

FCC MAIL SECTION

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

FCC 96-353

In re

MM Docket No. 96-173

CHAMELEON RADIO CORPORATION

Order to Show Cause Why the License of
Station KFCC(AM), Bay City, Texas
Should Not Be Revoked

Request for Extension of Special
Temporary Authority

**ORDER TO SHOW CAUSE, HEARING DESIGNATION ORDER
AND NOTICE OF APPARENT LIABILITY**

Adopted: August 15, 1996

Released: August 26, 1996

By the Commission:

1. The Commission has before it a Petition for Review By the Commission ("Petition for Review") filed on November 2, 1995 by Chameleon Radio Corporation ("Chameleon"), licensee of station KFCC(AM), Bay City, Texas.¹ Chameleon seeks review of an October 3, 1995 action by the Chief, Mass Media Bureau ("Bureau"). That Bureau action denied reconsideration of a September 8, 1995 action by the Chief, Audio Services Division ("Division") denying Chameleon's August 4, 1995 request for extension of Special Temporary Authority ("STA"). Also on file is Chameleon's above-captioned application for construction permit to build new permanent facilities for KFCC(AM), and to change KFCC(AM)'s community of license to Missouri City, Texas (BP-950804AC) ("Modification Application"). A "Formal Opposition To Application" has been filed by Tom S. Whitehead, Inc. ("Whitehead"), the licensee of station KWHI(AM), Brenham, Texas.

¹ Station KFCC(AM) is licensed to serve Bay City, Texas, on 1270 kHz with a transmitter power of 1000 watts (DA-N), from a site 5.8 km northeast of Bay City, Texas. The Commission's records indicate that KFCC(AM)'s main studio is located at the licensed site in Bay City.

BACKGROUND

2. Chameleon is wholly owned by Jo Nell Werlinger. Her son, Don Werlinger ("Werlinger"), is Chameleon's President. Jo Nell Werlinger and her son also have similar roles, respectively, in KENR Management Company, Inc. ("KMC"). Beginning on April 1, 1994, KMC began providing programming produced by various international broadcasters to the licensee of station KENR(AM), Houston, Texas, pursuant to a time-brokerage agreement. However, KMC became aware that it would lose its Houston broadcast outlet on April 5, 1995, when the KENR(AM) licensee notified KMC that it was terminating the time-brokerage agreement. Subsequently, on April 18, 1995, the Commission approved the assignment of KFCC(AM), Bay City, Texas, from Landrum Enterprises, Inc. ("Landrum") (BAL-950216EA) to Chameleon.² Bay City is located approximately fifty miles southwest of Houston.

3. On April 21, 1995, Chameleon filed a request for STA. Chameleon stated that, "due to the loss of its currently licensed site," it required STA to operate KFCC(AM) from an alternate site. Chameleon's STA request proposed to operate from "rural southwest Harris County" ("Harris County Site"). Exhibit E-1, attached to the STA request, indicated that the site is located less than one mile from the Houston corporate boundary, nearly 80 km from KFCC(AM)'s licensed site. Chameleon also attached to its STA request an application to the Federal Aviation Administration ("FAA"), signed on March 28, 1995 by Werlinger, seeking approval to erect a 180 foot tower on the Harris County Site. Chameleon stated that this tower would eventually become the center tower of a three-tower array. After filing the STA request, Werlinger states that he discussed the proposed STA in a telephone conversation with a Commission staff engineer. According to Werlinger, the staff engineer told him that because the proposed STA involved the construction of a new tower, the Commission staff could not grant the STA.

4. On May 2, 1995, Chameleon amended its STA request and submitted a new Exhibit E-1. The revised exhibit indicated that on the Harris County Site there is an "existing 180' tower," approximately 0.25 km from the tower location initially proposed in Chameleon's April 21, 1995 STA request and that Chameleon now sought to locate KFCC(AM) on this existing tower.³ On May 5, 1995, the Commission staff granted Chameleon STA to operate from the existing tower. The STA would expire on August 1, 1995. The staff letter incorrectly noted that the STA site was 0.25 km from KFCC(AM)'s licensed site. After receiving an oral complaint of interference from Whitehead, by letter dated May 12, 1995, the Commission staff ordered Chameleon to reduce KFCC(AM)'s operating power to 300 watts daytime and 50 watts nighttime from 1,000 watts. Subsequently, on May 18, 1995, the Commission staff issued a letter to Chameleon rescinding the STA ("Recision Letter"). The Commission staff stated that further study had revealed that

² Chameleon filed the application to acquire KFCC(AM) on February 16, 1995.

³ Chameleon also stated that it intended to file an FCC Form 301 "within 30 days of placing the STA on the air."

KFCC(AM) could not provide required coverage to its community of license, Bay City, Texas, from the Harris County Site, in contravention of 47 C.F.R. 73.24(i).⁴ The Recision Letter, however, was stayed on May 25, 1995 by the Division, pending further clarification of the record.

5. By letter dated July 25, 1995, the Division requested certain information from Chameleon. See July 25, 1995 letter from Larry D. Eads, Chief, Audio Services Division to Mr. Don Werlinger ("Inquiry Letter"). Among other things, the Inquiry Letter requested Chameleon to provide specific details concerning: (a) the circumstances under which Chameleon "lost" the Bay City Site and the date that the "loss" occurred; (b) Chameleon's present legal right of access to the Bay City Site in view of a sublease from Chameleon for the site held by Landrum, the prior licensee; (c) the present status of the KFCC(AM) transmission facility at the Bay City Site, and, if that status has been changed, the date of any such change and all details concerning the nature and extent of that change; and (d) the present address of the KFCC(AM) main studio. The Inquiry Letter also directed Chameleon to furnish a showing demonstrating that no better site - other than the Harris County Site - exists from which KFCC(AM) could maintain coverage as closely as possible to its licensed service, including principal community contour coverage of Bay City, Texas. Finally, the Inquiry Letter sought information as to whether Chameleon's principals, or its officers or directors, directly or indirectly, ordered construction of a tower on the Harris County Site and if so, the date construction of the tower began and the identity of the tower construction contractor.

6. On August 11, 1995, after receiving neither a request for extension of the STA nor a timely response to the Inquiry Letter, the Commission staff informed Chameleon that the STA had been terminated ("Recision Letter 2").⁵ Chameleon responded that day with a date-stamped copy of its extension request and a response to the Inquiry Letter ("Response Letter"). Chameleon stated that a copy of this letter had been mailed to the Commission on August 4, 1995 and, on that same date, Chameleon had filed the above-captioned Modification Application to change its community of license to Missouri City, Texas, and to operate permanently from the Harris County Site. By letter dated August 11, 1995, the Commission staff stayed Recision Letter 2, pending study of the material submitted in the Response Letter.⁶ After reviewing the complete record, and the material contained in the Response Letter, on September 8, 1995, the Division granted Whitehead's objection to the STA, denied Chameleon's request for extension, ordered KFCC(AM) to resume operations from its licensed site, and if immediate operation from the licensed site was not possible, to

⁴ Section 73.24(i) of the Commission's Rules requires an AM broadcast station to place a 5 mV/m daytime contour over its entire community of license and a 5 mV/m nighttime contour over 80% of its community of license. 47 C.F.R. § 73.24(i).

⁵ See August 11, 1995 Letter from Larry D. Eads, Chief, Audio Services Division to Mr. Don Werlinger.

⁶ See August 11, 1995 letter from Larry D. Eads, Chief, Audio Services Division to Don Werlinger.

file the appropriate request for silent authority. See September 8, 1995 letter from Larry D. Eads, Chief, Audio Services Division, to Don Werlinger ("Division Letter").

7. The Division Letter denied extension of the STA because Chameleon's basis for the STA -- the "loss of its currently licensed site" -- was not supported by Chameleon's STA request or the Response Letter.⁷ The Division Letter noted that, according to lease documents submitted by Chameleon, Chameleon had assigned the rights of some unidentified portion of the Bay City Site back to Landrum, KFCC(AM)'s previous owner. The Division Letter further indicated that Chameleon failed to respond to a specific question regarding Chameleon's legal rights to the Bay City Site, in view of the assignment of lease rights to Landrum.⁸ Also, the Division Letter stated that Chameleon had not responded to its query regarding the condition of KFCC(AM)'s licensed transmission facilities at the Bay City Site. Additionally, the Division Letter found that Chameleon failed to respond to specific questions concerning whether Chameleon was precluded from constructing at any other site by which it could maintain licensed service to Bay City, and whether KFCC(AM)'s current main studio complied with 47 C.F.R. § 73.1125(a).⁹

8. Because Chameleon failed to support its assertion that the site had been "lost," the Division Letter concluded that Chameleon "voluntarily" abandoned the Bay City Site. This abandonment was motivated, the Division believed, by Chameleon's need, once it lost its time-brokerage agreement with KENR(AM), for a Houston outlet to fulfill its contractual obligations to suppliers whose programs had been carried on KENR(AM). The Division relied upon the Response Letter's extensive discussion of the termination of its time-brokerage agreement with the Houston licensee to support this view. It also relied upon Chameleon's own admission that once the Houston licensee had terminated the time-brokerage agreement, Chameleon "moved with all haste toward finding an acceptable transmitter site in southwest Houston to which it could move."¹⁰ The Division Letter reasoned that, since Chameleon's admitted "need" for an acceptable Houston broadcast signal motivated the STA request rather than a site "loss" beyond Chameleon's control, extension of the STA was not warranted.

9. Additionally, the Division Letter denied the STA extension because it found that Chameleon's construction efforts at the Harris County Site contravened the Bureau's policy

⁷ The Division Letter noted that Whitehead, in addition to objecting to interference caused to KWHI(AM) from the KFCC(AM) STA operation, contended that Chameleon's abandonment of the Bay City Site may have been voluntary.

⁸ The Division Letter stated that the Commission's records indicated that Landrum was operating KFCC(AM) from the Bay City Site at the time of the assignment of license to Chameleon.

⁹ Section 73.1125(a) provides, in pertinent part, that absent the grant by the Commission of a "good cause" exception, a license of an AM station must maintain a main studio within the station's 5mV/m contour. 47 C.F.R. § 73.1125(a).

¹⁰ Response Letter at 9.

not to authorize, pursuant to STA, construction of new facilities intended for permanent use.¹¹ The Division noted that Werlinger claims that the Commission staff had initially rejected Chameleon's April 21, 1995 STA request for this reason. As noted above, Chameleon subsequently amended its STA exhibit to propose operation from an "existing" tower at the same site. Based upon Chameleon's representations made in the Response Letter, the Division determined that Chameleon, after learning that the staff would not grant the April 21, 1995 STA request, reached an agreement for a tower to be constructed on the Harris County Site, with construction to be completed by May 1, 1995. Chameleon reported to the Division that the tower is owned by Joe McClish ("McClish") of Economy RF Construction Company, an Austin Texas Communication Company.¹² Chameleon indicated that McClish, in the course of an April 26, 1995 telephone conversation, expressed his "interest" in owning the tower and agreed to erect it before May 1, 1995.¹³ Chameleon also stated that none of its funds were expended for the tower's construction and that no "broadcast equipment was placed on the site until after the grant of the STA."¹⁴ Chameleon reported that installation of broadcast equipment on the site began immediately upon grant of the STA and was completed by May 7, 1995.¹⁵ Because it appeared that Chameleon arranged for the construction of this tower for the primary purpose of providing service under the STA, with the intention of the tower becoming a permanent structure for new facilities, the Division found that extending the STA under such conditions would clearly violate its established STA policy, as well as Section 309 of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. § 309. That section of the Act requires that new facilities, such as those proposed by Chameleon in its STA request, may only be authorized after public notice and a thirty-day period in which interested parties may file petitions to deny. See 47 U.S.C. § 309(d)(1).

10. By letter dated September 22, 1995, Chameleon requested reconsideration of the Division Letter. Chameleon argued that the Division had ignored the "extraordinary circumstances" present when Chameleon's affiliated entity, KMC, was facing the cessation of its business by the cancellation of its time-brokerage agreement in Houston. Chameleon also argued that the Division had, in the past, permitted STA operations similar to that undertaken by Chameleon. On October 3, 1995, the Bureau denied Chameleon's request for reconsideration. Thereafter, on October 6, 1995, Chameleon filed a motion to stay the STA cancellation in the U.S. District Court of Appeals for the D.C. Circuit. The Commission filed a response on October 12, 1995, and attached a letter from the Acting Chief, Audio Services

¹¹ The Division stated that STAs are intended, pursuant to 47 C.F.R. § 1635(a), to permit the operation of a broadcast station for a limited time at variance from its authorized facilities, because of reasons beyond the licensee's control.

¹² Response Letter at 10.

¹³ Id.

¹⁴ Id.

¹⁵ Id.

Division.¹⁶ That letter stayed the STA cancellation and reinstated the STA extension request and Whitehead's objection, pending full Commission action on those filings. Chameleon moved the court on October 24, 1995 to withdraw its motion for stay without prejudice, and on October 26, 1995, the court granted that motion. Thus, Chameleon is presently operating KFCC(AM) from the Harris County Site.

11. In its Petition for Review now before the Commission, Chameleon argues that the Bureau's action in cancelling the STA is based upon erroneous findings of fact. Chameleon first contends that the Commission staff rescinded the STA based upon questionable claims of interference raised by one party, who later withdrew its objection, and by another party who "has verbally assured Chameleon" that it would raise no further objections to KFCC(AM)'s proposed permanent operations from the Harris County Site.¹⁷ Second, Chameleon argues that the Commission staff's ordered reduction in power for the STA operation "accounts for a major part of the present deficient signal" in Bay City. Third, Chameleon alleges that the Commission staff has, in the past, granted STA to stations which do not place the required signal over their city of license, pending the grant of construction permit applications for new facilities.¹⁸ Fourth, Chameleon contends that there was "no intentional, material misrepresentation by [Chameleon] in applying for the STA." In support, Chameleon attaches an affidavit from Werlinger which states in relevant part:

On or about January 5, 1995, I entered into negotiations with [Landrum] . . . to purchase [KFCC(AM)]. Landrum wanted to sell the AM station but still wished to retain use of the transmitter sit (sic) for its own FM operation. As part of the necessary terms of the sale Chameleon, therefore, agreed to purchase the assets of the AM station including the assumptin (sic) of the land lease used for the transmitter site but, simultaneously, to lease the transmitter site back to [Landrum]. Chameleon, therefore, did not have use of the transmitter site. In addition, I intended, in any event, to apply for a permanent change of my city of license. For these reasons, I applied for a [STA] which was granted by the FCC. The opportunity to use the original transmitter site was not afforded Chameleon. Part of Chameleon's application for the STA states that it had lost its transmitter site. That statement was true and there was no intention on my part to evade or misrepresent any facts to the FCC. The site loss was involuntary.

¹⁶ See October 11, 1995 letter to Don Werlinger from Linda Blair, Acting Chief, Audio Services Division, Mass Media Bureau.

¹⁷ On September 1, 1995, South Texas Broadcasting, Inc. withdrew an objection to the subject STA filed on May 23, 1995. Whitehead has filed an objection against the STA, the Modification Application, and opposes the subject Petition for Review.

¹⁸ Chameleon cites as examples: WINS, New York, New York; WBIV, Natick, Massachusetts; WNJR, Newark, New Jersey; KOPY, Georgetown, Texas; KCNW, Mission, Kansas; WWJZ, Mount Holly, New Jersey; KVCI, Mineola, Texas; and KBBV, Big Bear Lake, California.

October 5, 1995 Statement of Don Werlinger at 1. Chameleon also argues that the Bureau's STA policy is contrary to the public interest and contends that cancellation of the STA will force KFCC(AM) off the air and to remain silent, while it attempts "to find a transmitter site that will allow it to return to Bay City." Chameleon states that, in any event, cancellation will result in irreparable harm to Chameleon and the loss of service for the station's minority and ethnic audience presently served by KFCC(AM)'s operations in the Houston market.

12. Whitehead challenges Chameleon's qualifications to remain a Commission licensee. Contrary to Chameleon's assertions, Whitehead states that he never gave Chameleon assurances, either written or verbal, that he would not oppose Chameleon's Modification Application. Whitehead alleges that when Werlinger contacted him in "September offering to pay us money to withdraw our objections to Chameleon's STA application, we rejected the offer out of hand." Second, Whitehead argues that Chameleon's contention that it does not have access to its licensed transmission site is false. Third, Whitehead states that Chameleon deceived the Commission regarding the erection of the tower at the Harris County Site. Finally, Whitehead repeats allegations made in its earlier-filed objections that KFCC(AM)'s STA operation causes interference to Whitehead's KWHI(AM).

13. During the course of this proceeding, staff engineers from the Houston Field Office of the Commission's Compliance and Information Bureau ("CIB") inspected the Harris County Site and the Bay City Site.¹⁹ On May 25, 1995, a CIB Houston engineer inspected the Bay City Site and determined that it contains certain AM transmission equipment.²⁰ Specifically, the site consists of a studio building, three AM radio antenna towers, a satellite receiving dish, and a short studio link tower, on twenty-three acres of land. The phasing equipment for the AM towers is also located at that site. At the time of the Bay City Site inspection, the Commission staff requested Landrum to provide a statement regarding the site.

14. On December 5, 1995, Landrum supplied the Commission with an affidavit made under penalty of perjury. Landrum states that pursuant to an Assignment of Lease on April 20, 1995, Chameleon received "right title and interest" under an existing lease to utilize a portion of the Bay City Site. Landrum's affidavit further provides in pertinent part that:

[O]n April 20, 1995, [Landrum] and Chameleon entered into a Lease Agreement ("Sub-lease") allowing [Landrum] to use the Bay City Site for KIOX-FM's main studio operations. The Sub-lease, the Assignment of Lease and the Asset Purchase Agreement have never prevented Chameleon from

¹⁹ The CIB inspection of the Harris County Site arose after the CIB Houston field office monitored KFCC(AM) on four separate nights operating with power levels grossly exceeding the nighttime power authorized by the STA grant. On July 24, 1995, the CIB Houston field office issued a Notice of Violation to Chameleon for those violations. Chameleon responded that the unlawful operation was due to an improperly trained operator.

²⁰ See June 20th, 1996 affidavit of Kennard J. Adamcik, Electronics Engineer, CIB Houston.

operating [KFCC] at the Bay City Site subsequent to Chameleon's acquisition of the station. There is currently no lease agreement or other written or oral agreement between [Landrum] and Chameleon that would prevent Chameleon from gaining access to the Bay City Site in order to operate AM station [KFCC] from that site.

December 5th, 1995 affidavit of Jake H. Landrum at 1-2.

DISCUSSION

15. We believe that there is a substantial and material question of fact whether Chameleon possesses the requisite character qualifications to be or remain a Commission licensee. The "trait of truthfulness" is a key element of character necessary to operate a broadcast station in the public interest. See In the Matter of Policy Regarding Character Qualifications In Broadcast Licensing, Report, Order and Policy Statement, 102 FCC2d 1179, 1210 (1986). Here, we find that there is a substantial and material question of fact as to whether Chameleon has misrepresented or lacked candor with respect to material facts before the Commission. A misrepresentation is a false statement of fact made with an intent to deceive the Commission. Fox River Broadcasting, Inc., 93 FCC2d 127, 129, (1983). Lack of candor is a concealment, evasion or other failure to be fully informative, accompanied by an intent to deceive the Commission. Id. "A necessary and essential element of both misrepresentation and lack of candor is intent to deceive." Trinity Broadcasting of Florida, Inc., 10 FCC Rcd 12020, 12063 (1995). Fraudulent intent can be found from "the fact of misrepresentation coupled with proof that the party making it had knowledge of its falsity." David Ortiz Radio Corp. v. F.C.C., 941 F.2d 1253, 1260 (D.C. Cir. 1991) (quoting Leflore Broadcasting Co. v. F.C.C., 636 F.2d 454, 462 (D.C. Cir. 1980)). In other words, "intent can also be found from motive." Joseph Bahr, 10 FCC Rcd 32, 33 (Rev. Bd. 1994).

16. There is a substantial and material question of fact whether Chameleon made false statements of fact to the Commission regarding the status of the Bay City Site in Chameleon's initial STA request and in the Petition for Review. In its April 21, 1995 STA request, Chameleon asserted that the necessity for STA was "[d]ue to the loss of [KFCC's] currently licensed site." Chameleon repeats this statement of fact in Werlinger's affidavit attached to the Petition for Review where Werlinger states that, as a result of the Sub-lease, Chameleon "did not have use of the transmitter site." Further, Werlinger contends that the "site loss was involuntary." Werlinger's statements are directly contradicted by the December 5, 1995 affidavit of Landrum. Landrum, who executed the Sub-lease with Werlinger, states that nothing in the Sub-lease or any other agreements between the parties "have ever prevented Chameleon from operating [KFCC] at the Bay City Site subsequent to Chameleon's acquisition of the station." Landrum further states that presently there is no other agreement, "written or oral," preventing Chameleon from "gaining access" to the Bay City Site. As noted above, a Commission staff inspection of the Bay City Site reported that the site contained, among other things, a three-tower array previously used by KFCC(AM), in addition to phasing equipment for the AM towers.

17. In addition, there is evidence in the record that Werlinger evaded or failed to be fully candid in response to a Commission staff inquiry regarding the Bay City Site. As noted above, the Division requested Chameleon to provide specific details concerning:

- (a) the circumstances under which Chameleon "lost" the Bay City Site and the date that the "loss" occurred;
- (b) Chameleon's present legal right of access to the Bay City Site in view of the sublease given to Landrum;
- (c) the present status of the KFCC(AM) transmission facility at the Bay City Site, and if the status has been changed, the date of any such change and all details concerning the nature and extent of that change; and
- (d) the present address of the KFCC(AM) main studio.

See Inquiry Letter at 3-4. Although Werlinger submitted a twenty-page response letter, the bulk of that response dealt with the circumstances leading to KMC's loss of its Houston broadcast outlet. We find it significant that Werlinger failed to respond to the above-noted questions regarding the Bay City Site. See F.C.C. v. WOKO, 329 U.S. 228, 237 (1946) ("The fact of concealment may be more significant than the facts concealed"). The failure to answer questions regarding the Bay City Site raises a substantial and material question of fact as to whether Chameleon dealt candidly with the Commission staff.

18. There appears to be ample evidence in the record suggesting that Chameleon had a motive to deceive the Commission regarding the alleged Bay City Site "loss." Chameleon has maintained throughout this proceeding that, because of the unexpected termination of its time-brokerage agreement with the Houston licensee, its future was threatened unless it immediately obtained another Houston broadcast outlet.²¹ Werlinger has stated that he knew that Chameleon's only chance to remain economically viable depended upon "somehow receiving permission to make a change in the [KFCC] transmitter site through temporary authority and then present a completed [Modification Application] at a later date."²² As Werlinger is a self-described "accomplished propagational engineer,"²³ he apparently understood that a request for STA to accomplish an 80 km site relocation required a

²¹ Response Letter at 5.

²² Response Letter at 9.

²³ Response Letter at 5.

compelling showing of need sufficient to obtain the grant.²⁴ See 47 C.F.R. § 73.1635(a)(2) (Any STA request must "fully describe the proposed operation and the necessity for the requested STA"). Based upon the record before us, it appears that Werlinger was fully aware at the time he filed the STA request that Chameleon had access to the Bay City Site. Nevertheless, Werlinger, motivated by the "need" to preserve Chameleon's Houston economic interests, appears to have deliberately misled the Commission staff about the status of the Bay City Site in order to obtain the STA.

19. We additionally find that the record raises a substantial and material question as to whether Chameleon lacked candor and intended to deceive the Commission with respect to the "existing" tower at the Harris County Site. Werlinger contends that the Commission staff told him that the STA could not be granted because it involved construction of a new tower. In response to the staff's statement, Chameleon admits that it immediately arranged with McClish to build a tower on the Harris County Site. McClish allegedly completed construction of the tower by May 1, 1995. On May 2, 1995, Chameleon amended its STA request and indicated that an "existing" tower was located 0.25 km from the location of Chameleon's previously-proposed tower site. When filing this amended request, Chameleon apparently failed to report to the Commission staff that this "existing" tower did not exist when Chameleon's initial STA request had been filed. Nor did Chameleon reveal that Werlinger personally made arrangements for the tower's construction upon land leased by Chameleon, after he learned that the staff could not grant Chameleon's initial STA request.²⁵ As noted above, Chameleon appears to have had a motive to conceal this tower construction from the Commission staff because of its "need" for immediate authority to serve Houston and its awareness that such authority would not be granted if it involved construction of permanent facilities at the Harris County Site.

20. In view of the record established in this proceeding, we cannot conclude that Chameleon's subject STA extension request warrants grant. Pursuant to Section 309(f) of the Act, the Commission may authorize temporary operations for a period not to exceed 180 days upon a finding of "extraordinary circumstances" requiring temporary operations in the public interest. 47 U.S.C. § 309(f).²⁶ Although Chameleon argues that the termination of its time-brokerage agreement with the Houston licensee constitutes "extraordinary circumstances" justifying a grant of STA, we disagree. The public interest lies not with Chameleon's private business interests in Houston, but with KFCC(AM)'s provision of service to its licensed community of Bay City, Texas. As shown above, there is a substantial and material question of fact as to the truthfulness of Chameleon's claim that its Bay City Site has been "lost."

²⁴ Werlinger describes his efforts at obtaining the STA as a "creative use" of the Rules, and going "to the outer limits" of the Rules. Response Letter at 17, 19.

²⁵ Chameleon asserts that McClish "volunteered" to own the tower on the Harris County Site.

²⁶ Section 309(f) of the Act is applicable to parties who have filed an application subject to 47 U.S.C. § 309(b) (e.g., the Modification Application).

Given that Chameleon does not clear this first hurdle in demonstrating the basis for its STA request, we do not need to reach the merits of Chameleon's other arguments with respect to the veracity of the interference allegations, the reasons underlying KFCC(AM)'s failure to put a city-grade signal over Bay City from the Harris County Site and the status of other facilities granted STA by the Commission staff.

21. Given the substantial and material question of fact raised concerning Chameleon's basic character qualifications, we conclude that, as detailed below, it should be directed to show cause as to why its license for KFCC(AM) should not be revoked. This proceeding is intended to encompass all authorizations and applications held or filed by Chameleon's principal, Jo Nell Werlinger, for KFCC(AM). We will hold all pending applications filed by Jo Nell Werlinger for KFCC(AM) in abeyance, pending resolution of this proceeding. Also, Jo Nell Werlinger may not dispose of the KFCC(AM) license or acquire an interest in additional licenses during the pendency of this proceeding. Additionally, prior to the resolution of this proceeding, Don Werlinger may not acquire an interest in a Commission license.

CONCLUSION

22. Accordingly, IT IS ORDERED, That the November 2, 1995 Petition for Review By the Commission filed by Chameleon Radio Corporation IS DENIED.

23. IT IS FURTHER ORDERED, That the Stay issued October 11, 1995 by the Audio Services Division of the Mass Media Bureau IS DISSOLVED, the objection of Tom S. Whitehead, Inc. IS GRANTED to the extent indicated herein, and Chameleon Radio Corporation's August 4, 1995 request for extension of Special Temporary Authority IS DENIED.

24. IT IS FURTHER ORDERED, That, pursuant to 47 C.F.R. § 73.1635(a)(5)(b), the May 5, 1995 Commission staff letter granting Special Temporary Authority, as modified by the Commission staff letter of May 12, 1995, IS CANCELLED and Station KFCC(AM) IS DIRECTED TO IMMEDIATELY CEASE OPERATIONS from the Harris County Site, and resume its licensed operations, or seek silent authority pursuant to 47 C.F.R. § 73.1740. Further operation from the Harris County Site will subject Chameleon to daily forfeitures calculated in accordance with Section 503(b) of the Act.

25. IT IS FURTHER ORDERED, That, pursuant to Section 312(a)(2) of the Communications Act of 1934, as amended, Chameleon Radio Corporation IS DIRECTED TO SHOW CAUSE why the license for Station KFCC(AM), Bay City, Texas, should not be REVOKED, and why Chameleon Radio Corporation's pending application for modification of facilities and change of community of license for Station KFCC(AM) should not be denied, at a hearing to be held at a time and location specified in a subsequent Order, upon the following issues:

1. To determine whether Chameleon Radio Corporation misrepresented or lacked candor to the Commission regarding the status of its licensed broadcast facility at Bay City, Texas, when requesting Special Temporary Authority on April 21, 1995.

2. To determine whether Chameleon Radio Corporation lacked candor to the Commission regarding the construction of a tower at the Harris County Site, when filing its amended request for Special Temporary Authority on May 2, 1995.

3. To determine, in light of the evidence adduced under the foregoing issues, whether Chameleon Radio Corporation possesses the requisite qualifications to be or remain licensee of KFCC(AM), Bay City, Texas.

26. IT IS FURTHER ORDERED, That the instant letter shall constitute a Bill of Particulars with respect to all the foregoing issues.

27. IT IS FURTHER ORDERED, That, pursuant to Section 312(d) of the Act, both the burden of proceeding with the evidence and the burden of proof shall be upon the Mass Media Bureau as to all the foregoing issues.

28. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the licensee, pursuant to 47 C.F.R. § 1.91(c), in person or by attorney, shall file with the Commission within thirty (30) days of the receipt of the Order to Show Cause a written appearance stating that it will appear at the hearing and present evidence on the matters specified in the Order. If the licensee fails to file an appearance within the time specified, the right to a hearing shall be deemed to have been waived. See 47 C.F.R. § 1.92(a). Where a hearing is waived, a written statement in mitigation or justification may be submitted within thirty (30) days of the receipt of the Order to Show Cause. See 47 C.F.R. § 1.92(a). In the event the right to a hearing is waived, the presiding officer, or the Chief Administrative Law Judge, if no presiding officer has been designated, will terminate the hearing proceeding and certify the case to the Commission in the regular course of business and an appropriate order will be entered. See 47 C.F.R. § 1.92(c).

29. IT IS FURTHER ORDERED, That, if it is determined that the hearing record does not warrant an Order revoking the license of Chameleon for KFCC(AM), it shall also be determined if Chameleon has willfully or repeatedly misrepresented facts to the Commission in violation of 47 C.F.R. § 1015. If so, it shall also be determined whether an Order for Forfeiture shall be issued pursuant to Section 503(b) of the Act in an amount up to \$250,000 for the willful and/or repeated violation of 47 C.F.R. § 1015.

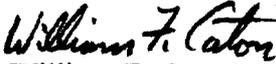
30. IT IS FURTHER ORDERED, That this document constitutes a Notice of Apparent Liability for forfeiture for violation of 47 C.F.R. § 1015. The Commission has determined that, in every case designated for hearing involving revocation or denial of

assignment, transfer, or renewal of license for alleged violations which also come within the purview of Section 503(b) of the Act, it shall, as a matter of course, include this forfeiture notice so as to maintain the fullest possible flexibility of action. Since the procedure is thus a routine or standard one, we stress that the inclusion of this notice is not to be taken as in any way indicating what the initial or final disposition of the case should be; that judgment is, of course, to be made on the facts of each case.

31. IT IS FURTHER ORDERED, That the Secretary of the Commission send a copy of this Order by Certified Mail - Return Receipt Requested, to:

Chameleon Radio Corporation
10865 Rockley Road
Houston, Texas 77099

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary