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

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Federal Communications Commission
Office of Secretary

In The Matter of the)
Application of) WT Docket No. 95-11
)
HERBERT L. SCHOENBOHM)
Kingshill, Virgin Islands)
)
For Amateur Station)
and Operator Licenses)

To: Administrative Law Judge Edward Luton

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Acting Chief, Wireless Telecommunications Bureau (Bureau), respectfully submits, by his attorneys, the following Proposed Findings of Fact and Conclusions of Law, pursuant to Section 1.263 of the Commission's Rules, 47 C.F.R. § 1.263.

PRELIMINARY STATEMENT

1. On February 2, 1994, Herbert L. Schoenbohm ("Schoenbohm") applied for renewal of his amateur station (KV4FZ) and operator licenses. Those licenses were originally scheduled to expire on March 2, 1994, but their term has been extended pursuant to Section 1.62(a) of the Commission's Rules, 47 C.F.R. § 1.62(a), until the disposition of Schoenbohm's application.

2. On February 6, 1995, the Bureau, under delegated authority, adopted an Order designating Schoenbohm's application for hearing. Herbert L. Schoenbohm, 10 FCC Rcd 1669 (1995). Schoenbohm filed a timely appearance. The issues, as specified prior to the first hearing, are:

(a) To determine whether, in light of the conviction described in the Hearing Designation Order, Herbert L. Schoenbohm is qualified to renew his amateur service licenses.

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(b) To determine whether Herbert L. Schoenbohm violated Section 1.1210 of the Commission's Rules, 47 C.F.R. § 1.1210, by soliciting or encouraging others to make a presentation that he was prohibited from making.

(c) If it is determined that Herbert L. Schoenbohm did violate Section 1.1210 of the Commission's Rules, 47 C.F.R. § 1.1210, to determine the effect of such a violation on his qualifications to renew his amateur service licenses.

(d) To determine, in light of the foregoing issues, whether granting Herbert L. Schoenbohm's application would serve the public interest, convenience and necessity.

3. The first prehearing conference took place on March 30, 1995. The parties exchanged exhibits, including the witnesses' direct testimony in writing, prior to the first hearing, which took place on August 8, 1995. The Presiding ALJ denied Schoenbohm's renewal application in his Initial Decision released on February 2, 1996. Herbert L. Schoenbohm, 11 FCC Rcd 1146 (1996). Schoenbohm filed exceptions to the Initial Decision. The General Counsel, in his Memorandum Opinion and Order, Herbert L. Schoenbohm, 11 FCC Rcd 12537 (1996), released September 27, 1996, remanded this proceeding to the Presiding ALJ to take evidence on the following additional issues:

(c)(1) To determine whether Herbert L. Schoenbohm made misrepresentations or lacked candor in his testimony about his felony conviction, loss of pension rights, and ex parte communications.

(c)(2) To determine if Herbert L. Schoenbohm used his amateur radio facilities for communications about how to obtain illicit access codes.

The remand prehearing conference took place on December 6, 1996. The parties exchanged additional exhibits, including Schoenbohm's direct testimony in writing, prior to the remand hearing. The

remand hearing took place on April 1, 1997, and the record was closed the same day (**Transcript references for the remand hearing are shown in bold type**).

FINDINGS OF FACT

Conviction

4. In Government v. Schoenbohm, No. Crim: 1991/0108 (D.V.I. Dec. 30, 1992), Schoenbohm was convicted in the U.S. District Court for the District of the Virgin Islands (District Court) of violating 18 U.S.C. § 1029(a)(1) (fraudulent use of counterfeit access device). Section 1029 provides, in pertinent part, that whoever:

knowingly and with intent to defraud uses one or more counterfeit access devices . . . shall, if the offense affects interstate or foreign commerce, be punished as provided" It defines an "access device" as "any plate, card, code, account number, or other means of access that can be used . . . to obtain money, goods, services or any other thing of value"

The District Court sentenced Schoenbohm to imprisonment for a term of two months. The District Court suspended execution of this sentence and placed Schoenbohm under house arrest for two months with two years probation. The District Court also required Schoenbohm to pay a fine of \$5,000 during the probation period. Schoenbohm started serving his sentence on January 11, 1993. (Bureau Exhibit 1).

5. On appeal, the U.S. Court of Appeals for the Third Circuit affirmed Schoenbohm's conviction. United States V. Schoenbohm, No. 93-7516 (Third Circuit July 22, 1994). On

November 2, 1994, the U.S. Court of Appeals for the Third Circuit denied Schoenbohm's petition for a rehearing. United States V. Schoenbohm, No. 93-7516 (Third Circuit November 2, 1994).

(Bureau Exhibit 1). On February 28, 1995, the District Court denied Schoenbohm's motion to vacate his conviction. The United States Supreme Court denied Schoenbohm's petition for a writ of certiorari (**Tr. 42**) on November 4, 1996. Schoenbohm V. United States, 117 S.Ct. 410 (1996).

6. As noted above in Paragraph 4, Schoenbohm was convicted of the crime of fraudulent use of a counterfeit access device. At the first hearing in this proceeding, Schoenbohm testified "I was convicted for defrauding a telephone resale service provider by ... making unauthorized long distance calls." (Schoenbohm Exhibit 1, p. 1) However, in later testimony at the first hearing he described his conviction follows:

... I did not steal any money or cause the account of any telephone subscriber to be debited. I was convicted solely of having knowledge in my mind of certain telephone access codes of which 4 of the 6 digits were said to be similar to those that could be used to make long distance calls without paying for them. These telephone numbers were the 'Counterfeit Access Device' which I was convicted of possessing or using (Schoenbohm Exhibit 7, p. 2).

During direct examination at the first hearing, Schoenbohm continued to describe his conviction as being based on possession rather than on the performance of any act:

Q: Now, you have been convicted, have you not, of the crime of possessing a counterfeit telephone access device?

A: That's correct.

Q: And what was that device you were convicted of

possessing?

A: It was never fully described in court but believed to be numbers in my mind.

Q: In other words, numbers that could be used to make long-distance telephone calls?

A: That's correct.

Q: -- without paying for them? Is that correct?

A: Correct. (Tr. 38)

7. At the remand hearing, Schoenbohm continued the same theme. Schoenbohm testified that his conviction was based "solely on the use or possession of three six digit numbers which had been given to me by CALLS." (Schoenbohm Exhibit 8, p. 2) Schoenbohm also described his conviction as "for use or possession of a counterfeit access device." (Tr. 43) Schoenbohm further testified that he "was convicted solely of having knowledge in my mind of certain access codes ..." (Tr. 44) Upon additional questioning, Schoenbohm admitted that his conviction rested on something he did and that this was more than simply having numbers in his head. (Tr. 44) Subsequently, however, Schoenbohm testified that Title 18 U.S.C. Section 1029(a)(1) refers to "possessing or using a counterfeit access device." (Tr. 46) Schoenbohm then testified that a description of his conviction contained in Schoenbohm's original Proposed Findings of Fact and Conclusions of Law (filed September 13, 1997) "could have been written differently. It could have been use or possession." (Tr. 52) He then testified that the same

description "could have been made more accurate in reflection of the statute by using use or possession." (Tr. 54) Schoenbohm subsequently testified that "I was convicted of -- of having knowledge of certain numbers that could be used to make long distance calls without paying for them." (Tr. 55-56) Schoenbohm then acknowledged that he was convicted of using counterfeit access devices (Tr. 56, 57), but subsequently testified that he was convicted of possessing or using counterfeit access devices (Tr. 60-61). Schoenbohm then agreed that he was convicted of the use -- not possession or use -- of counterfeit access devices (Tr. 61).

8. Schoenbohm gave a number of explanations at the remand hearing for his references to "possession." Schoenbohm testified that his counsel asked him a question "as to the nature of counterfeit access devices, which were in my possession," because he had specifically asked his counsel "to make it clear that I did not possess or use any mechanical, electro-mechanical, or magnetic access devices; that the only devices I had were telephone numbers in my mind." (Schoenbohm Exhibit 8, p. 1). additionally, Schoenbohm testified:

It was mentioned to -- to set apart from the actual manufacture and trafficking portions of the statute and the supposed relation to electronic means of producing something or trafficking of something which I think is what the statute really -- really speaks to. (Tr. 63)

All right. The description in here was to set it apart from the conviction of actually stealing money or accessing the account of any telephone subscriber. And I did not steal any money or cause the account of any subscriber to be debited. It was a description of -- you say softer, more

benign. I don't believe it's -- A conviction is a conviction. It's serious enough standing by itself. (Tr. 63)

I could explain something here, Mr. -- Judge Luton, that possession was one of the counts for which I was convicted. (Tr. 64)

What I can tell you is that it was not -- it was only used in an explanation of what the device was. And it certainly -- I can understand your concern. But I think I made it sufficiently clear throughout the testimony and submissions that I was convicted for use of a counterfeit access device. But what was that counterfeit access device? There's a lot of speculation of what it was. And I think that was my attempt to explain that these were numbers in my mind that were used. (Tr. 66)

Following these "explanations," Schoenbohm agreed that the use of the word "possession" muddies the water and does not fit anywhere in this case (Tr. 66).

9. Schoenbohm, in testifying at the first hearing, declared that he cannot express any remorse for the crime of which he was convicted because it would jeopardize an appeal which was pending at that time (Schoenbohm Exhibit 1, p. 1). Even though he has apparently exhausted his judicial remedies, Schoenbohm still has not expressed any remorse. Schoenbohm believes he was improperly convicted (Tr. 135). During redirect examination at the remand hearing, he testified that, in his judgment, the government did not fulfill its burden at the criminal trial of showing that the access codes that he was convicted of using were unauthorized and that he was unable to file an appeal on that basis because of his attorney's error (Tr. 133).

Mitigation Evidence

Employment

10. Schoenbohm was employed from 1979 to until 1992 -- with a one year break in 1985 -- as Chief of Communications for the Virgin Islands police department (Schoenbohm Exhibit 1, p. 1; Tr. 57-58; **Tr. 70-71**). He was fired from this position following his conviction (**Tr. 71**). At the time of his termination his annual salary was \$35,000 (**Tr. 71**). The Government of the Virgin Islands subsequently rehired Schoenbohm as "Director of Transportation for the Virgin Islands Government under the Department of Property and Procurement" (Schoenbohm Exhibit 2), which was a political appointment (Tr. 58). Schoenbohm is currently employed in that position with an annual salary of \$42,500 (**Tr. 72**). At the time of the first hearing, Schoenbohm was also employed part time as a District Field Representative for Delegate Victor O. Frazer, who represented the Virgin Islands in the United States House of Representatives (Schoenbohm Exhibit 4; Tr. 52-53).

Effects of Conviction; Loss of Pension Rights

11. Schoenbohm in direct written testimony at the first hearing that he suffered immensely as a result of his conviction, losing his job, future retirement benefits worth at least \$150,000, and health care benefits in addition to serving two months of confinement and two years of probation (Schoenbohm Exhibit 1, p. 1). When asked at the first hearing whether Schoenbohm Exhibit 1, which contains this direct written

testimony, was true and correct, Schoenbohm testified, "Yes, it is" and did not offer any corrections. (Tr. 43)

12. By contrast, however, at the remand hearing, Schoenbohm admitted that his pension rights had been restored at the time of the first hearing in this proceeding as a result of his reemployment by the Virgin Islands Government (Tr. 73-74; Schoenbohm Exhibit 8, p.2). Schoenbohm asserts, however, that, even though he eventually regained his pension rights, he suffered the loss of his pension rights during the period between his being fired by the Virgin Islands Government and his being rehired (Schoenbohm Exhibit 8, p. 1).

Public Service

13. Schoenbohm testified at the first hearing, that he had engaged in the following public service activities: Chairman of the State Emergency Communications Committee for the Virgin Islands from March 1978 until his conviction in December 1992 (Schoenbohm Exhibits 1, 1A, 1B); assisting, on June 5, 1987, with the apprehension of a hijacker (Schoenbohm Exhibits 1, 1C); arranging, by means of amateur radio, for the safe rescue at sea of Thor Heyerdahl in 1969 (Schoenbohm Exhibit 1); providing communications during Hurricanes David and Frederick in 1979 (Schoenbohm Exhibits 1, 1D); providing communications "in an effort to save lives and property" during Hurricane Hugo in 1989 (Schoenbohm Exhibits 1, 1E); and providing communications during Hurricane Andrew in 1992 (Schoenbohm Exhibits 1, 1F).

14. Schoenbohm declared that, as Chairman of the State

Emergency Communications Committee for the Virgin Islands, he received a Planning Award (Schoenbohm Exhibit 1). The letter proffered to support this claim does not indicate that Schoenbohm was a recipient of the award (Schoenbohm Exhibit 1B). The record contains no information about the significance of a Planning Award. Aside from Schoenbohm's claim to having received a Planning Award, the record contains no information about any accomplishments made by Schoenbohm as Chairman of the State Emergency Communications Committee for the Virgin Islands.

15. The letter proffered to support Schoenbohm's assertion that he assisted, on June 5, 1987, with the apprehension of a hijacker was directed to him as Chief of Communications, U.S. Virgin Islands (Schoenbohm Exhibit 1C). The letter proffered to support Schoenbohm's assertion that he provided communications during Hurricane Hugo in 1989 also was directed to him as Chief of Communications (Schoenbohm Exhibit 1E).

Reputation

16. Schoenbohm has been active in island politics since 1979 and has run for political office (Tr. 59). He won a primary election for a seat in the Virgin Islands senate and also campaigned for other candidates (Tr. 61-62); he claims to have been instrumental in getting Delegate Victor O. Frazer elected to Congress (Schoenbohm Exhibit 3, p. 6). Schoenbohm has written a newspaper column since 1990 (Tr. 60). Additionally, Schoenbohm was employed as a radio talk show host at broadcast stations in the Virgin Islands during 1980 and between 1992 and 1995 (Tr. 62-

64); and, at the time of the first hearing, he hosted a Monday through Friday talk show on an uncompensated basis (Tr. 64-66). Schoenbohm also worked as a stringer for a local radio station, over which he reported news stories (Tr. 60).

17. Despite being well known, Schoenbohm produced no witnesses to testify about his reputation.

Ex Parte Communications

18. The parties stipulated that Schoenbohm Exhibit 3 is an essentially accurate transcription of a tape recording made by Mr. Hugh J. LeBlanc ("Le Blanc") at about 8:30 a.m. on April 3, 1995 (Tr. 32-34). The transcription indicates that Schoenbohm made amateur radio transmissions on the frequency 14.313 MHz concerning a number of subjects. In particular, Schoenbohm made the following transmissions:

Well, I'm not allowed, I'm not allowed under the ex parte rules to ask for assistance of, with people in political positions but other people, if they feel that government is overbearing or I'm being treated unfairly, have every right to point this out to their elected representatives. Congressional inquiries may indicate that these things will be conducted under the scrutiny of greater illumination but I am not permitted under ex parte rules to engage in asking for assistance. We don't have a Republican here but the person elected to Congress presently is from here. He is an independent. He is a wonderful person and I was very, very instrumental in getting him elected to Congress. If you [covered up by LeBlanc's remark]

... presently though, he is a nonvoting delegate. We don't have a vote except in committee and I just don't know what he could do in a situation like this but I am not permitted, I'm not permitted at this time because of ex parte rules to make any requests for political intervention. Other people could do it if they're so disposed but I can't do it. Go ahead.

[covered up by LeBlanc's remark] ... It's in the Longworth Building in Washington, D.C.

[Amateur Station AB4PW not heard on LeBlanc's tape.]

Victor Frazer, F-R-A-Z-E-R, Victor Frazer. His phone number is area code 202-225-1700.

[conversation continues]

Getting back to the other thing. I think that there is one thing that can be established. If you have observed KV4FZ operating his station in a manner that you think is beneficial to communications, emergency communications, or during Hugo [Hurricane], or Hurricane Andrew, or Hurricane Frederick or Bob, I don't go back to [Hurricane] David and Hurricane Gilbert, the one in Jamaica. If you have any indication or any observation, that is something you can raise in a letter to someone else if you observed it, it may have an impact. I don't know if the other things will or will not, but you may ask. I think what you should do, if it were me I would ask the question of the gentleman that you plan to write whether or not he feels, he feels the cancellation or the refusal to renew the license of KV4FZ would have a negative impact on the communications readiness and preparedness [covered up by LeBlanc talking to himself] whether or not to renew the license or the failure to renew the license would have a negative impact on the people of his constituency. That might make a difference, but I, it would depend on how things are crafted. AB4PW, KV4FZ. (Schoenbohm Exhibit 3, pp. 6-9)

19. At the first hearing Schoenbohm claimed that he had no knowledge of the Commission's ex parte rules when this case was first designated for hearing and that he did not realize that soliciting help from elected officials might be improper. Therefore, "... before I received from the Commission the hearing designation order, and shortly thereafter, I did in fact, write a number of letters to elected officials requesting assistance." (Schoenbohm Exhibit 7, p. 1) Schoenbohm declared that he sent no further letters after his attorney explained the Commission's ex parte rules to him (Schoenbohm Exhibit 7, p. 1). Schoenbohm declared further that his remarks on April 3, 1995 (set out

above) were nothing more than an exposition of his newly acquired knowledge concerning the ex parte rules (Schoenbohm Exhibit 7, p. 1). Mr. Malcolm B. Swan ("Swan"), a licensed amateur, submitted an affidavit on Schoenbohm's behalf. Swan stated that, during a two-way, single side band conversation he had with Schoenbohm on April 3, 1995, he asked Schoenbohm for the name of the person who represented the Virgin Islands and that Schoenbohm provided Delegate Frazer's name (Schoenbohm Exhibit 5). Swan stated that, at no time, was he requested to solicit or contact any member of Congress on Schoenbohm's behalf (Schoenbohm Exhibit 5).

20. At the remand hearing, Schoenbohm repeated his earlier claim that, during his two-way radio conversation with Swan on April 3, 1995, he (Schoenbohm) was expounding on his "newly discovered knowledge of the ex parte rules." (Schoenbohm Exhibit 8, p. 3) He further testified that he told Swan he "could not write to politicians or people at the FCC without violating the rules, but that others could do so. I told him that I hoped that if others did, in fact, write, they would include certain information in their letters. However, I did not ask him to write anybody, and he did not, in fact, write anybody."

(Schoenbohm Exhibit 8, p. 3) In addition, Schoenbohm testified that: "... I did not at the time know that the ex parte rule prevented me from encouraging other people to write to politicians on my behalf. If I had known that portion of the rule, I would not have said what I said to Swan, lest it be misinterpreted as a solicitation." (Schoenbohm Exhibit 8, p. 3)

At the remand hearing, Schoenbohm further contended that the language on which the ex parte issue is based was simply a "poor choice of words." (Tr. 107). Schoenbohm claimed that Swan asked him how to seek assistance when one has a grievance with the government (Tr. 99) and that, in responding to this query, he used his own situation to illustrate the format for communicating with a congressman (Tr. 95, 103, 108). He said that he used himself as an example because "that is just my style." (Tr. 108) Schoenbohm testified that he did not know whether Swan actually had any grievance (Tr. 100).

21. The transcription of Schoenbohm's conversation with Swan on April 3, 1995, contains nothing indicating that Schoenbohm was using his own situation to illustrate the format for contacting a congressman (Schoenbohm Exhibit 3). The portion of the transcription leading up to the conversation on which the ex parte issue is based includes discussion concerning the Commission's Rules, government policies and this proceeding. It does not, however, include any statement indicating that Schoenbohm is going to demonstrate how to contact a congressman (Schoenbohm Exhibit 3, p. 3, line 41 - p.5, line 51).

Illicit Access Codes

22. The parties stipulated to the accuracy of Joint Exhibit 1, submitted at the remand hearing. Joint Exhibit 1 shows that Schoenbohm, on April 5, 1987, and subsequent dates, was engaging in radio communications with amateur radio operators Antonio J.

Benvenuti (KV4BA) and Daniel D. Worely (KP4CD). During these conversations, Schoenbohm demonstrated how to randomly select telephone numbers from a block of numbers and to use the numbers so selected to place calls to the users of a radio system that Schoenbohm believed to be operating illegally:

... The FCC classification of that is "Yankee Bravo," and it is not a common carrier service. And the fact anybody anywhere in the world can just sit down here in the phone and just dial up a number. Hold it just a minute I want to check. (Dial tone) I'll give you a number. Let's see. What is it? 68706. I'll try one, just try one, 68706. (Dialing) See what happens. (Ring). Ok. Well, that is a -- As soon as I did that a UHF transmitter came up on approximately 800, 817 MegaHertz and started transmitting. Uh, anybody in the world can call these numbers ... Just picking these numbers at random. No. 68752 (Beeps pulses) (Rings) (Voice answers "Hello." KV4FZ hangs up. Dial tone) Yeah, you're getting through to a (Electronic ring) -- on all those numbers you're getting through to a circuit which makes the transmitter come on the air and connects directly to somebody that's got one of these radios in their car and that's illegal. You can't use the trunked business frequency for a cellular car telephone service, Tony. KV -- and a whole block of numbers 68700 through 68760 approximately. There are probably a few numbers in there that were issued before, but there is a block of numbers you can dial any one of those numbers you get somebody, get the transmitter to go on the air which is in violation of FCC rules. KV4BA, KV4FZ. (Joint Exhibit 1, pp. 3-4)

Yeah. 68700 to 6875 -- 68760 but every time you call those numbers, uh, somebody gets charged 50 cents. Or 40 cents. I think it's 40 cents. Every time you call Hahu. Somebody, somebody gets charged 40 cents. Obviously that's a common carrier service. Right? (Joint Exhibit 1, p. 4)

And another thing, Tony. Tony, you can do it if you have some spare time, is just start dialing those numbers from 68700 to 68760, ah, dial 'em one-by-one in a block if you got a touch tone phone. Put it on the autodialer if they're busy. And when somebody answers, ask them the name of their business and we'll find out who's, who is on the system real fast. (Joint Exhibit 1, p.8)

By the time he gets a bill for 400 dollars a month for all these calls he's gotten, and never talked to anybody, he'd

like get pretty upset, wouldn't he? (Joint Exhibit 1, p. 9)

23. According to Schoenbohm's testimony, he noticed that businesses located in the British Virgin Islands were advertising telephone numbers in the U.S. Virgin Islands (Schoenbohm Exhibit 9, p. 1; **Tr. 114**). Schoenbohm testified that he knew Mr. David Ackley ("Ackley) owned a "YB" radio system that could be used to illegally transmit signals between the U.S. and British Virgin Islands (Schoenbohm Exhibit 9, p. 1). Schoenbohm testified that there was "bad blood" between himself and Ackley; the FCC had sanctioned Ackley for interfering with Schoenbohm's radio communications (**Tr. 130-131**). Schoenbohm testified that he learned that the telephone company in the U. S. Virgin Islands had issued a block of telephone numbers to Ackley (Schoenbohm Exhibit 9, p. 1; **Tr. 115**). Schoenbohm began calling these numbers and listening on frequencies licensed to Ackley to determine whether calls to these numbers would activate Ackley's transmitters (Schoenbohm Exhibit 9, p. 1). During the conversation transcribed in Joint Exhibit 1, Schoenbohm asserts that he was calling telephone numbers for the purpose of demonstrating that the calls would activate transmitters owned by Ackley or his company and to encourage other amateurs "to pursue Mr. Ackley's illegal operations and assist me in closing down these illegal operations." (Schoenbohm Exhibit 9, p. 1) Schoenbohm says he believes that Ackley charged his customers 40 cents for every incoming call (**Tr. 123**). Schoenbohm claims he

did not envision the bills of Ackley's subscribers actually reaching \$400 a month, but was merely stating what could happen (Joint Exhibit 1, p. 9; Tr. 123).

24. At the remand hearing, Schoenbohm asserted that the telephone numbers he called "were simply telephone numbers I picked out of the yellow pages and/or numbers which I learned from the telephone company would have been assigned to Ackley or his company." (Schoenbohm Exhibit 9, pp. 1-2) Upon cross-examination, Schoenbohm indicated that he does not know whether any of the telephone numbers in the block assigned to Ackley's customers were unlisted:

Q.: So my point, there were some numbers that were not to your knowledge listed in the phone directory or listed in advertisements.

A. Yes, yes. (Tr. 116)

Q. But you don't know if these numbers were listed, do you? You don't know if these people --

A. No, I don't. (Tr. 121)

CONCLUSIONS OF LAW

Conviction

25. The standard used to evaluate the effect of a felony conviction upon an applicant's qualifications is set forth in the Commission's policy statements regarding character qualifications. See Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179, 1183 (1986), recon., 1 FCC Rcd 421,424 (1986), appeal dismissed sub nom. National Association for Better Broadcasting v. FCC, No. 86-1179 (D.C.

Cir. June 11, 1987), as modified, 5 FCC Rcd 3252, 3253 (1990) [to cover nonbroadcast licensees], recon., 6 FCC Rcd 3448 (1991). The Commission's inquiries into an applicant's character focus on "the likelihood that an applicant will deal truthfully with the Commission and comply with the Communications Act and [Commission] rules and policies." Policy Regarding Character Qualifications in Broadcast Licensing, 5 FCC Rcd 1179, 1183 (1986).

Truthfulness, Misrepresentations, and Lack of Candor

26. Schoenbohm's conviction for a felony involving fraudulent conduct implicates his propensity for truthfulness. See Policy Regarding Character Qualifications in Broadcast Licensing, 5 FCC Rcd 1179, 1196-97 (1986). This inquiry necessarily focuses upon whether, despite his conviction, Schoenbohm can be relied on to deal with the Commission truthfully. Schoenbohm has not presented any substantial evidence to establish his future reliability as a licensee. Despite being well known in his community, Schoenbohm failed to produce a single witness who testified that he had a reputation in his community for truthfulness and honesty. By contrast, in In Re Application of Richards, FCC 95R-04, on which Schoenbohm has relied heavily, the applicant, Richard Richards, produced no fewer than 26 such witnesses. Id. at para. 8.

27. Not only did Schoenbohm fail to present any evidence of his capacity for truthfulness, he has demonstrated, through his testimony, that he cannot be relied upon to tell the truth. In

his initial testimony at the first hearing, Schoenbohm was straight forward: "I was convicted for defrauding a telephone resale service provider by ... making unauthorized long distance calls." Later, however, Schoenbohm altered his first testimony to cast his conviction in a different light. He described his conviction as follows:

... I did not steal any money or cause the account of any telephone subscriber to be debited. I was convicted solely of having knowledge in my mind of certain telephone access codes of which 4 of the 6 digits were said to be similar to those that could be used to make long distance calls without paying for them. These telephone numbers were the "Counterfeit Access Device" which I was convicted of possessing or using.

Additionally, Schoenbohm described his conviction as being based on possession rather than on the performance of any act:

Q: Now, you have been convicted, have you not, of the crime of possessing a counterfeit telephone access device?

A: That's correct.

Q: And what was that device you were convicted of possessing?

A: It was never fully described in court but believed to be numbers in my mind.

Q: In other words, numbers that could be used to make long-distance telephone calls?

A: That's correct.

Q: -- without paying for them? Is that correct?

A: Correct.

28. This proceeding was remanded, in part, to give Schoenbohm an opportunity to explain this mischaracterization of his conviction. Schoenbohm has not only failed to give a

satisfactory explanation, he has compounded his offense by continuing to give strained and distorted descriptions of his conviction. At the remand hearing he repeatedly used the term "possession" or "possessing" in describing his conviction. In addition, Schoenbohm testified that he was "convicted solely of having knowledge in my mind of certain access codes ..." and that he was convicted of "having knowledge of certain numbers that could be used for making long distance calls without paying for them."

29. Schoenbohm's explanations for his emphasis on "possession" are difficult to follow but his main points appear to be that he wanted to make it clear that his conviction did not result from the use of a physical counterfeit access device and that he was not convicted of stealing money from subscribers. These "explanations" are illogical because Schoenbohm could have easily made both points without reference to "possession" -- simply by saying that his conviction involved neither a physical counterfeit access device nor theft from subscribers. Following his "explanations," Schoenbohm agreed that use of the word "possession" muddies the water and does not fit anywhere in this case.

30. The evident reason for Schoenbohm's testimony misdescribing his conviction is that such testimony was a conscious effort to influence and mislead the trier of fact. The testimony was an attempt to portray a softened, more benign, image of the facts underlying Schoenbohm's felony conviction and

was false. Contrary to his claims, Schoenbohm was actually convicted for the fraudulent use of access codes. Schoenbohm misrepresented a material fact to the Commission and was lacking in candor.

31. Schoenbohm testified at the first hearing that he lost pension rights worth \$150,000 as the result of being fired from his job as Chief of Communications for the Virgin Islands police department. When asked by his counsel, at the first hearing, whether the exhibit containing this testimony is true and correct, Schoenbohm answered "Yes, it is," and did not offer any correction. In fact, as revealed at the remand hearing, Schoenbohm had regained his pension rights by the time of the first hearing and had been without them only during the period between the loss of his job as Chief of Communications for the Virgin Islands police department and his being rehired by the Virgin Islands Government. Since Schoenbohm Exhibit 1 was not true and correct on this point, it was incumbent upon Schoenbohm to point this out when testifying about the truth and correctness of that exhibit, but he did not do so. By failing to make a correction until the remand hearing, Schoenbohm was lacking in candor.

32. As discussed in detail below in paragraphs 39-43, Schoenbohm misrepresented material facts to the Commission and was lacking in candor in his testimony about soliciting an ex parte presentation.

33. It must be concluded that the Commission cannot rely

upon Schoenbohm to be truthful in his dealings with the Commission.

Mitigation

34. No weight should be given to Schoenbohm's claims of mitigation. Schoenbohm asserts that he is gainfully employed, a good citizen, and has paid his debt to society through his criminal penalty and the associated hardships. Schoenbohm's untruthful and misleading testimony in this proceeding precludes any finding of mitigation. Furthermore, Schoenbohm has taken no steps to remedy his misconduct. Schoenbohm has not expressed any remorse for his crime -- which would be the first step in remedying misconduct -- even though he has apparently exhausted his appellate remedies. Despite losing his appeals, Schoenbohm still blames his difficulties, not on himself, but on what he claims was an unjust conviction.

35. In sum, the mitigation evidence offered by Schoenbohm is unpersuasive and is vastly outweighed by Schoenbohm's criminal conviction, solicitation of ex parte communications, misrepresentations, and lack of candor.

Solicitation of Ex Parte Presentation

36. Section 1.1210 of the Commission's Rules, 47 C.F.R. § 1.1210, states, in pertinent part, as follows "... no person shall solicit or encourage others to make any presentation which he or she is prohibited from making under the provisions of this subpart."

37. Schoenbohm Exhibit 3 shows that Schoenbohm did solicit

others to make prohibited ex parte presentations in his behalf in this proceeding. Schoenbohm's claim -- which he made at the first hearing and reiterated at the remand hearing -- that he did not intend to solicit others to make ex parte presentations in his behalf is contradicted by the plain meaning of his words. Schoenbohm told his listeners that he is not permitted to make any requests for "political intervention" in this matter but other people can do so. He then provided the name, address and telephone number of Congressional Delegate Victor Frazer. Schoenbohm went on to make specific suggestions about the content of letters written to congressmen in his behalf -- such as providing information concerning Schoenbohm's participation in emergency communications, and asking the congressmen whether the nonrenewal of Schoenbohm's amateur licenses would have any negative impact on their constituents. Finally, the clear implication of Schoenbohm's claim to have been instrumental in Delegate Frazer's election is that Delegate Frazer is indebted to him and, therefore, would be inclined to assist him.

38. Swan claimed that he asked Schoenbohm for the name of the person who represented the Virgin Islands and that, in response, Schoenbohm provided Delegate Frazer's name. Even if this claim is true, it is clear that Schoenbohm was encouraging Swan and any others who were listening to solicit ex parte presentations on his behalf.

39. This proceeding was remanded, in part, to give Schoenbohm an opportunity to explain the apparent contradiction

between the plain meaning of his words on April 3, 1995, and hi, Schoenbohm reiterated the claim made during the first hearing that he was simply expounding on his "newly acquired knowledge of the ex parte rules" -- a claim which is unsupported by evidence. In subsequent testimony at the remand hearing, however, Schoenbohm concocted a new claim: that during the conversation giving rise to the ex parte issue, he was using his own circumstances to illustrate the format for contacting a congressman. The claims testimony at the first hearing. At the remand hearing, however is preposterous because it is inconsistent with the plain meaning of Schoenbohm's words. If Schoenbohm was using his own situation to demonstrate how to contact a congressman, this should have been evident either from an explicit reference or from context. There is nothing in the transcription of Schoenbohm's communications -- either in the portion which gave rise to the ex parte issue or in the long discussion leading up to it -- indicating that Schoenbohm was using his own circumstances to demonstrate how to contact a congressman.

40. Schoenbohm admitted that shortly before and shortly after this case was designated for hearing, he wrote a number of letters to elected officials seeking their assistance. He claimed that at those times he was unfamiliar with the Commission's ex parte rules and did not realize that it would be improper for him to request help from elected officials with his case. Schoenbohm claimed that, after retaining an attorney in

March 1995 who explained the ex parte rules to him, he ceased writing letters to elected officials seeking their assistance. However, Schoenbohm now claims that he did not understand that the ex parte rules prohibit him from encouraging others to write politicians in his behalf. This is unconvincing because the prohibition against soliciting ex parte presentations is a logical corollary to the basic prohibition against ex parte presentations in restricted proceedings; the basic prohibition would be ineffective without any prohibition against solicitation. Therefore, Schoenbohm either knew or should have known that his remarks were in violation of ex parte rule. It must be concluded that Schoenbohm did solicit others to make presentations that he was prohibited from making and therefore, by claiming that he did not do so, he misrepresented a material fact to the Commission and was lacking in candor.

Illicit Access Codes

41. The issue of whether Schoenbohm used his amateur radio facilities for communications about how to obtain illicit access codes must be decided against him. Schoenbohm has not sustained his burden of proof on this issue: During his amateur radio conversations with Benvenuti and Worely, Schoenbohm demonstrated how to obtain telephone numbers by randomly selecting them from a block of numbers and how to use the numbers so selected to place calls to the users of a "YB" radio system licensed to Ackley, which Schoenbohm believed to be operating illegally. The key question is whether any of the telephone numbers within the block