

Before the
Federal Communication Commission
Washington, DC 20554

10706

FCC 16M-27

In the Matter of)	MB Docket No. 14-82
)	
PATRICK SULLIVAN,)	FRN 0003749041, 0006119796,
(Assignor))	0006149843, 0017196064
)	
and)	Facility ID No. 146162
)	
LAKE BROADCASTING, INC.)	File No. BALFT-20120523ABY
(Assignee))	
)	
Application for Consent to Assignment of)	
License of FM Translator Station W238CE,)	
Montgomery, Alabama)	

ORDER

Issued: October 27, 2016

Released: October 27, 2016

On October 7, 2016, the Enforcement Bureau (“Bureau”) filed a Motion to Strike or, alternatively to meet for a Status Conference. Lake Broadcasting (“Lake”) timely filed its Opposition to the Bureau’s Motion to Strike on the same date, October 7, 2016.

The following sequence occurred: The parties were required to conclude all depositions by September 16, 2016. On September 15, 2016, the Bureau took the deposition of Lake’s expert, Dr. Duncan-Hively. Eleven days later, Lake produced yet another written Duncan-Hively opinion on an Abel Assessment test that she performed on September 20, five days after she had been deposed by the Bureau. The Bureau would not be able to depose Duncan-Hively a second time without seeking leave. *Cf.* Federal Rules of Civil Procedures 26 (a)(2)(A)(ii); *see also* 47 CFR § 1.351.

Lake will be able to include the Abel Assessment opinion in its direct case exhibits, unless the Bureau receives its requested strike relief. The Bureau recognizes that Duncan-Hively has experience in running the test, could have done so in advance of September 16, and only thought to do so after Dr. Weitzl questioned the “Static-99R Assessment that Dr. Duncan-Hively had already performed.”

Lake argues against the timeliness of the Bureau’s Motion to Strike, which was filed on October 7, 2016 (Friday). Lake filed its opposition on the same date. The Weitzl deposition was taken by Lake on September 15, the day before expert depositions were to close.¹ At her deposition of September 15, Dr. Weitzl testified that the Static 2002-R test that Dr. Duncan-Hively had administered to Rice on March 14, 2016, which measured “Moderate Low,” was an “underestimate of his risk.” After the expert deposition deadline had passed, and without

¹ *Order* FCC 16M-20, released June 21, 2016.

seeking leave, Duncan-Hively administered to Rice the “Abel Assessment of Sexual Interest,” and an updated Static 2002-R test. She based her additional expert opinion on these two tests which were completed on September 24, nine days after the Bureau had deposed her.

The Bureau argues that these additional assessments and opinion by Dr. Duncan-Hively should be stricken. Otherwise, the Bureau will need to further depose her, noting that the guidance of Federal Rule of Civil Procedure 26(b)(4)(A) and its intent and purpose otherwise would be breached. *See* Bureau Br. at 2-3 & 1 n.1.

First, the Bureau is correct on the procedure and the unfairness of possibly being forced to take a second deposition of Duncan-Hively. All parties here are aware, or should be aware, of the budgetary shortfalls at the FCC. So the Bureau should delineate the reasons for which it would need more deposing of Duncan-Hively should the out-of-time reports make it into evidence. The Bureau now knows full well all testing she has performed, and the results found. Could the “cross-examination” of Duncan-Hively trial substitute for deposing? All options must be considered and justified. Second, it is unfathomable that Lake did not first seek leave to submit additional evidence, and await a ruling by the Presiding Judge. At this juncture of trial preparation, it is not clear whether the value of Lake’s additional expert materials outweighs any additional expense and further delay that would be incurred should the materials admitted.

Rulings

Therefore, IT IS ORDERED that the Motion to Strike is denied without prejudice to refile should Lake fail to request leave to have the report considered as rebuttal evidence with (1) legal and practical argument for considering the late report as rebuttal, and (2) stated reasons for raising rebuttal as a pre-hearing matter. The Bureau will then file an opposition in accordance with Commission rules, including EB’s need for a second deposition as outlined above.

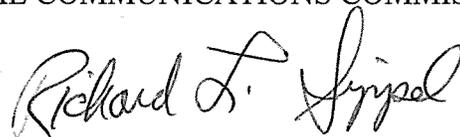
Accordingly, IT IS ORDERED that to the extent that the additional testing reports may be admitted into evidence, in view of the untimeliness and disruption caused by Lake, it will be received, if at all, only as rebuttal.

IT IS FURTHER ORDERED that by **October 31, 2016**, Lake Broadcasting SHALL FILE a motion for leave to submit the results of the post September 16 testing conducted by Dr. Duncan-Hively as rebuttal, and the Enforcement Bureau SHALL FILE its opposition or reply by **November 7, 2016**.

IT IS FURTHER ORDERED that the questions of rebuttal usage, and scheduling further discovery, and concluding trial preparation shall be determined at a Status Conference to be held **at 10:30 am Wednesday, November 16, 2016**.

IT IS FURTHER ORDERED that the parties shall submit lists of other subjects that they seek to raise for discussion at the conference, and file those by **12 noon on November 14, 2016**.

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel
Chief Administrative Law Judge