initial Decision does not resolve the designated issue of the effects, if any, of Rice’s felony convictions on his qualifications (and Lake’s) to be a Commission licensee and the related question of whether Rice is now rehabilitated from his past criminal behavior. As the Presiding

Judge noted, the presiding officer who oversaw the presentation of the testimony and evidence on this issue – then-Presiding Judge Richard L. Sippel – was not available to prepare the initial decision and the Commission provided no instruction on how the current Presiding Judge should proceed. The Commission itself has the authority and a complete record on which to decide this issue, however, and after three years of litigation and the expenditure of Commission resources and public funds, the Enforcement Bureau (Bureau) respectfully requests that it do so.

Here, again, the record before the Commission demonstrates that Lake has not met its burden of proving that Rice has been rehabilitated from the crimes for which he was convicted. Among other things, the medical evidence from the only expert specializing in evaluating sex offenders, Dr. Kimberly Weitzl, establishes that (i) Rice suffers from at least four mental disorders, including pedophilia, a chronic and life-long sexual disorder from which he cannot be cured; (ii) Rice blames his offenses on involuntary medical conditions (*e.g.*, bipolar affective disorder, dysthymia, dissociative disorder, and alcohol abuse) for which he is not currently receiving any therapy or monitoring from a mental health provider; (iii) Rice continues to drink alcohol despite it being a trigger for his criminal acts; (iv) the sex offender treatment Rice received while incarcerated was ineffective and insufficient; and (v) Rice still refuses to express contrition or take responsibility for his criminal actions.

Moreover, the evidence presented from local Missouri law enforcement demonstrates that Rice is at an elevated risk to reoffend. Specifically, Ms. Tamara Gremminger, a Probation and Parole Officer and Sex Offender Specialist with the Missouri Department of Corrections, Division of Probation and Parole, who regularly performs sex offender risk assessments and testifies frequently for the state of Missouri, concluded that Rice is very likely to reoffend. Ms. Gremminger based this conclusion on her over twenty years of experience with sex offender risk

assessments and factors such as Rice's lack of regular employment, family, or other close relationships, and his continued drinking. Lake did not offer any evidence from local law enforcement to refute Ms. Gremminger's testimony.

For these reasons, the Bureau submits that the Commission should (i) affirm the Initial Decision; (ii) render a final decision on the effects, if any, of Rice's felony convictions on his qualifications (and Lake's) to be a Commission licensee and the related question of whether Rice is now rehabilitated from his past criminal behavior; and (iii) find that Lake failed to meet its burden of demonstrating, by a preponderance of the evidence, that Rice has been rehabilitated and that he (and therefore, Lake) is qualified to hold a Commission license.

TABLE OF CONTENTS

SUMMARY.....	i
I. PRELIMINARY STATEMENT.....	1
II. THE INITIAL DECISION AND LAKE'S EXCEPTIONS	4
III. THE INITIAL DECISION DID NOT ERR IN FAILING TO EXCLUDE THE BUREAU'S DIRECT CASE EXHIBIT NO. 4	6
IV. THERE IS NO BASIS TO STRIKE FOOTNOTE 60 FROM THE HDO	7
V. THE INITIAL DECISION IS NOT INVALID.....	7
VI. THE COMMISSION SHOULD AFFIRM THE INITIAL DECISION ON THE QUESTION OF WHETHER RICE WILL DEAL TRUTHFULLY WITH THE COMMISSION.....	8
VII. THE COMMISSION SHOULD AFFIRM THE INITIAL DECISION ON THE ISSUE OF RICE'S ABUSE OF PROCESS	9
VIII. THE COMMISSION SHOULD ISSUE A FINAL DECISION ON THE QUESTION OF RICE'S REHABILITATION	10
IX. LAKE DID NOT MEET ITS BURDEN OF PROOF ON THE QUESTION OF RICE'S REHABILITATION.....	12
X. CONCLUSION.....	14

TABLE OF CITATIONS

Cases

<i>Beech Aircraft Corp. v. Rainey</i> , 488 U.S. 153 (1988)	6
<i>Contemporary Media, Inc. v. FCC</i> , 214 F.3d 187 (D.C. Cir. 2000), <i>cert. denied</i> , 532 U.S. 920 (2001)	1, 9
<i>United States v. Harris</i> , 557 F.3d 938 (8th Cir. 2009)	6

Rules

Fed. R. Evid. 803(6).	6
Fed. R. Evid. 803 (8).	6

Statutes and Regulations

47 U.S.C. § 309(e)	2
47 CFR § 1.267(b)	5, 7
47 CFR § 1.274(b)	11

Administrative Decisions

<i>Contemporary Media, Inc.</i> , Decision, 13 FCC Rcd 14437 (1998)	1
<i>Contemporary Media, Inc.</i> , Initial Decision, 12 FCC Rcd 14254 (ALJ, rel. Aug. 18, 1997)	9
<i>David Titus</i> , Decision, 29 FCC Rcd 14066 (Nov. 6, 2014)	12, 13
<i>Patrick Sullivan and Lake Broadcasting, Inc.</i> , Hearing Designation Order, 29 FCC Rcd 5421 (MB 2014)	<i>passim</i>
<i>Patrick Sullivan and Lake Broadcasting, Inc.</i> , Initial Decision, 19M-03 (ALJ, rel. May 30, 2019)	<i>passim</i>
<i>Patrick Sullivan et al.</i> , Memorandum Opinion and Order, FCC 18-51 (Apr. 26, 2018)	4
<i>Patrick Sullivan et al.</i> , Memorandum Opinion and Order, FCC 17M-31 (ALJ, rel. Aug. 28, 2017)	4
<i>Patrick Sullivan et al.</i> , Order, FCC 17M-29 (ALJ, rel. Aug. 3, 2017)	6
<i>Patrick Sullivan et al.</i> , Order, FCC 17M-25 (ALJ, rel. June 8, 2017)	4
<i>Policy Regarding Character Qualifications in Broadcast Licensing</i> , Report, Order and Policy Statement, 102 FCC 2d 1179 (1986)	10
<i>Policy Regarding Character Qualifications in Broadcast Licensing</i> , Policy Statement and Order, 5 FCC Rcd 3252 (1990)	12

**ENFORCEMENT BUREAU'S REPLY BRIEF IN RESPONSE TO EXCEPTIONS AND
BRIEF OF PATRICK SULLIVAN AND LAKE BROADCASTING, INC.**

1. On May 30, 2019, the Presiding Judge released an Initial Decision in the above-captioned matter.¹ On July 1, 2019, Patrick Sullivan (Sullivan) and Lake Broadcasting, Inc. (Lake) filed exceptions to this Initial Decision (Exceptions).² The Chief, Enforcement Bureau, through her attorneys, respectfully submits this reply brief in response to these Exceptions.

I. PRELIMINARY STATEMENT

2. On May 23, 2014, the Commission's Media Bureau designated the above-captioned application of Sullivan for Consent to Assignment of the License of FM Translator Station W238CE, Montgomery, Alabama (Application) to Lake for hearing.³ Lake's president, director and sole shareholder, Michael S. Rice (Rice), previously held radio station authorizations that were revoked by the Commission as a result of his felony convictions for sexual assaults against children.⁴ During this prior proceeding, the Commission concluded – and the U.S. Court of Appeals for the District of Columbia affirmed – that Rice's companies had engaged in misrepresentation and/or lack of candor with the Commission regarding Rice's participation in the management and operation of his various broadcast stations following his arrest.⁵

3. In the HDO, the Media Bureau raised concerns as to “whether Rice has been rehabilitated to an extent that the Commission is fully confident [he] will refrain from engaging

¹ See *Patrick Sullivan and Lake Broadcasting, Inc.*, Initial Decision, FCC 19M-03 (ALJ, rel. May 30, 2019) (Initial Decision).

² See Exceptions and Brief of Patrick Sullivan and Lake Broadcasting, Inc. (Jul. 1, 2019) (Exceptions).

³ See *Patrick Sullivan and Lake Broadcasting, Inc.*, Hearing Designation Order, 29 FCC Rcd 5421 (MB 2014) (HDO).

⁴ See, e.g., *id.* at 5421, para. 1 and 5422, para. 3.

⁵ See *id.* at 5427, paras. 17 and 18. See also *Contemporary Media, Inc.*, Decision, 13 FCC Rcd 14437, 14454-59, paras. 34-39 (1998); *aff'd*, *Contemporary Media, Inc. v. FCC*, 214 F.3d 187 (D.C. Cir. 2000), *cert. denied*, 532 U.S. 920 (2001).

in the kind of behavior for which he was convicted.”⁶ The HDO also questioned whether, based on Rice’s companies’ previous lack of candor with the Commission, and Rice’s failure to ensure that his companies’ submissions to the Commission were “complete, accurate and truthful,”⁷ Rice (and therefore, Lake) “can be relied upon to be . . . forthcoming in their dealings with the Commission”⁸ and “comply in all other respects with the Commission’s Rules, regulations, and policies.”⁹ The HDO ordered the Commission’s Administrative Law Judge, *inter alia*,

(a) To determine the effects, if any, of Michael S. Rice’s felony convictions on his qualifications and/or the qualifications of Lake Broadcasting, Inc., to be a Commission licensee; [and]

(b) To determine the effects, if any, of the misrepresentation and lack of candor by Michael S. Rice’s broadcast companies on his qualifications and/or the qualifications of Lake Broadcasting, Inc., to be a Commission licensee.¹⁰

Pursuant to Section 309(e) of the Communications Act of 1934, as Amended, and as set forth in the HDO, “the burden of proceeding with the introduction of evidence and the burden of proof [on each of these issues] shall be upon the applicant.”¹¹ Thus, Lake, as the applicant, bore the burden of proving by a preponderance of evidence that it has the qualifications to be a Commission license. Since Lake is owned and operated by Rice, in order to have the Application granted, Lake was also required to prove by a preponderance of evidence that Rice has the qualifications to be a Commission licensee.

4. The Enforcement Bureau (Bureau) and Lake had ample opportunity to develop a record regarding each of the designated issues before the hearing commenced on May 3, 2017. At the hearing, Lake did not offer any evidence on the effects, if any, of Rice’s broadcast

⁶ HDO at 5429, para. 21.

⁷ HDO at 5427, para. 17.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 5429, para. 22(a) and (b).

¹¹ 47 U.S.C. § 309(e); *see also* HDO at 5430, para. 28.

companies' misrepresentations and/or lack of candor on his qualifications and/or the qualifications of Lake to be a Commission licensee. Instead, Lake focused its case exclusively on "the effects, if any, of [Rice's] felony convictions on his qualifications and/or the qualifications of [Lake] to be a Commission licensee."¹² In support of its case, Lake called Rice and an expert psychologist Lake had retained, Dr. Ann Dell Duncan-Hively, to testify. Bureau counsel cross-examined both Rice and Dr. Duncan-Hively. At the close of Lake's direct case, the Bureau put on its direct case, calling outside expert psychologist, Dr. Kimberly Weitzl, and Tamara Gremminger, a sex offender specialist in the Probation and Parole Department of the Missouri Department of Corrections. Lake's counsel cross-examined each of the Bureau's witnesses.

5. After a lunch break on the last day of the hearing – and right before the Bureau's counsel was to conduct the re-direct examination of Dr. Weitzl – Lake's counsel announced that Sullivan was withdrawing the Application and that Lake would not continue with the hearing proceeding. Then-Presiding Judge Richard L. Sippel allowed the Bureau to conduct the re-direct examination of its expert to ensure that the record of the hearing was complete. Counsel for Lake declined the opportunity to re-cross-examine the Bureau's expert.

6. Days after the hearing ended, Lake and Sullivan filed separate motions to dismiss the Application. In its motion, Lake agreed not to file any further broadcast applications with the Commission.¹³ The motion was silent as to whether Rice also agreed not to file additional applications.¹⁴ Lake also filed a motion to disqualify Judge Sippel. Judge Sippel denied the

¹² HDO at 5429, para. 22.

¹³ See Motion to Dismiss (May 8, 2017) at 1 and accompanying Declaration.

¹⁴ See *id.* When asked by Judge Sippel at the close of the hearing whether Rice would agree not to file additional applications, Lake's counsel had "no idea what he will do in the future." See May 5, 2017 Hearing Transcript (5/5/17 Hearing Tr.) at 654:20-655:6.

motions to dismiss and Lake's motion to disqualify.¹⁵ Lake appealed the disqualification decision to the Commission, and on April 26, 2018, the Commission denied Lake's appeal.¹⁶ Thereafter, the parties submitted their proposed findings of fact and conclusions of law.¹⁷ Judge Sippel retired from federal service before issuing an initial decision.

7. On December 6, 2018, the Commission appointed Jane Hinckley Halprin as a Commission administrative law judge. On May 30, 2019, Presiding Judge Halprin released an Initial Decision in the above-captioned matter.

II. THE INITIAL DECISION AND LAKE'S EXCEPTIONS

8. The HDO identified two separate issues to consider in analyzing whether Rice (and therefore, Lake) possesses the qualifications to be a Commission licensee – (a) the effect of Rice's prior felony convictions, and (b) the effect of Rice's companies' prior misrepresentations to and/or lack of candor with the Commission.¹⁸ The Initial Decision resolves only the second of these two issues. Specifically, the Presiding Judge concluded that, because Lake "completely focus[ed] its case on whether Mr. Rice is now rehabilitated from his past criminal behavior,"¹⁹ it failed to meet its burden of proof "regarding the effect of the misrepresentations and lack of candor by [Rice's] broadcast companies on his qualifications and/or the qualifications of [Lake]

¹⁵ See *Patrick Sullivan and Lake Broadcasting, Inc.*, Order, FCC 17M-25 (ALJ, rel. June 8, 2017) (denying motions to dismiss); *Patrick Sullivan and Lake Broadcasting, Inc.*, Memorandum Opinion and Order, FCC 17M-31 (ALJ, rel. Aug. 28, 2017) (denying motion to disqualify).

¹⁶ See *Patrick Sullivan and Lake Broadcasting, Inc.*, Memorandum Opinion and Order, FCC 18-51 (Apr. 26, 2018).

¹⁷ See, e.g., Enforcement Bureau's Proposed Findings of Fact and Conclusions of Law (May 10, 2018) (EB's Findings); Enforcement Bureau's Reply Proposed Findings of Fact and Conclusions of Law (June 11, 2018) (EB's Reply Findings). See also *Patrick Sullivan and Lake Broadcasting, Inc. Findings of Fact and Conclusions of Law* (May 10, 2018) (Lake's Findings); *Patrick Sullivan and Lake Broadcasting, Inc. Reply Findings of Fact and Conclusions of Law* (June 11, 2018) (Lake's Reply Findings).

¹⁸ See, e.g., HDO at 5429, paras. 21 and 22(a) and (b).

¹⁹ Initial Decision at 5, para. 7.

to be a Commission licensee.”²⁰ As a result, the Presiding Judge concluded that a “determination cannot be made that Michael S. Rice is qualified to be a Commission licensee.”²¹

9. In concluding that Rice was not qualified to hold Commission licenses, the Presiding Judge also considered Rice’s decision to abandon the hearing on the last day of testimony and avoid a potentially negative adjudication of his character qualifications while reserving the right to fight about the exact same issues another day.²² She concluded that such actions reflected Rice’s lack of respect for the Commission and amounted to an abuse of process.²³

10. In its Exceptions, Lake challenges each of the Initial Decision’s findings.²⁴ Lake also challenges the Initial Decision’s failure to exclude from the record the Bureau’s Direct Case Exhibit No. 4²⁵ – the Missouri Department of Corrections Probation and Parole file relating to Rice – and the HDO’s inclusion of Footnote 60²⁶ – which merely poses the question as to whether crimes involving child sex abuse may be so egregious that an applicant may be determined to be qualified only in the most compelling of circumstances.²⁷ Lastly, Lake asserts – without further argument – that the Initial Decision fails to conform to the requirements of section 1.267(b) of the Commission’s rules (Rules) and that a remand is necessary.²⁸

11. For the reasons set forth below, the Bureau respectfully requests that the Commission deny Lake’s Exceptions, affirm the Initial Decision, and issue a Final Decision that

²⁰ *Id.* at 7, para. 10.

²¹ *Id.*

²² *See id.* at 5-6, paras. 8-9.

²³ *See id.* at 5-6, para. 9.

²⁴ *See* Exceptions at 9-10, paras.7-8; and at 12, para. 11.

²⁵ *See id.* at 8-9, para. 6.

²⁶ *See id.* at 10-11, paras. 9-10.

²⁷ *See* HDO at n.60.

²⁸ *See* Exceptions at 4, and 12 at para. 11.

decides the question of Rice's rehabilitation and the effect of his prior criminal conduct on his qualifications (and Lake's) to be a Commission licensee.

III. THE INITIAL DECISION DID NOT ERR IN FAILING TO EXCLUDE THE BUREAU'S DIRECT CASE EXHIBIT NO. 4

12. Lake suggests that the Initial Decision erred in failing to exclude and/or to ignore Rice's Missouri Department of Corrections Probation and Parole file (the Bureau's Direct Case Exhibit No. 4), and any testimony of the Bureau's experts or proposed findings of fact that rely on these documents, because Exhibit No. 4 contains "impermissible hearsay."²⁹ Yet, in the very next sentence, Lake acknowledges that these same documents are "admissible as 'business records' of the Missouri Department of Corrections."³⁰ Indeed, at the hearing, Lake's counsel stated that "[i]f they are only being admitted as business records I have no specific objection."³¹

13. As a result, these documents fall within the exceptions to the "hearsay" rules set forth in Rules 803(6) and 803(8) of the Federal Rules of Evidence and are thus presumed to be admissible – for the truth of the matter asserted therein – unless the party opposing admission proves the records' untrustworthiness.³² Here, Lake has failed to meet this burden. It has not demonstrated in any way that the records in the Bureau's Direct Case Exhibit No. 4 are untrustworthy. The Commission should deny this Exception.

²⁹ See *id.* at 8-9, para. 6.

³⁰ *Id.* at 8, para. 6.

³¹ May 3, 2017 Hearing Transcript (5/3/17 Hearing Tr.), at 257:9-10.

³² See, e.g., *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169-170 (1988); *United States v. Harris*, 557 F.3d 938, 941-942 (8th Cir. 2009) (finding that parole and probation records are excepted hearsay). See also *Patrick Sullivan and Lake Broadcasting, Inc.*, Order, FCC 17M-29 (ALJ, rel. Aug. 3, 2017) at 3 (the Bureau's Direct Case Exhibit No. 4 meets the standards of "FRE 803(8) (public records or reports, including observations and evaluations), as well as FRE 803(6) (business records kept in the course of regularly conducted activities)" and can be relied on for the truth of the matters asserted therein).

IV. THERE IS NO BASIS TO STRIKE FOOTNOTE 60 FROM THE HDO

14. Lake alleges that footnote 60 of the HDO should be stricken because it “raises the possibility of denying a license to someone accused of ‘egregious misconduct,’ even if the hearing record fully supports grant of a license.”³³ Not so. Footnote 60 does not suggest that the Commission’s administrative law judge ignore a hearing record that otherwise fully supports grant of a license (*e.g.*, demonstrates an applicant’s rehabilitation of past criminal conduct) and deny an application for a Commission license simply because the prior criminal act is considered egregious. Moreover, there is nothing in this footnote, or in the HDO for that matter, that suggests – as Lake alleges – that those involved in the Commission’s hearing process decided before they even designated the Application that they would “deny a grant to the applicant because of his previous ‘egregious’ misconduct.”³⁴ As Lake has failed to offer any basis upon which to strike this footnote, the Commission should deny this Exception.

V. THE INITIAL DECISION IS NOT INVALID

15. Lake asserts that the Initial Decision is invalid because “it does not conform to the requirements” of section 1.267(b) of the Rules.³⁵ Specifically, Lake appears concerned with the fact that the Initial Decision contains a Commission identification number that usually reflects a “Memorandum Opinion and Order” and that, as Lake reads it, the Initial Decision fails to include the “foregoing” findings of fact and conclusions of law it references in its “Conclusion” paragraph.³⁶ On these basis, Lake suggests that “the Commission should direct the ALJ to make further findings of fact and conclusions of law in this proceeding in traditional format and to

³³ Exceptions at 10, Heading C.

³⁴ *Id.* at 11, para. 10.

³⁵ *Id.* at 4; *see also id.* at 12, para. 11

³⁶ *See id.* at 12, para. 11.

issue a supplemental Initial Decision.”³⁷ Neither of these perceived failures of the Initial Decision render it invalid or necessitate a remand of the proceedings to the Presiding Judge.³⁸

VI. THE COMMISSION SHOULD AFFIRM THE INITIAL DECISION ON THE QUESTION OF WHETHER RICE WILL DEAL TRUTHFULLY WITH THE COMMISSION

16. The HDO presented two distinct and independent legal questions on which to evaluate the qualifications of Rice (and therefore, Lake) to be Commission licensees. As the applicant, Lake had the burden of proof on both of these questions,³⁹ but Lake focused its entire case on only one – the effect of Rice’s prior felony convictions and the related issue of “whether Mr. Rice is now rehabilitated from his past criminal behavior.”⁴⁰ As the Presiding Judge correctly noted, Lake did not present any evidence “on the separate issue of [Rice’s] propensity to deal truthfully with the Commission in light of his and [Lake’s] past misdeeds in that regard.”⁴¹

17. In its Exceptions, Lake still fails to cite to any such evidence in the record. Instead, Lake relies only on its Direct Case “Exhibit 2 and Lake Findings 7 through 38”⁴² – neither of which demonstrate that either Rice or Lake “can be relied upon to be truthful, candid, and forthcoming in their dealings with the Commission.”⁴³ Lake’s Direct Case Exhibit 2 is an unsigned, unverified statement in which Lake alleges that it is in good standing as a Missouri

³⁷ *Id.*

³⁸ It is unclear whether Lake is also asserting (by virtue of its Heading D in the Exceptions) that the Initial Decision is invalid because it does not contain findings of fact and conclusions of law on all material issues presented on the record. *See* Exceptions at 12, Heading D. Nevertheless, Lake fails to offer any legal argument or citation in support of this statement.

³⁹ *See supra* n.11.

⁴⁰ Initial Decision at 5, para. 7.

⁴¹ *Id.* *See also* EB’s Findings at paras. 14 and 89.

⁴² Exceptions at 9, para. 7.

⁴³ HDO at 5429, para. 21.

corporation and that Rice is rehabilitated from his criminal conduct.⁴⁴ Lake's Proposed Findings of Fact 7-38 similarly fail to demonstrate that Rice will be truthful with the Commission. Proposed Findings 7-36 address the evidence that Lake introduced to support its contention that "Mr. Rice's felony convictions have no continuing effect on his qualifications or the qualifications of Lake to be a licensee because Mr. Rice is fully rehabilitated from his past criminal activity, has a very low risk of re-offending, and is fully fit to become a Commission licensee again."⁴⁵ Proposed Findings 37 and 38 are nothing more than a restatement of Lake Direct Exhibit 2.

18. As Lake has still failed to cite to any evidence establishing that Rice will be truthful with the Commission, the Commission should affirm the Initial Decision.

VII. THE COMMISSION SHOULD AFFIRM THE INITIAL DECISION ON THE ISSUE OF RICE'S ABUSE OF PROCESS

19. Lake's eleventh-hour abandonment of the hearing and Rice's subsequent refusal to agree not to file additional applications with the Commission provides an additional basis upon which the Commission should affirm the Initial Decision. As the Presiding Judge noted, Rice's attempt to avoid a final (and what he believed would be a negative) adjudication on his character after years of litigation and an opportunity to fully participate in a hearing demonstrates

⁴⁴ See Lake's Direct Case Exhibit 2. It contains only two attachments: Lake's April 22, 2017 Missouri Certificate of Good Standing and its 2017 Missouri Annual Registration Report.

⁴⁵ Lake's Findings at para. 6. Lake continues to suggest that Rice was not held accountable in any way for his companies' prior misrepresentations to and/or lack of candor with the Commission. See Exceptions at 10, para. 8. Although the Commission did not find that Rice lacked the qualifications to be a Commission licensee on the basis of his companies' misrepresentations with the Commission, the administrative law judge did conclude (and the Commission affirmed) not only that Rice was the one with the "ultimate responsibility and duty" to ensure that his companies' submissions to the Commission were complete, accurate, and truthful, especially since those reports related to his own activities, but that he made no "attempt whatsoever to live up to his obligations in this regard." *Contemporary Media, Inc. v. FCC*, 12 FCC Rcd 14254, 14305, para. 195 (ALJ, rel. Aug. 18, 1997), *aff'd*, *Contemporary Media, Inc.*, Decision, 13 FCC Rcd 14437 (1998), *aff'd*, 214 F.3d 187 (D.C. Cir. 2000), *cert. denied*, 532 U.S. 920 (2001).

not only his lack of respect for the Commission and its rules,⁴⁶ but an attempt to manipulate the Commission's processes for his own benefit.⁴⁷ Indeed, it is evident that the last-minute motions to dismiss the hearing and to disqualify Judge Sippel were orchestrated precisely because Rice wanted to delay resolution of the question of his character until a later proceeding in the apparent hopes of achieving what he perceived would be a more favorable ruling.

20. In the Exceptions, Lake suggests that the Presiding Judge erred in concluding that Rice's behavior amounted to an abuse of process simply because Rice was unsuccessful in his attempt to terminate the proceeding.⁴⁸ This contention misses the point entirely. The issue is not whether Rice was ultimately successful in his manipulations but that he tried to game the system in the first place. Moreover, at the core of any analysis of an applicant's character to hold a Commission license is whether that applicant will comply with the Commission's rules and procedures.⁴⁹ Rice's attempt to circumvent the Commission's hearing procedures in order to insulate himself from a negative character finding – whether or not he was successful – calls into question Rice's "proclivity to . . . comply with the Commission's rules and policies."⁵⁰

21. For these reasons, the Commission should affirm the Initial Decision.

VIII. THE COMMISSION SHOULD ISSUE A FINAL DECISION ON THE QUESTION OF RICE'S REHABILITATION

22. The Initial Decision does not address the evidence concerning the effect of Rice's prior felony convictions on his qualifications (and Lake's) and the related question of whether Rice is now rehabilitated from his past criminal behavior. For the reasons discussed below, the

⁴⁶ See Initial Decision at 6, para. 9.

⁴⁷ See *id.*

⁴⁸ See Exceptions at 12, para. 11.

⁴⁹ See, e.g., *Policy Regarding Character Qualifications in Broadcast Licensing*, Report, Order and Policy Statement, 102 FCC 2d 1179 (1986) (1986 Character Policy Statement) at 1183, para. 7; 1190-91, para. 23.

⁵⁰ *Id.* at 1197, para. 37.

Bureau respectfully submits that, after more than three years of litigation and the expenditure of Commission resources and public funds, the Commission can and should decide this issue.⁵¹

23. The Commission has a complete record from which it can prepare a decision on these questions. The Bureau and Lake each presented its entire direct case and Judge Sippel ruled on – and admitted, where he deemed appropriate – each party’s direct case exhibits. Likewise, Lake’s counsel cross-examined the Bureau’s direct case witnesses and the Bureau’s counsel cross-examined Lake’s direct case witnesses. On the last day of the hearing, Lake’s counsel was also given the opportunity to offer rebuttal testimony from its expert, Dr. Duncan-Hively, and to re-cross-examine the Bureau’s expert (although he chose not to do either). Following the hearing, both parties submitted initial and reply findings of fact and conclusions of law.⁵² Thus, neither Lake nor the Bureau can make any argument that it would be prejudiced by the Commission deciding the matter on the current record.

24. Rice holds in his own name two wireless authorizations: an Amateur Radio Service License for call sign W0DQJ and a General Radiotelephone Operator License.⁵³ His Amateur Radio Service License expires in 2023.⁵⁴ Rice’s application for renewal of this license – or any subsequent application he may file before then as an individual or through a separate corporate entity – would raise the very same questions concerning his qualifications that have already been fully litigated in this case. Should the Commission choose not to address these issues now, it would be a waste of the extensive Commission resources (including those of the Bureau and the Office of the Administrative Law Judge) and public funds already expended to

⁵¹ See 47 CFR § 1.274(b). The Rules provide the Commission with the authority to issue a final decision on the record where, as here, “the presiding officer becomes unavailable to the Commissions after the taking of testimony has been concluded.” *Id.*

⁵² See *supra* n.17.

⁵³ See Initial Decision at 7, n.36.

⁵⁴ See *id.*

bring this case to hearing in the first instance. It would also reward Rice for his eleventh-hour abandonment of the hearing by granting him the very relief he sought with Lake's motions to dismiss the instant case and to disqualify Judge Sippel (the denial of which the Commission upheld) – a new hearing before a different administrative law judge and delayed adjudication on the qualification questions arising from his prior criminal conviction.

25. For reasons of judicial economy and efficiency, and to avoid any appearance of allowing an applicant to game the hearing process for its own benefit, the Commission should render a final decision on the designated issue concerning the effect of Rice's felony convictions on his qualifications (and Lake's) and the related question of whether Rice is now rehabilitated from his past criminal behavior.

IX. LAKE DID NOT MEET ITS BURDEN OF PROOF ON THE QUESTION OF RICE'S REHABILITATION

26. As the applicant, Lake had the burden of proving that Rice has been rehabilitated to an extent that the Commission can be fully confident that he will refrain from engaging in the kind of behavior for which he was convicted.⁵⁵ Mr. Rice's age is insufficient to demonstrate that he has a low risk of re-offending.⁵⁶ Rather, for convicted sex offenders such as Rice, the Commission will consider, among other things, the following factors: (i) the applicant's reputation for good character in the community;⁵⁷ (ii) the applicant's expression of contrition, if any;⁵⁸ (iii) any measures taken by the applicant to prevent future misconduct;⁵⁹ (iv) the testimony

⁵⁵ See HDO at 5430, para. 28.

⁵⁶ Cf. Exceptions at 11, para. 9 and May 4, 2017 Hearing Transcript (5/4/17 Hearing Tr.) (Gremminger) at 487:8-17 (even when an ex-offender is almost 76 years old and has not reoffended in more than 25 years, these factors alone are not dispositive on the question of whether he will reoffend). See also EB's Reply Findings at paras. 9-10.

⁵⁷ *Policy Regarding Character Qualifications in Broadcast Licensing*, Policy Statement and Order, 5 FCC Rcd 3252 (1990) (1990 Character Policy Statement) at n.4 (internal citation omitted). See also *David Titus*, 29 FCC Rcd 14066, 14074, para. 18 (2014) (*Titus Decision*).

⁵⁸ See *Titus Decision* at 14074, para. 18.

⁵⁹ 1990 Character Policy Statement at n.4 (internal citation omitted).

of medical experts;⁶⁰ and (v) the local law enforcement's determination regarding the sex offender's ongoing risk to the community.⁶¹ As the Commission has recognized, "[g]iven the greater expertise of local authorities in evaluating the risks that sex offenders pose to their communities,"⁶² local law enforcement is "better positioned to make the determination whether an individual poses a danger to the community than is the Commission."⁶³

27. As detailed further in the Bureau's Proposed Findings and its Reply Findings, Lake failed to meet its burden of proof on this issue for at least the following reasons:

- The only evidence that Lake offered concerning Rice's "reputation for good character" is inadmissible hearsay and unreliable.⁶⁴
- Lake did not demonstrate that Rice has expressed contrition for his actions.⁶⁵ Rice admitted that he still considers his victims to be willing participants who manipulated him when they came to his apartment to engage in sexual activities,⁶⁶ and he continues to blame his sexually deviant behavior on an "undiagnosed mental condition,"⁶⁷ various mental disorders,⁶⁸ and his use of alcohol.⁶⁹
- Lake did not demonstrate that Rice has taken meaningful measures to prevent future misconduct.⁷⁰ Despite the fact that Rice blames his past sexual misconduct on mental disease and his use of alcohol, he has not received any therapy or monitoring from a mental health provider for many years⁷¹ and continues to engage in social drinking without receiving any current treatment for alcohol abuse.⁷²

⁶⁰ *Titus Decision* at 14074, para. 18.

⁶¹ *See id.* at 14073, para. 15-16.

⁶² *Id.* at 14073, para. 16.

⁶³ *Id.* at 14073, para. 15.

⁶⁴ *See, e.g.,* EB's Findings at paras. 21-24; 94-95; EB's Reply Findings at paras. 8, 41-42.

⁶⁵ *See, e.g.,* EB's Findings at paras. 26-34; 97-98.

⁶⁶ *See* 5/3/17 Hearing Tr. (Rice) at 288:10-13.

⁶⁷ *See id.* at 223:4-15.

⁶⁸ *See id.* at 224:1-4, 16-19; 225:1-11, 294:12-295:12.

⁶⁹ *See id.* at 209:6-9.

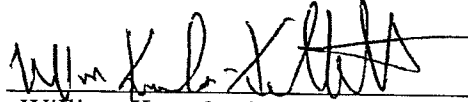
⁷⁰ *See, e.g.,* EB's Findings at paras. 15-20; 96; *see also* EB's Reply Findings at paras. 17-22.

⁷¹ *See* 5/3/17 Hearing Tr. (Rice) at 297:24-298:20; 299:6-21.

⁷² *See id.* at 209:6-23; 299:22-24; 300:12-15.

Respectfully submitted,

Rosemary C. Harold
Chief, Enforcement Bureau

A handwritten signature in black ink, appearing to read "William Knowles-Kellett", written over a horizontal line.

William Knowles-Kellett
Attorney
Investigations and Hearings Division
Enforcement Bureau
Federal Communications Commission
445 12th Street SW, Room 4-C330
Washington, D.C. 20554
(202) 418-1420

Gary Oshinsky
Attorney
Investigations and Hearings Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, SW, Room 4-C330
Washington, D.C. 20554
(202) 418-1420

July 11, 2019

CERTIFICATE OF SERVICE

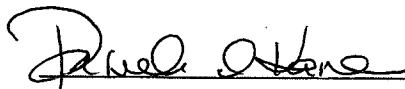
Pamela S. Kane certifies that she has on this 11th day of July, 2019, sent copies of the foregoing ENFORCEMENT BUREAU'S REPLY BRIEF IN RESPONSE TO EXCEPTIONS AND BRIEF OF PATRICK SULLIVAN AND LAKE BROADCASTING, INC. via electronic mail to:

David Senzel
Office of the General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

The Honorable Jane H. Halprin
Administrative Law Judge
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

John B. Adams
Office of the Administrative Law Judge
Federal Communications Commission
445 12th Street, S.W., Room 1-C861
Washington, DC 20554

Jerold L. Jacobs, Esq.
Law Offices of Jerold L. Jacobs
1629 K Street, N.W., Suite 300
Washington, DC 20006
jerold.jacobs.esq@verizon.net
Counsel for Patrick Sullivan and Lake Broadcasting, Inc.


Pamela S. Kane