

FCC MAIL SECTION

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Federal Communications Commission

FCC 97D-11

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DISPATCHED

Before the
Federal Communications Commission
Washington, D.C. 20554

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)	

Appearances

Michael Don Werlinger, pro se, on behalf of Chameleon Radio Corporation; and Alan E. Aronowitz and Kathryn S. Berthot, on behalf of the Mass Media Bureau.

**INITIAL DECISION
OF
ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN**

Issued: September 15, 1997

Released: September 18, 1997

Preliminary Statement

1. By Order to Show Cause, Hearing Designation Order and Notice of Apparent Liability, 11 FCC Rcd 11088 (1996) (Show Cause Order), the Commission ordered Chameleon Radio Corporation (Chameleon) to show cause why its license for Station KFCC(AM), Bay City, Texas, should not be revoked.¹ The following issues were designated:

¹ The Commission also cancelled Chameleon's Special Temporary Authority and directed Chameleon to cease operations from the Harris County Site and resume its licensed operations from the Bay City site.

(a) 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.

(b) 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.

(c) 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.

2. The Show Cause Order placed the burden of proceeding with the introduction of evidence and the burden of proof with respect to the designated issues upon the Mass Media Bureau (Bureau). The Show Cause Order also directed that, if it is determined that revocation of the KFCC(AM) license is not warranted, the Presiding Judge shall determine, pursuant to Section 503(b) of the Communications Act of 1934, as amended (Act), 47 U.S.C. §503, whether to issue an Order of Forfeiture against Chameleon in an amount up to \$250,000 for the willful and/or repeated violation of Section 73.1015 of the Commission's Rules, 47 C.F.R. §73.1015. ²

3. A hearing in this proceeding was held in Washington, D.C. on February 24, 1997, after which the record in this proceeding was closed. See Order, FCC 97M-25, released February 27, 1997. The Bureau and Chameleon have filed Proposed Findings and Replies to Findings.

Findings of Fact

Issue (a) - Representations Concerning The Loss of The Bay City Site

4. Michael Don Werlinger (Werlinger) is the President of Chameleon, the licensee of KFCC(AM), Bay City, Texas. MMB Ex. 14, p. 1. At the time Chameleon acquired KFCC, Werlinger was also President of KENR Management Company, Inc. (KMC). Beginning on April 1, 1994, KMC provided programming produced by various international programmers to the licensee of station KENR(AM), Houston, Texas, pursuant to a time-

² Section 73.1015 of the Commission's Rules provides, in pertinent part, that no applicant, permittee, licensee, or person who files any application, pleading, report or any other written statement to the Commission or in response to any Commission inquiry shall make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission.

brokerage agreement. However, in late November 1994, KENR(AM) was sold, and KMC became aware that it would likely lose its Houston broadcast outlet. MMB Ex. 1, p. 1. KMC's time-brokerage agreement was formally terminated by the new licensee of KENR(AM) on April 6, 1995. MMB Ex. 13, p. 3.

5. Faced with the imminent termination of the time-brokerage agreement, Werlinger continued negotiations with the new licensee of KENR(AM), while at the same time seeking another Houston outlet for the programming he was contractually obligated to deliver in that market. MMB Ex. 13, p. 2. With regard to finding another outlet to serve Houston, Werlinger focused on obtaining the license for KFCC (then KIOX(AM)³), which 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 (Bay City site). MMB Ex. 13, p. 2; MMB Ex. 14, p. 1. Werlinger initially hoped to be able to maintain a programming agreement with KENR(AM) for a period of time sufficient for him to remove KFCC from the air and file an FCC Form 301 for Commission authorization to change the station's community of license to a community where service to Houston could be effectuated. MMB Ex. 5, pp. 3, 7-8; MMB Ex. 13, p. 2; Tr. 82-84, 121-122. However, when the agreement with KENR(AM) was terminated, Werlinger sought the subject special temporary authority (STA) for KFCC to continue to meet KMC's contractual obligations to deliver programming to the Houston market pending a permanent relocation of KFCC. MMB Ex. 5, pp. 7-8. On February 16, 1995, an application (BAL-950216EA) to assign the license of KFCC, Bay City, Texas, from Landrum Enterprises, Inc. (Landrum Enterprises) to Chameleon was filed. That application was granted by the Commission on April 18, 1995. Chameleon Ex. 1, App. 1.

6. Immediately following closing on April 20, 1995, Chameleon removed KFCC from the air. MMB Ex. 5, p. 8; Tr. 99. On April 21, 1995, Chameleon filed a request for STA to operate KFCC at variance from its licensed parameters. MMB Ex. 6. The STA request was signed by Werlinger. MMB Ex. 6, p. 1. Although the station had been taken silent the previous day, Chameleon represented in the STA request that KFCC "currently operates from a licensed site near Bay City, Texas." Chameleon asserted that it required the requested STA to operate from an alternate site "[d]ue to the loss of its currently licensed site." MMB Ex. 6, p. 3. Chameleon did not elaborate on the circumstances under which Bay City "lost" the site. MMB Ex. 6, p. 2; Tr. 98. On May 5, 1995, the Division granted Chameleon an STA "due to loss of authorized site." MMB Ex. 8, p. 1.

7. On July 25, 1995, the Bureau's Audio Services Division (Division) issued a Letter of Inquiry which provided a further opportunity for Chameleon to be candid regarding the "loss" of the Bay City site. The Division requested Chameleon to provide specific details concerning:

³ For ease of reference, the station will hereafter be referred to as KFCC.

- (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 Chameleon Ex. 1, App. 8, pp. 3-4.

8. On August 1, 1995, Chameleon filed a request for extension of the STA. Chameleon Ex. 1, App. 9. On August 4, 1995, Chameleon submitted a nineteen page response signed by Werlinger. While Werlinger expounded extensively about the circumstances leading to Chameleon's loss of its Houston programming outlet, Werlinger chose to ignore the staff's pointed questions about the loss of its Bay City site. See MMB. Ex. 5. Werlinger's "stonewalling" was broken only when Chameleon was confronted with the loss of its STA.

9. After reviewing the complete record, including Chameleon's response to the Letter of Inquiry, the Division issued a letter on September 8, 1995, denying Chameleon's request for extension of the STA, cancelling the STA, and directing KFCC to resume operations from its Bay City site or to file an appropriate request for silent authority. MMB Ex. 14. The Division explained that Chameleon's proffered basis for requesting the STA -- the "loss of its currently licensed site" -- was not supported by Chameleon's submissions. The Division noted that, according to lease documents submitted by Chameleon, Chameleon had assigned the rights of some unidentified portion of KFCC's authorized site in Bay City back to Landrum Enterprises, KFCC's previous owner, but that Chameleon failed to respond to a specific question regarding its legal rights to the site.⁴ Because Chameleon failed to support its assertion that the site had been "lost," the Division concluded that Chameleon had "voluntarily" abandoned the

⁴ The Division's letter also stated that Chameleon did not respond to its query regarding the condition of KFCC's licensed facilities at Bay City, whether Chameleon was precluded from constructing at any other site by which it could maintain licensed service to Bay City, or whether KFCC was in compliance with the main studio requirements of Section 73.1125(a) of the Commission's Rules. MMB Ex. 14, pp. 4-5.

Bay City Site.⁵ The Division further concluded that Chameleon's use of STA to introduce a new broadcast service to Houston was a violation of both its STA policy, which requires that the site "loss" be beyond the applicant's control, and the licensing procedures of Section 309 of the Communications Act of 1934, as amended (Act).⁶ MMB Ex. 14, pp. 5-6.

10. On September 29, 1995, Werlinger wrote a letter to the Chief of the Bureau, which for the first time specifically addressed the "loss" of the Bay City site. Werlinger explained that it was never the intention of Chameleon to occupy the Bay City site because Landrum Enterprises, the prior owner of KFCC, operates an FM station from that site. Werlinger asserted that the "loss" of the Bay City site was a result of the site "being retained by the previous owner [Landrum Enterprises] as a condition of the purchase of KFCC...." Werlinger stated that this arrangement was formalized through a lease back agreement signed simultaneously with closing on April 20, 1995, and emphasized that the lease back occurred "as a condition of sale." MMB Ex. 16, p. 1 (emphasis in original). As revealed by the record, discussed below, Werlinger's assertion that he was obligated to vacate the Bay City site by virtue of the lease back agreement, repeated in a subsequent written submission and at the hearing, was not truthful.

11. In a statement made under penalty of perjury which was attached to Chameleon's Petition for Review filed November 2, 1995,⁷ Werlinger continued to assert that the site loss was "involuntary." In this regard, Werlinger claimed that he did not have use of the transmitter site since Landrum Enterprises wished to retain the Bay City site for its own FM

⁵ The Division believed that Chameleon's abandonment of KFCC's authorized site at Bay City was motivated by KMC'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). MMB Ex. 14, p. 5. The Division 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. MMB Ex. 14, p. 5.

⁶ 47 U.S.C. §309. Specifically, Section 309 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.

⁷ Chameleon's petition filed with the Commission sought review of the staff's denial of Chameleon's request for reconsideration of the Division's September 8, 1995 letter cancelling the STA. The then Acting Chief of the Bureau, by letter dated October 11, 1995, stayed cancellation of the STA and reinstated the STA extension request pending full Commission review. Chameleon Ex. 1, App. 16. The Show Cause Order denied Chameleon's Petition For Review and cancelled Chameleon's Special Temporary Authority to operate from the Harris County site.

station operation and that "as part of the necessary terms of the sale", Chameleon had agreed to lease back the Bay City site for such use. MMB Ex. 7, p. 1.

12. In his direct written and oral testimony, Werlinger continued to attribute his "loss" of the Bay City site to the lease back agreement. Werlinger asserted in his direct written testimony that his prior use of the word "involuntary" in reference to the "loss" of the Bay City site "intended no misconception that anything more was involved than the legal obligation under the contract which had been consummated and acted upon by all parties," i.e. that the site was no longer available to him by operation of the lease back agreement with Landrum Enterprises. Chameleon Ex. 1, p. 8. At hearing, Werlinger again testified that he was obligated to vacate the Bay City site by virtue of the lease back agreement.⁸ Tr. 114. Werlinger eventually admitted, however, under cross examination, that he had entered into the lease back agreement voluntarily and that Landrum Enterprises never asked or required him to vacate the Bay City site, or enter into the lease back agreement, as a condition of the sale of KFCC. Werlinger also stated that there is nothing in Chameleon's agreement with Landrum Enterprises that would prevent Chameleon from utilizing the Bay City site. Tr. 117-118; Tr. 127-130. Further, Landrum never told him to remove KFCC's facilities from the site. Tr. 114, 120. In this connection, the AM three tower array was not dismantled and was used when Chameleon's STA was denied and Chameleon was forced to operate from Bay City. Tr. 125-127. These admissions are consistent with testimony supplied by Jake Landrum, President of Landrum Enterprises, in which Landrum states that the lease back agreement never prevented Chameleon from operating KFCC at the Bay City site and that Landrum never told Chameleon to leave or not use the Bay City site. MMB Ex. 20, pp. 1-3.

13. Werlinger also admitted at hearing that the reason no specific provision was made in the lease back agreement for Chameleon to have access to KFCC's licensed site in Bay City was that Chameleon never intended to operate KFCC from that site. Tr. 82-84, 121-122. Werlinger confirmed that it was his voluntary decision not to use the authorized Bay City site, and he admitted that Chameleon voluntarily abandoned the Bay City site the day he closed on the radio station. Tr. 82. In acquiring the Bay City site, Werlinger's intent from the outset, not disclosed in his STA request, was to move the station to a Houston area site in order to continue the program service which Werlinger was providing. Tr. 82, 85. Werlinger never intended to serve Bay City. Tr. 84.

14. Werlinger has been a technical consultant since 1981 and claims to have filed numerous STA requests for clients. Tr. 210-212. He attempted to justify his failure to include details in his STA request concerning the "loss" of the transmitter site by claiming he is not

⁸ Werlinger testified at hearing that the closing on KFCC and the lease back agreement occurred simultaneously on April 20, 1995, obligating him to vacate the Bay City site immediately. Tr. 114, 117. However, the term of the lease back agreement did not actually commence until May 1, 1995, ten days after Chameleon filed an STA claiming that its Bay City site had been "lost" MMB Ex. 4, p. 2.

familiar with the provisions of Section 73.1635 requiring that a STA request must "fully describe the proposed operation and the necessity for the requested STA." Tr. 187-188, 210. Werlinger asserted further, in his direct written testimony and at hearing that based on his experience, the loss of an authorized transmitter site was not necessary to obtain an STA. Chameleon Ex. 1, p. 7; Tr. 99, 130-132, 145. The only specific instance cited by Werlinger in support of his claim was an STA request filed by him as a technical consultant on behalf of the licensee of Station KVCI(AM), formerly licensed to Mineola, Texas. Chameleon Ex. 1, pp. 7-8, 11-12, 17-18; Tr. 131-133, 207.

15. It is true, as asserted by Werlinger, that the STA request for KVCI(AM) contained no reference to a lost transmitter site. However, the staff letter of November 22, 1993 granting the STA request, which Werlinger acknowledged he received, explicitly stated that the grant was "due to loss of authorized site." Chameleon Ex. 1, App. 21, p. 26; Tr. 137, 145.⁹ Thus, even assuming Werlinger was unaware prior to November 22, 1993 of the need to demonstrate site loss, the letter of that date granting the KVCI(AM) STA request put him on notice of the Commission's requirements. Contrary to Werlinger's assertion that he could have omitted any reference to loss of site in the April 1995 KFCC STA request, his inclusion of such statement plus his past experience with the KFCI(AM) STA request demonstrates that he was well aware of and fully understood the Commission's requirements. Werlinger's plea of ignorance is not credible and is rejected. His attempt to justify and excuse his misconduct is part and parcel of his unwillingness to be forthcoming in Commission filings and the hearing itself.

Issue (b) - Representations Concerning Construction
of a Tower at the Harris County Site

16. In the STA request, filed April 21, 1995, Chameleon proposed to operate from a site in "rural southwest Harris County" (Harris County site) at coordinates N 29-38-10, W 95-32-22. The coordinates N 29-38-10, W 95-32-22 were the same coordinates as those

⁹ Although he prepared and filed the STA request on behalf of the KVCI(AM) licensee, Werlinger maintained at hearing that despite the fact that he knew the Commission grant was in error and did not reflect what he asked for, he was under no obligation to correct the Commission's error because he was only a paid consultant, not the licensee. Tr. 137, 145. Nevertheless, the KVCI(AM) STA was subsequently terminated in part because the staff determined that the licensee had not, for reasons beyond its control, lost its authorized site. MMB Ex. 22, p. 3. The KVCI(AM) STA was later reinstated following a letter from its counsel to the Commission. The Letter recounts a meeting with Commission staff in which the licensee's principal stated that the licensee was misled by its previous consultant (Werlinger) and prior attorney into believing it was in compliance with Commission rules and policies. Also the letter recites (unlike KFCC) KVCI(AM) cannot return to its licensed site since the tower has been dismantled and the site has been sold. MMB Ex. 23; Tr. 149-153. The two cases are factually dissimilar in other respects. See Tr. 153-156.

inaccurately specified in the STA request for KFCC's authorized Bay City site. MMB Ex. 6, p. 3. The coordinates specified in the STA request as the licensed site for KFCC were in fact the coordinates for the Harris County site. Werlinger testified at hearing that this was a "typographical error." Tr. 86-87. While Chameleon stated in the STA request that it intended to make the proposed Harris County site its permanent transmitter location, the STA request did not disclose Chameleon's intention to effectuate a change of community of license from Bay City to any specific community closer to Houston, Texas. MMB Ex. 6, p. 4; Tr. 106-107. In this regard, Werlinger admitted at hearing that KFCC's STA proposal would not provide city-grade signal coverage to Bay City from the Harris County site, as required by Section 73.24(i) of the Commission's Rules, 47 C.F.R. §73.24(i). Tr. 104. Chameleon's STA request neither disclosed that fact nor requested a waiver of that rule. MMB Ex. 6, pp. 3-4; Tr. 104.

17. Chameleon also proposed to construct a new 180 foot tower at the Harris County site, and it stated in the STA request that on April 20, 1995, it had sought FAA authority to construct. MMB Ex. 6, pp. 3-4. However, Chameleon's FAA notification, which included the coordinates for the Harris County site, was dated March 28, 1995.¹⁰ MMB Ex. 11, p. 1.

18. Between April 21, 1995 and April 26, 1995, Werlinger had a telephone conversation with John Vu, a staff engineer in the Bureau's Audio Services Division (Division), regarding the proposed STA. Vu informed Werlinger that because the proposed STA involved the construction of a new tower, the Division would not grant the STA. MMB Ex. 5, p. 8; Tr. 162. Vu made clear that an STA would be granted only if an existing tower was used. Tr. 163. Werlinger disagreed with Vu and repeatedly tried to convince him that he was in error. Werlinger insisted that STA requests had been granted in the past where new tower construction was involved and that the STA should be granted as requested. MMB Ex. 5, p. 8-9; Tr. 163. According to Werlinger, "Mr. Vu remained adamant that no new construction could take place." MMB Ex. 5, p. 9; Tr. 163. Although Werlinger disagreed with Vu's explanation of the Commission policy on new tower construction for STAs, he clearly understood that Vu was telling him that an STA would not be granted for the Harris County site if construction of a new tower was required. Tr. 162-166; Tr. 189-190. Werlinger did not discuss his disagreement with Vu with any other member of the Division's staff or with any other office within the Commission. Tr. 164. Instead, after failing to convince Vu that the requested STA should be granted, Werlinger decided to "work around" this policy and build a new tower at the Harris County site, falsely claiming it was an existing tower. Tr. 164, 166-167, 172-173. Werlinger describes his efforts at obtaining the STA as a "creative use" of the rules and as going "to the

¹⁰ The March 28 date on the FAA notification also conflicts with Werlinger's statement that after KMC was notified on April 6, 1995 that the time-brokerage agreement with KENR(AM) was being terminated, Chameleon "moved with all haste toward finding an acceptable transmitter site in southwest Houston to which it could move" and that "a site was found in rural Harris County." MMB Ex. 5, p. 8.

outer limits" of the rules. MMB Ex. 5, pp. 16, 18. If an STA could only be granted for an "existing" tower, then Werlinger was going to "[make] the tower exist." Tr. 172.

19. On April 26, 1995, after his conversation with VU, Werlinger spoke with Joe McClish (McClish) of Economy RF Construction Company, an Austin, Texas, communications tower construction company, and arranged to have a new 180 foot tower constructed at the Harris County site. On April 29, 1995, McClish began the preparation work for the tower, which included pouring concrete foundations. By May 1, 1995, McClish had constructed a Rohn model 25 tower at the Harris County site, at coordinates different than in the April 21 STA request. However, the ground system and folded unipole antenna were not installed on the tower at this time. In fact, no broadcast equipment was placed on the site until after grant of the STA. MMB Ex. 5, p. 9. Werlinger testified that it was his thinking at the time that since he could not construct a new "broadcast" tower under the Commission policy cited by Vu, he would build a new "nonbroadcast" tower and then convert it to a "broadcast" tower once the STA was granted. Tr. 179-180. Werlinger insisted at the hearing that he had complied with Commission policy, as explained by Vu. Tr. 166-167, 170-173, 178-181, 187-190.

20. On May 2, 1995, Chameleon amended its STA request. MMB Ex. 18. As amended, Figure E:1 of the STA request depicts the originally proposed tower at coordinates N 29-38-10, W 95-32-22, plus an "existing" 180 foot tower at coordinates N 29-38-14, W 95-32-24, approximately 0.25 km from the tower proposed in the April 21 STA request. MMB Ex. 18, p. 2. The amended STA request did not disclose that the "existing" tower was in fact a newly constructed tower, nor did it disclose Werlinger's role in arranging for the construction of the "existing" tower. Tr. 181.

21. The amended STA request also failed to disclose that the April 21 STA request contained incorrect coordinates for KFCC's authorized Bay City site. MMB Ex. 18; Tr. 96. Because the April 21 STA request contained incorrect coordinates for KFCC's authorized site, the "existing" tower referred to in the amended STA request appeared to be only 0.25 km from the licensee's authorized site. MMB Ex. 14, p. 2. Moreover, because the amended STA request contained two different sets of coordinates, one set for the originally proposed tower and one set for the "existing" tower, the amended STA request on its face appeared to propose the use of an existing tower which was located at different coordinate than those provided in the April 21 STA request, rather than a newly constructed tower. MMB Ex. 18; Tr. 96-997.

22. On May 5, 1995, the Division granted Chameleon STA to operate with 1,000 watts daytime and 100 watts nighttime from the "existing" tower at coordinates N 29-38-10, W 95-32-22 "due to loss of authorized site." MMB Ex. 8, p. 1. Although these coordinates were actually the coordinates for the originally proposed tower at the Harris County site, and not the coordinates specified in the amended STA request for the "existing" tower, Chameleon never notified the Division of this error. Tr. 96. The Division's letter also incorrectly noted that the STA site was 0.25 km from KFCC's licensed site in Bay City. MMB Ex. 8, p. 1. Again,

Chameleon did nothing to correct this misunderstanding on the Division's part. Tr. 96, 157-159. By May 7, 1995, the ground system and folded unipole antenna had been installed on the tower, and on May 8, 1995, KFCC began operating from the Harris County site. MMB Ex. 5, p. 11.

23. By letter dated May 12, 1995, the Division superseded the grant of the STA. MMB Ex. 9. The May 12, 1995, letter corrected the coordinates for the Harris County site because, upon further review of the amended STA request, the Division noticed that the coordinates specified in the May 5, 1995, letter granting the STA were actually the coordinates for the originally proposed tower, not the asserted "existing" tower. The May 12, 1995 letter also ordered KFCC to reduce its operating power to 300 watts daytime and 50 watts nighttime. MMB Ex. 9. The Division ordered the reduction in power because it had received complaints of interference from the licensee of KWHI, Brenham, Texas. MMB Ex. 5, p. 14. On May 18, 1995, the Division rescinded the STA, noting that further study had revealed that KFCC could not provide the required city-grade signal strength coverage to its community of license, Bay City, Texas, from the Harris county site, in contravention of Section 73.24(i) of the Commission's Rules. MMB Ex. 10. However, at Chameleon's request, the Division stayed the rescission of KFCC's STA on May 25, 1995, pending further clarification of the record. Chameleon Ex. 1, App. 7.

24. On July 25, 1995, the Division issued its Letter of Inquiry. In addition to requesting specific details concerning the circumstances under which Chameleon "lost" the Bay City site; discussed, supra, the Division's Letter of Inquiry requested Chameleon to provide any information as to whether its 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 identify of the tower construction contractor. Chameleon Ex. 1, App. 8, pp. 3-5.

25. On August 4, 1995, Chameleon submitted its response to the Division's Letter of Inquiry. In this response, Chameleon falsely represented that it was McClish who had suggested building a tower on the Harris County site. Specifically, Chameleon reported that during the course of a conversation on April 26, 1995, "McClish asked [Werlinger] if he (McClish) would be prohibited from erecting a tower 180 feet in height and leasing the tower to Chameleon once and if the STA were permitted." Chameleon further reported that McClish "stated that if Chameleon would grant use of its land (which Chameleon held under a lease/purchase agreement) on a reasonably priced basis, his company would like to erect a tower and rent space to other tenants if Chameleon could not make use of the tower." MMB Ex. 5, p. 9. Chameleon also claimed that "all work [on the tower] was done at McClish's expense" and that "no funds were passed from Chameleon or any principal in Chameleon toward the construction of the tower." MMB Ex. 5, p. 9.

26. In his direct written testimony, Werlinger admitted, for the first time, that contrary to his previous representations to the Commission in his August 4, 1995 response, Werlinger was "instrumental" in making arrangements with McClish for the construction of a

180 foot tower at the Harris County site. Chameleon Ex. 1, p. 11. Thus, Werlinger admitted at hearing that after being informed by Vu that an STA would not be granted if new construction was involved, he called McClish and asked McClish to construct the tower at the Harris County site. Tr. 170.

27. In addition, Werlinger was not completely candid in asserting in his August 4, 1999 response that all the work on the tower was done at McClish's expense and that no funds were passed from Werlinger toward the construction of the tower. MMB Ex. 5, p. 9. Werlinger failed to disclose that approximately \$5000 used by McClish to construct the tower was a portion of the funds which Werlinger had paid to McClish on another project, and which reduced McClish's indebtedness. Chameleon Ex. 1, p. 11; Tr. 168-169. Werlinger also disclosed for the first time at hearing that after McClish finished the work he had been previously paid for, he paid McClish for the work in constructing the tower and owns the tower. Tr. 169-170.

28. At hearing, Werlinger sought to excuse his failure to disclose his role in arranging for the construction of the tower by suggesting that Vu should have known that he was not exactly being candid about the tower and that Vu should have asked questions about the tower. Tr. 182-183. In Werlinger's view, he had no duty other than to represent that "there was a tower there." Tr. 184. When asked whether he had any obligation to disclose what was later learned to be his instrumental role in constructing a new tower on the Harris County site, he replied that that would be "putting an onus on me that would not have been there in any other case." Tr. 184. Werlinger conceded grudgingly, after further questioning, that he "probably" should have fully disclosed to the Commission the circumstances surrounding the construction of the tower at the Harris County site. Tr. 184-185.

CONCLUSIONS

Issue (a) - Representations Concerning The Loss Of The Bay City Site

29. Issue (a) requires a determination whether Chameleon misrepresented or lacked candor to the Commission regarding the status of its licensed broadcast facility at Bay City when it requested STA on April 21, 1995. The record evidence establishes that Chameleon willfully misrepresented that its currently authorized transmitter site had been lost with the intent to deceive the Commission and cause it to issue the requested STA. Further, Chameleon engaged in a systematic pattern of evasion, lack of candor and truthless statements to shield the truth concerning its claimed "loss" of the Bay City facility. Accordingly, issue (a) is resolved adversely to Chameleon.

30. Chameleon represented in its STA request that such authority was needed to operate KFCC from an alternate site "due to the loss of its currently operated site." The findings demonstrate that this claim was false and had no basis in fact. Chameleon was neither required nor asked to vacate the Bay City site, but rather voluntarily abandoned the site the day

Werlinger, its principal, closed on the radio station. In acquiring the Bay City site, Werlinger's intent from the outset, not disclosed in the STA request, was to move the station to a Houston area site in order to continue the program service which Chameleon was providing. Chameleon never intended to serve Bay City. Thus, contrary to the false representation in the April 21, 1995 STA request, Chameleon never "lost" the use of its currently licensed site.

31. Chameleon's initial misrepresentations is compounded by its pattern of evasion and deceit in its effort to conceal the truth about the site "loss" from the Commission. The staff's letter of inquiry provided an opportunity for Chameleon to be candid concerning the "loss" of the site. However, instead of being forthcoming, Chameleon chose to ignore the staff's specific questions regarding the status of KFCC's authorized Bay City site. Chameleon's "stonewalling" was only broken when Chameleon was confronted with the loss of its STA. However, even at that late date, Chameleon chose deceit over truth. Chameleon claimed that the site was lost as a result of a contractual agreement entered into as a condition of the purchase of KFCC. In a subsequent statement made under penalty of perjury, Werlinger continued to assert that the site loss was "involuntary", a position which Chameleon maintained in his direct written and oral testimony. However, the lease back agreement does not, by its terms, expressly preclude Chameleon from operating KFCC from the Bay City site. More important, as Werlinger admitted under cross examination, no specific provision was made in the lease back agreement because Chameleon never had any intention of operating KFCC from that site. As discussed, supra, Chameleon voluntarily abandoned the site, since it was Chameleon's intent from the outset to move the station to a Houston area site in order to continue the program service which it was providing. In this regard, at hearing, Werlinger sought to excuse his misconduct by claiming that he was not aware that the loss of site was necessary to obtain an STA. Contrary to Werlinger's assertion, the findings demonstrate that he was well aware of and fully understood the Commission's requirements. Moreover, assuming arguendo, that Werlinger was unaware of the Commission's requirements, that neither explains nor minimizes Werlinger's pattern of deceit as reflected in the record.

Issue (b) - Representations Concerning Construction Of a Tower
at the Harris County Site

32. Issue (b) calls for a determination whether Chameleon lacked candor to the Commission regarding the construction of a tower at the Harris County site when filing its amended STA request on May 2, 1995. The findings establish that Chameleon willfully failed to be candid with the Commission in asserting in the amendment that the proposed tower was an "existing" tower. Further, Chameleon made misrepresentations and lacked candor in response to Commission inquiries concerning the construction of the tower. Issue (b) is resolved adversely to Chameleon.

33. After Chameleon filed the April 24 STA request proposing the construction of a new tower, Werlinger learned that the Division would not grant the request because it proposed new construction. After failing to convince the Division staff to grant the STA request, Werlinger concocted the scheme of building a new tower at the Harris County site and

falsely claiming it was an existing tower. The amendment to the STA did not disclose any facts as to how the tower came into existence or that Werlinger played an "instrumental" role in the construction of the tower. Chameleon did not disclose these material facts because Werlinger knew that the Division would not grant the requested STA if the true facts behind the construction of the tower were revealed.

34. Moreover, Chameleon continued to conceal the true facts, resorting to false and candorless statements in response to Commission inquiries. Thus, in response to the Commission's Letter of Inquiry, Chameleon falsely represented that it was McClish who had suggested building a tower at the Harris County site. In actuality, as Werlinger admitted, for the first time in his direct written testimony, Werlinger was "instrumental" in making arrangements with McClish for the construction of the tower. In this connection, contrary to his previous representation, Werlinger called McClish and asked McClish to construct the tower. Also, Werlinger was not completely candid in asserting in his August 6, 1995 response that all the work on the tower was done at McClish's expense and that no funds were passed from Werlinger toward the construction of the tower. Werlinger concealed the fact, first revealed at the hearing, that the approximately \$5,000 used by McClish to construct the tower was a portion of the funds which Werlinger had paid to McClish on another project and which reduced McClish's indebtedness.

35. In addition to the misconduct discussed in the proceeding paragraphs, the record reveals that even at the hearing stage, Werlinger was unwilling to be completely forthright. Werlinger continued to be evasive in his responses and explanations. His testimony is also marked by an unwillingness to accept responsibility for his misconduct, attempting to place the blame, instead, on the staff in a lame effort to justify his indefensible conduct.

36. Under Section 312(a) of the Communications Act of 1934, as amended, the Commission may revoke any station license for, among other things, false statements knowingly made either in an application or in any statement of fact which may be required under Section 308 of the Act or because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application. See 47 U.S.C. § 312(a). Misrepresentation involves false statements of fact made with an intent to deceive the Commission. Lack of candor involves concealment, evasion and other failures to be fully forthcoming or informative, accompanied by an intent to deceive the Commission. Both represent deceit, differing only in form. Fox River Broadcasting, Inc., 93 FCC 2d 127, 129 (1983). Intent may be found from the false statement of fact coupled with proof that the party making it had knowledge of its falsity. See David Ortiz Radio Corp. v. FCC, 941 F.2d 1253, 1260 (D.C. Cir. 1991). Intent may also be found from motive. See Joseph Bahr, 10 FCC Rcd 32, 33 (Rev. Bd. 1994). A licensee's indifference and wanton disregard for the accuracy of its representations and its obligations to the Commission is equivalent to an affirmative and deliberate intent. RKO General, Inc. v. FCC, 670 F.2d 215, 225 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 and 457 U.S. 1119 (1982).

37. Absolute candor is perhaps the foremost prerequisite for Commission licenseeship. Catoctin Broadcasting Corp. of New York, 2 FCC Rcd 2126 (Rev. Bd. 1987), aff'd in pertinent part, 4 FCC Rcd 2553 (1989), recon. denied, 4 FCC Rcd 6312 (1989); Mid Ohio Communications, 104 FCC 2d 572 (Rev. Bd. 1986), rev. denied, 5 FCC Rcd 940, recon. dismissed in part, denied in part, 5 FCC Rcd 4596 (1990). The duty of candor requires applicants to be fully forthcoming as to all facts and information that may be decisionally significant to their applications. Swan Creek Communications v. FCC, 39 F.2d 1217, 1222 (D.C. Cir. 1994); RKO General, Inc. v. FCC, supra at 229. In order for the Commission to maintain the integrity of its processes, it must routinely rely upon the representations of its licensees. Given the Commission's limited resources, its system of regulatory control must, of necessity, presuppose the honor of its regulatees. Tri-State Broadcasting Co., Inc., 5 FCC Rcd 1156, 1173 (Rev. Bd. 1990), recon. denied, 5 FCC 3727 (Rev. Bd. 1990), rev. denied, 6 FCC Rcd 2604 (1991). Indeed, the "trait of truthfulness" and the "future reliability" of a licensee are the two key elements of the character necessary to operate a broadcast station in the public interest. See Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179, 1290-1210 (1986). In this regard, the Commission is concerned with "whether the licensee will in the future be likely to be forthright with the Commission and to operate its station consistent with the requirements of the Communications Act and the Commission's Rules and policies." Id.

38. The ultimate issue (issue c) calls for a determination, in light of the evidence adduced under the previous issues, whether Chameleon possesses the requisite qualifications to be or remain a licensee. The record compels the conclusion that Chameleon is unfit to be a licensee. The record evidence clearly establishes that Chameleon willfully misrepresented facts and lacked candor to the Commission when requesting the STA on April 21, 1995, and lacked candor in the May 2, 1995, amendment to that STA request. Moreover, rather than being candid with the Commission in response to Commission inquiries, Chameleon has engaged in a deliberate pattern of outright falsehoods, evasiveness, and deception. As is also abundantly clear from the record, Chameleon further demonstrated at hearing that it can not be trusted. There is nothing in the record to indicate that Chameleon either understands or can be expected to meet the burden of licensees to be forthcoming in their dealings with the Commission and to comply with its rules and policies. Therefore, revocation of the license of Chameleon for KFCC(AM) is mandated.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,¹¹ the license of Chameleon Radio Corporation, Station KFCC(AM), Bay City, Texas IS REVOKED.

FEDERAL COMMUNICATIONS COMMISSION



Joseph Chachkin
Administrative Law Judge

¹¹ In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).