

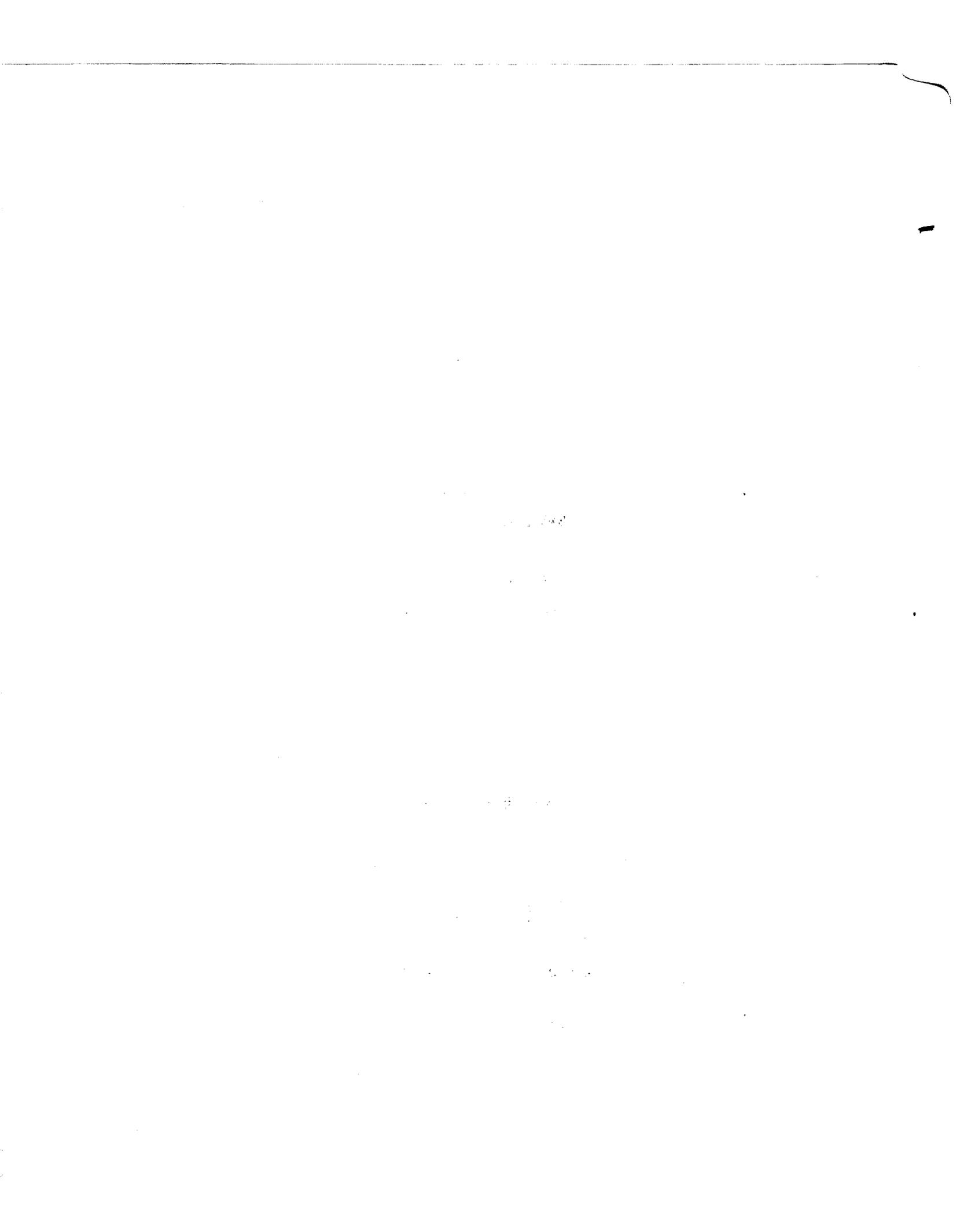
Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
CHAMELEON RADIO CORPORATION)	MM Docket No. 96-173
)	
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)	

MASS MEDIA BUREAU'S EXHIBITS

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ORIGINAL

September 3, 1996

Via Hand Delivery

Alan Aronowitz, Esq.
Mass Media Bureau
Federal Communications Commission
Suite 8002, 2025 M Street, N.W.
Washington, D.C. 20554

Dear Mr. Aronowitz:

1. This is to provide information relative to the Commission's "Order to Show Cause, Hearing Designation Order and Notice of Apparent Liability," released August 26, 1996 in re Chameleon Radio Corporation, MM Docket No. 96-173 ("the FCC Order").

Hearing issue one
Status of licensed facility at Bay City, Texas

2. Central to this issue is the bona fides of a statement in the initial STA request filed by Chameleon Radio Corporation ("Chameleon") that the STA was requested "due to the loss of its currently licensed site." The loss of the site was not caused by condemnation or natural disaster. It was caused by contractual obligations incurred in securing an agreement for the purchase of the radio station, then KIOX(AM), now, KFCC(AM), a condition of purchase. The station was bought from Landrum Enterprises, Inc., which owned a co-located FM station with joint studios, offices and other operating facilities located on land which also

Federal Communications Commission

Docket No. 96-173 Exhibit No. 1

Presented by MMB

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Reporter JS

Date 2-24-97

was the site of the three-tower AM array. The land was owned by a third party, who had leased it to Landrum Enterprises, Inc.¹

3. As a part of the transaction, the seller assigned its lease rights for the property to Chameleon and then took back a sublease of the property from Chameleon in order to continue to operate its FM station there. The sublease back to Landrum Enterprises, Inc. was for a three year period with options to renew for additional periods aggregating 18 years. The Agreement of Purchase and Sale of Assets filed with the Commission, attached as Exhibit 2, provided for the sublease back to Landrum Enterprises, Inc., page 17, ¶7.1(b)(viii). A copy of the sublease itself, executed at closing of the transaction, attached as Exhibit 3, was furnished to the Commission along with the other closing documents, at the time Mr. Werlinger filed a 19-page letter to Mr. Eads, dated August 4, 1995, attached as Exhibit 4.

4. While Mr. Landrum apparently has advised the FCC that Chameleon retained access rights to the property for its AM transmitting operation, the wording of the sublease to Mr. Landrum's company does not provide this. The entire property is subleased to Landrum Enterprises, Inc. and while there is a reference to access to a microwave facility and receiving dish having nothing to do with the AM station, there is no provision

¹ Factual information throughout this letter, except as given in reliance on exhibits, is supported by the sworn declaration of Don Werlinger, President of Chameleon Radio Corporation, attached as Exhibit 1.

for access to the three AM towers or to quarters in the building for operation of the AM station. Exhibit 2 at page 1, §1.

5. Under these circumstances, in the mind of Chameleon and Mr. Werlinger, the author of its initial STA request, the reference to the "loss" of the AM transmitter site was intended to refer to Chameleon's contractual obligations in purchasing the station.

6. While with the 20-20 vision of hindsight, Mr. Werlinger might prefer that he then had the prescience either to omit the subject altogether or to be more explicit about the circumstances, he demonstrably had no intent or motive to deceive or be uncandid with the Commission in the matter.

7. For one thing, the contractual obligation and leaseback arrangement on which he relied for the reference to "loss" of the site, had been disclosed to the FCC in the sale and purchase agreement when the assignment application was submitted for its approval.

8. Additionally, the STA request was not for a move to somewhere in the vicinity of the existing site in Bay City. The STA request proposed to move the transmitting site to a location near Houston. The STA request contained a map which showed coverage of the Houston area from the requested STA location. Exhibit 5 attached. Because these exhibits clearly show the location of the proposed tower near Houston, they display total candor.

9. Also, in Mr. Werlinger's past experience with the FCC,

the loss of the existing site had not been a prerequisite for an STA request, so Mr. Werlinger thought he could write the request for STA with or without any reference to the status of the existing site as he had done in past submissions to the FCC. It simply didn't seem to be the governing factor. In October 1993, on behalf of a client of his technical consulting business, Mr. Werlinger had filed, and the FCC had granted, an STA request without referring to the loss of the transmitter site, or without giving any other explanation, while asking permission to move the site from one community (Mineola, Texas) to an entirely separate, distant community (Canton, Texas) under circumstances that precisely parallel those here. Exhibit 6. About which we shall have considerably more to say later.

10. Chameleon's Application for Review provided the affidavit of Mr. Werlinger containing a series of related paragraphs that first refer to the contractual leaseback obligation and then, fairly read, convey the thought that because of it, Chameleon did not have use of the site, had thus lost the site, and the site loss thus was involuntary. Attached as Exhibit 7. The use of the word "involuntary" in this context intended no misconception that anything more was involved than the contractual obligation which was the predicate for the use of the word.

11. By this time, there could be no misunderstanding of the facts and circumstances on the part of the Commission. Prior to filing the Application for Review with Mr. Werlinger's affidavit

attached, Chameleon had furnished to the FCC a copy of the sublease of the property to Landrum Enterprises, Inc. Mr. Werlinger had filed a 19-page single-spaced statement addressed to Mr. Eads explaining in full detail the strategy to purchase the AM station for the purpose of moving it to Houston, Exhibit 4 at page 4, 6, 8-9, and he had openly and freely discussed that strategy in visits at the FCC in Washington with key members of the Commission's processing staff including Messrs. Vu, Burtle and Eads.

Hearing issue two
Construction of a tower at the proposed STA site

12. At the time the initial STA request was filed, there was no existing tower at the location of the proposed site. The FCC staff advised Chameleon that an STA would be granted only if there were an existing tower. Chameleon was instrumental in making arrangements for construction of a 180 foot tower by a party who did that as his business. The tower complied with zoning and FAA requirements. For the tower per se, to the understanding of Chameleon, there was no need for FCC clearance, only the FAA. Communications users requiring FCC authorizations need to obtain FCC clearance. When the tower was erected and before Chameleon made any effort to install its broadcast equipment or use it, Chameleon amended its STA request to report the tower, the STA was granted and only then did Chameleon become a duly authorized user.

13. No false statements or misrepresentations were made to the FCC concerning the matter. Chameleon did not perceive the

need to report the circumstances of construction of the tower to the Commission. If that was and is in error, Chameleon regrets the error. But no deception or lack of candor was intended. Chameleon was simply attempting to follow new and unexpected Commission guidelines.

14. Prior to filing its STA request for KFCC(AM), Chameleon was unaware that the Commission required an existing tower for STA grants. Mr. Werlinger's experience in the Canton, Texas STA was to the contrary. The Canton STA was granted for a location which required the construction of a new tower. Mr. Werlinger's experience in other STA's which he has requested or of which he has knowledge was the same as in Canton, i.e., no existing tower was required. Nevertheless, if in the past an STA could be obtained where a new tower needed to be constructed after the STA was issued, there seemed no reason why the tower could not be constructed before the STA is issued, followed by installation of the broadcast facilities after the STA was issued, if for some reason that sequence of events were the prevailing view of what the FCC staff desired. Either way, a radio station requires a tower.

15. Chameleon did and does not believe there was any "premature construction." The tower, with a grounded folded unipole antenna, could be a general purpose tower for rental to other users, whether or not Chameleon ever was authorized to use the tower. Chameleon, which itself proposed a grounded folded unipole antenna, did not install its proposed antenna or other

related gear until after the STA had been granted and such installations were authorized.

16. Chameleon did and does not understand how the construction a tower for STA use (whether before or after an STA has been issued) has any impact on the permanent licensing regulatory program initiated by the filing of Form 301's with attendant public notice and protest rights under the Communications Act. In the past, STA's have always been granted without public notice. Notice was given (and no protests were timely filed) when Chameleon filed an FCC Form 301 several months later for permanent authorization of a directional array that reduced grandfathered interference and caused no new prohibited interference to any one. In the past, form 301's for changed facilities such as those in question have always required public notice, STA requests have not.

17. In sum, construction of the tower in relation to the STA request followed established Commission policy. It was well-intended and bona fide. Any transgression that may have taken place, and we don't think there was any transgression, was unintentional.

Unanswered questions

18. The FCC Order at ¶17 lists four questions concerning which Chameleon allegedly did not supply answers posed in the Commission's letter dated July 25, 1995 and for that alleged reason is said to raise the question of whether it was uncandid with the FCC's staff. They are:

(a) The circumstances under which Chameleon "lost" the Bay City Site and the date that the "loss" occurred: (i) The answer is that the loss occurred at the time of consummation of the acquisition of KFCC(AM) on April 21, 1995 upon execution of the sublease of the premises back to Landrum Enterprises, Inc.

(ii) There was no lack of candor on this score with the staff. The written 19-page response dated August 4, 1995 to the Commission's letter explained in detail the origin of the idea of the purchase of the AM station in order to move it closer to Houston, and furnished a copy of the sublease itself to the Commission. In meetings with Mr. Eads before that time and with Mr. Stewart thereafter, Mr. Werlinger advised them of the leaseback of the property to the FM operator along with Chameleon's desire to move the station. In the Application for Review filed in October 1995 the sublease was identified in writing as the basis for losing the transmitter site. Exhibit 7.

(b) Chameleon's present legal right of access to the Bay City Site in view of the sublease given to Landrum: (i) The sublease does not provide to Chameleon the legal right to use the premises. A "reverse" sublease back to Chameleon from Landrum Enterprises, Inc. or its successor in business would be required for that purpose. The terms under which that could be done are not known and have never been negotiated. (ii) The legal rights of Chameleon under the the sublease were never addressed in writing or orally in meetings with the staff. There was no motive or intent to withhold anything from the Commission. In

light of the repeated candid disclosures of the intent to move closer to Houston in the 19-page letter and in conversations with the staff, it did not occur to Chameleon to offer a speculative analysis of its legal rights, if any, to co-habit the Bay City property with Landrum Enterprises, Inc. or its successor in business.

(c) The present status of the KFCC(AM) transmission facility at the Bay City Site, and if the status has changed, the date of any such change and all details concerning the nature and extent of that change: (i) The towers and certain equipment (but not the transmitter and certain audio processing equipment) remain on the premises. The transmitter and related equipment were moved to the Harris County location on the evening of May 5, 1995, and were installed after issuance of the STA. (ii) The station facilities at the Bay City site were inspected by FCC field personnel. Through a number of written documents as well as personal conferences in Washington and telephone conversations, the staff knew that the station was operating with a transmitter located at the STA site. The staff also knew the position of Chameleon that it would be impossible for financial reasons to operate with the Bay City facilities as a stand-alone AM station. Given that statement of position, also the candid disclosure of Chameleon's plans for a transmitter site in Harris County, failure to address the equipment located at the Bay City site was not a material evasion or lack of candor.

(d) The present address of the KFCC(AM) main studio:

(i) Is 10865 Rockley Road, Houston, Texas 77099. (ii) Is well known to the Commission's staff. While the studio is not located in Bay City, it is well within the 5 mv/m contour of the STA site. The studio has been inspected by FCC field personnel. Washington staff personnel have called representatives of Chameleon at their offices and telephone numbers on Rockley Road. Correspondence from Chameleon to the FCC is on letterhead from the Rockley Road address. Failure to list the address of the studio in the 19-page letter dated August 4, 1995, was failure to state information which the staff already knew. It was not a deliberate or intended concealment of information about the studio.

Information concerning Mr. Werlinger

19. Since 1980, Don Werlinger has produced engineering documents which have resulted in more than 30 new AM and FM allocations and grants in Texas, Louisiana, Arkansas, Oklahoma, Nebraska, New Mexico and California.

20. In the Austin, Texas, area alone, Mr. Werlinger's understanding of the allocations process has resulted in new or improved FM allocations in the cities of Round Rock, Georgetown, Elgin, Bastrop, Johnson City and Giddings. In the same area, new or improved AM facilities in Elgin, Lockhart and Georgetown either were initiated or initiated and completed by Mr. Werlinger. His work has introduced broadcast competition where none had before existed in Huntsville, Hereford and Kerrville (all Texas) and his expertise has resulted in first ever aural

service grants in Hearne, Hamby, Hawley and Lometa (all Texas).

21. In addition to his engineering work, Mr. Werlinger's 26-year career has included ownership and/or operational responsibilities through LMA's in more than a dozen radio stations which have received numerous field inspections. Only once did a field inspection result in a notice of violation, being presented to an operation controlled by Mr. Werlinger and it was not of such a serious nature (i.e., excess operating power) that a forfeiture was imposed.

22. Mr. Werlinger's now lengthy record before the Commission is not one of a scofflaw filled with a long list of violations, reflecting a pattern of abuse or disrespect for FCC rules, regulations and policies. Rather, his record is replete with examples of his skillful additions to spectrum usage to bring competition to previously non-competitive markets, first time service to previously unserved markets and, in the instant matter, to bring a unique programming voice to first generation immigrants previously unavailable.

Rule violations in this matter

23. Chameleon concedes two rule violations. One, with the STA facilities, it no longer covered the community of license with the requisite signal strength. The second, during brief periods of time following rescission of the STA and while waiting for restoration of the STA as had been requested and which shortly occurred, Chameleon continued to operate under the STA rather than shutting the station down. In fact, immediately

following each of the two rescissions, Mr. Werlinger traveled to Washington to personally argue for the reinstatement at the FCC, telling the staff that the station remained on the air, ultimately prevailing in his reinstatement request on each occasion.

24. Chameleon did not deceive the Commission with regard to either of these rule violations.

25. No longer placing the requisite signal strength over the community of Bay City. The initial request for STA showed that the proposed STA site was in southwest Harris County and would provide a signal over a substantial part of the Houston area. It was crystal clear in the initial STA request that from the STA site, Bay City would no longer be served with a 5.0 mv/m signal. Nevertheless, at the originally granted 1000 watt STA power, Bay City received a measured 2.3 mv/m signal from the STA operation, less than the required 5.0 mv/m, but certainly a signal easily detected by inexpensive receivers in Bay City. Regardless, the STA request was granted. The Commission's grant came as no surprise to Chameleon and Mr. Werlinger.

26. In Exhibit 6 we have provided copies of documents from the Commission's files relative to the STA prepared by Mr. Werlinger in October 1993 and filed to change the transmitter location of KVCI(AM) from Mineola, Texas, to Canton, Texas. This STA grant required a move of 36 kilometers and changed the station's service area from one serving Mineola to one serving Canton, similar to the move and change of service area of

KFCC(AM) from Bay City to Missouri City. In fact, the KFCC(AM) move toward Houston resulted in a greater residual signal to Bay City than the KVICI(AM) move toward Canton yielded to Mineola.

27. The STA site in Canton did not contain an existing tower, just like the STA site in southwest Harris County. Subsequent to the granting of the Canton STA request, an FCC Form 301 was filed for permanent operation from facilities there, just as an FCC Form 301 was filed seeking permanent operation subsequent to the STA grant to KFCC(AM) in this case.

28. The STA request for a site in Canton did not state that the existing site in Mineola had been lost, nor was it otherwise justified on the basis of the situation regarding the existing site at Mineola. Here, Mr. Werlinger used his experience relative to the Canton STA to formulate his request to move the Bay City transmitting location. His reference to loss of the existing site, while unnecessary, was accurate and not misleading as demonstrated earlier (¶¶2-11)

29. In point of fact, the STA request in Canton involved loss of the licensee's site due to a contractual obligation as part of the purchase of the radio station. As in the KFCC(AM) situation, the KVICI(AM) transmission facilities were co-located with an until then co-owned FM station. When Canton Broadcasting, Inc. purchased the AM station, it waived its rights to the old facility. To the knowledge of Chameleon and Mr. Werlinger, the tower and ground system of KVICI(AM)'s old site in Mineola remains in tact today. The KVICI(AM) file contains no

indication that the staff has raised the issue with KVCI(AM).

30. Mr. Werlinger was aware that the Commission's staff had granted the Canton STA, and routinely renewed the term of that STA (now, at least eight times, including a renewal dated June 20, 1996). Why would the Commission's staff grant and continue to renew the Canton STA until such time as an FCC Form 301 request could be processed, but refuse to do the same for KFCC(AM)?

31. The parallels (§§26-30) are astonishingly complete on all material points, with one unexplained and unexplainable exception. In the case of Canton for which the STA was initially filed in 1993 and is still operational, the Commission renewed its then most recent extension request in July 1995 at the same time the Commission twice, in May and July 1995, undertook to rescind the STA authorization for KFCC(AM) shortly after it was filed. Mr. Werlinger's reliance on the Canton prototype was reasonable and reasoned. The Commission's different treatment of the two virtually identical situations was neither, and cannot be justified.

32. Operation under the STA after rescission for a brief period of time while a request for reinstatement was considered and granted. Some background information will be useful to place this limited rule violation in context.

33. The public interest benefits from the KFCC(AM) STA operation and even more so under a permanent license are enormous. KFCC(AM) is one of four radio stations in the Bay

City, Texas market. This is a declining town of about 18,000 people (1990 U.S. Census, a reduction from the 1980 U.S. Census population). Bay City is located in Matagorda County along the Gulf Coast southwest of Houston. The other three stations are FM facilities. All of them are the high-powered Class C facilities. The AM station is a low-powered one kilowatt station. Before it was purchased by Chameleon, KFCC(AM) did not provide its own programming service; rather it simulcast the audio portion of the cable television CNN Headline News around the clock.

34. In the opinion of Chameleon, then and now, KFCC(AM), could not possibly survive as a stand-alone facility in competition with three strong FM stations in such a small radio market. By moving to the STA site, Chameleon's principals found an audience for a programming format which, while not attractive to any of the other radio stations there, provides unique programming for some 20 different nationalities. Chameleon has provided that format without interruption using the STA facilities of KFCC(AM) since commencement of operations under STA in May 1995.

35. The public interest benefits are these. An AM station, which was being simulcast by the previous owner and cannot survive as a stand-alone AM station in a small market with three major FM stations, would be licensed to a larger and growing community having no radio stations, i.e., Missouri City, Texas, population approximately 36,000 (U.S. Census), where it can survive as a stand-alone AM station, providing a unique program

service not otherwise available to approximately 20 different nationalities and thus of interest to a population aggregating in the hundreds of thousands in the Houston area.

36. From an engineering point of view, the public interest would also be served. KFCC(AM) operating from the site near Bay City is the subject of mutual interference with one other radio station, KWHI(AM), because the spacing of their respective transmitting locations dated back to an earlier time period when shorter spacings were permitted than under current standards, and the spacing was "grandfathered" when the current rules were adopted. KFCC(AM), operating from the site in Harris County, will markedly improve the situation, eliminating some 90% of the interference areas that were grandfathered. The current STA operation of KFCC(AM) reduces the grandfathered (otherwise prohibited) interference to KWHI(AM) by more than 50% below the level of the Bay City site.

37. To provide some measure of the type and meaning of ^{Fcc} KCFP(AM)'s unique program service, Exhibit 8 is a chart of the 19 nationality groups currently on the air, occupying 24 hours a day, seven days a week. Exhibit 9 is a letter from the producer of "Radio Kafe," providing Spanish programming of interest to persons from Central and South America. Exhibit 10 consists of letters from Cross-Cultural Network (Radio Program in Russian), Radio South Asia, Radio Recovery (English language regarding alcohol, drugs and other recovery groups), The Spiritual Assembly of the Baha'is of Houston, Aqui el Salvador, Voice of Sanatan

Hinduism, God's Romany Christian Church, the producer of Sunday Morning Live, Hindu University of America, Hispanos Todos Unidos, Radio Variedades, Amanecer Tropical, producer of Your Personal Power Hour (English language), host of Hit Parade! for the Indian, Pakistani and Bangladeshi communities and Programma Asi Canta El Sur De America.²

38. In this milieu, Chameleon continued operation without interruption for a period of approximately eight days in May 1995 and for approximately 20 days in September 1995 following rescission of the STA and until the STA was restored at its earnest request. Chameleon candidly apprised the Commission of its limited unauthorized operation. Under all of the circumstances, these limited transgressions, if not fully justified, are substantially mitigated. For sure, there was no deception of the Commission by Chameleon about what it did.

39. If the Commission elects to impose a monetary forfeiture to protect its processes and serve as a warning that rule violations, whatever the circumstances, will result in forfeiture, Chameleon is willing to accept monetary punishment.

40. In the same breath, we ask the Commission as it reviews the foregoing and the record before it to extend the STA pending completion of processing the pending FCC Form 301, grant the 301 and thus allow permit continuation of KFCC(AM)'s unique public interest programming service without interruption.

² In the near future, Chameleon will submit copies of individual letters from listeners in support of continuing this program service.

"Extraordinary circumstances"

41. We would like to give the Commission a single example of what continuation of the STA and eventual licensing permanent operations means to the listeners of KFCC(AM). In the Houston area, there are approximately 100,000 persons whose origins are in the Indian subcontinent. Many cannot read or understand the English language. The daily, hour-long program, Radio South Asia, is the only source, written or aural, for many of them for essential information, that we all take for granted, such as the weather forecasts. This example could also be given for various other nationalities served by KFCC(AM) as well. The loss of this service on which these peoples have come to rely, even for a brief period of time, is a disservice of the public interest. The cessation of operations for any extended period of time would mean the financial demise of the station itself and an incredibly unfortunate loss of this uniquely needed programming.

42. These are "extraordinary circumstances" warranting continuation of the STA pending processing of the FCC Form 301 within the meaning of 47 U.S.C. §309(f).

Further questions

43. If you should have further questions concerning the matter, we will be happy to answer them. During the next few days, I shall be out of town and in my absence, Harry Cole with whom you are familiar will be available to assist in any way we can.

Section 1.1201 considerations

44. Although Mr. Whitehead through counsel has filed letters and pleadings in this matter even though the radio station with which he is associated will be the beneficiary of elimination of 90% of the grandfathered interference area upon commencement of KFCC(AM) permanent operations and has already benefitted from a 50% reduction with the KFCC(AM), his standing to file objections has never been established. This is to make clear that we are not serving a copy of this letter on counsel for Mr. Whitehead, nor did we serve a copy of our Motion for Procedural Dates filed August 29, 1996, but if you believe that counsel for Mr. Whitehead should receive copies of either or both documents, please advise and we shall furnish them.

Respectfully submitted,



Gene A. Bechtel

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Counsel for Chameleon Radio
Corporation

September 3, 1996

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DECLARATION

Don Werlinger declares under the penalty of perjury that the following statements are true and correct of his best knowledge and belief:

1. I am President of Chameleon Radio Corporation.
2. Factual statements in the foregoing letter to Mr. Aronowitz, except where reliance is placed on exhibits, are true and correct of my best knowledge and belief.



Don Werlinger

September 1, 1996

<u>Federal Communications Commission</u>	
Docket No. <u>96-173</u>	Exhibit No. <u>2</u>
Presented by <u>MMB</u>	
Disposition	Identified <u>X</u>
	Received _____
	Rejected <u>Withdrawn</u>
Reporter <u>GS</u>	
Date <u>2-24-97</u>	