

FCC MAIL SECTION

Federal Communications Commission

FCC 98-73

APR 23 1 29 PM '98

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

DISPATCH

In re	)	
	)	
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	)	
	)	
	)	
	)	

APPEARANCES

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

DECISION

Adopted: April 17, 1998

Released: April 22, 1998

By the Commission:

I. INTRODUCTION

1. In this Decision, we affirm the Initial Decision of Administrative Law Judge Joseph Chachkin, Chameleon Radio Corp., 12 FCC Rcd 19348 (I.D. 1997), to revoke the license of Chameleon Radio Corporation (Chameleon) for station KFCC(AM), Bay City, Texas. We find, as did the ALJ, that Chameleon's principal, Don Werlinger (Werlinger), made numerous misrepresentations and lacked candor in connection with a request by Chameleon for special temporary authorization (STA).

II. BACKGROUND

2. The facts in issue occurred around the time that Chameleon acquired KFCC(AM) in 1995. At that time, Werlinger was also the president of KENR Management Company, Inc. (KMC), which provided programming produced by various international programmers to station KENR(AM) in Houston, Texas. However, in November 1994, KENR(AM) was sold and Werlinger became aware that KMC would likely lose its Houston broadcast outlet. 12 FCC Rcd at 19349-50 ¶ 4.

3. The ALJ found that, while continuing to negotiate with the new licensee of KENR(AM), Werlinger also sought an alternative Houston outlet for the programming he was contractually obligated

to deliver. On April 18, 1995, the Commission granted Chameleon's application for assignment of station KFCC(AM) from Landrum Enterprises, Inc. (Landrum). According to the ALJ, Werlinger had hoped that he would be able to maintain programming on KENR(AM) long enough to file an FCC Form 301 for authorization to change KFCC(AM)'s community of license to one that would permit service to Houston. Instead, however, Werlinger took KFCC(AM) off the air immediately after closing and, on April 21, 1995, filed a request for an STA to operate KFCC(AM) at variance with its licensed parameters. 12 FCC Rcd at 19350 ¶¶ 5-6.

4. The designated issues inquire into two aspects of the STA request. The first issue inquires into whether Chameleon made misrepresentations or lacked candor concerning the reason that it was requesting the STA. The second issue inquires into whether Chameleon lacked candor about facts regarding its proposed antenna site.

#### Reason for requesting an STA

5. In its request, Chameleon asserted that it required the STA to operate from an alternate site "[d]ue to loss of its currently licensed site." On May 5, 1995, the Audio Services Division of the Mass Media Bureau (Division) granted Chameleon an STA "due to loss of authorized site." 12 FCC Rcd at 19350 ¶ 6. On July 25, 1995, the Division, having discovered that Chameleon's proposed transmitter site would not serve the community of license, Bay City (see below), sent a letter of inquiry to Chameleon asking it to clarify the "loss" of the Bay City site. The ALJ found that, in its August 19 response, Chameleon discussed the loss of its Houston programming outlet, but ignored the Division's questions about the circumstances under which Chameleon supposedly "lost" the Bay City site and about Chameleon's current legal right of access to the site. The ALJ found that Chameleon "stonewalled" the Division in this regard. *Id.* at 19350-51 ¶¶ 7-8.

6. On September 8, 1995, the Division cancelled the STA and ordered Chameleon to resume operations at Bay City or seek authority to go silent. The Division ruled that Chameleon had not supported its claim that it "lost" its currently licensed site and ruled that rather it had voluntarily abandoned the site to provide programming to Houston. The Division found that this did not constitute a valid basis to issue an STA. 12 FCC Rcd at 19351-52 ¶ 9. On September 29, Chameleon wrote to the Chief of the Mass Media Bureau and addressed for the first time the claimed "loss" of the Bay City site. Werlinger explained that Chameleon had been obligated to vacate the site because, as a condition of sale, Chameleon had been obligated to lease the site back to the KFCC(AM)'s former licensee Landrum. The ALJ concluded that this explanation was false but that it was subsequently repeated in further written submissions and at hearing. *Id.* at 19352 ¶ 10.

7. The ALJ found that in a sworn statement to the full Commission, on November 2, 1995, Werlinger again claimed that the site loss was "involuntary" because Landrum wished to retain the site for its own FM operation and that as part of the "necessary terms of the sale" Chameleon had agreed to lease the site back to Landrum. 12 FCC Rcd at 19352-53 ¶ 11. Similarly, the ALJ found that in his direct written and oral testimony, Werlinger attributed the "loss" of the Bay City site to the lease back agreement. According to the ALJ, only on cross examination did Werlinger admit (1) that Landrum never asked Chameleon to vacate the Bay City site, (2) that the lease back agreement did not preclude Chameleon from using the Bay City site, and (3) that the AM tower array at Bay City was still available for use by Chameleon. The President of Landrum confirmed at the hearing that Landrum never told Chameleon it could not use the Bay City site. The ALJ found that Werlinger admitted that his failure-to use the authorized Bay City site was voluntary. *Id.* at 19353 ¶¶ 12-13.

8. The ALJ also faulted other hearing testimony by Werlinger. At the hearing Werlinger, who

had been a technical consultant since 1981, had attempted to justify his failure to include details in Chameleon's STA request concerning the "loss" of the transmitter site by claiming ignorance of the provisions of 47 C.F.R. § 73.1635 requiring that the STA requests must fully describe the necessity for the requested STA, and claiming that, based on his experience, loss of a transmitter site was not necessary to obtain an STA. As to the latter point, Werlinger relied on an STA request he filed on behalf of station KVCJ(AM). The ALJ found Werlinger's claimed ignorance not credible and rejected it. The ALJ noted that, although the request for STA filed by KVCJ(AM) did not mention loss of transmitter site, the order granting the STA stated that the grant was "due to loss of authorized site." The ALJ also observed that Chameleon's inclusion of a statement concerning loss of site in KFCC(AM)'s STA request was inconsistent with Werlinger's claim at hearing that he did not think that this factor was required. 12 FCC Rcd at 19353-54 ¶¶ 14-15.

#### Proposed transmitter site

9. In its April 21, 1995 STA request, Chameleon proposed to operate at a site in Harris County, Texas at coordinates N 29-38-10, W 95-32-22. The request erroneously specified that these same coordinates were those of Chameleon's current Bay City site,<sup>1</sup> a circumstance that Werlinger later characterized as a "typographical error." Chameleon did not disclose its intention to effectuate a change in its community of license from Bay City to a community closer to Houston.

10. Chameleon also proposed to construct a new 180 foot tower at the Harris County site. FCC 12 FCC Rcd at 19354-55 ¶¶ 16-17. The ALJ found that sometime between April 21 and 26, 1995, Werlinger had a telephone conversation with John Vu, a Division staff engineer. Vu told Werlinger that the Division would not grant the STA if it involved the construction of a new tower, as opposed to the use of an existing tower. According to the ALJ, although Werlinger strenuously disagreed with Vu's explanation of Commission policy and tried to convince him that he was in error, Werlinger did not discuss his disagreement with any other Division staff members. Instead, the ALJ found that Werlinger decided to "work around" Vu's objection by building a new tower and falsely claiming that it was an existing tower. 12 FCC Rcd at 19355-56 ¶ 18.

11. The ALJ found that on April 26, 1995, Werlinger spoke to Joe McClish (McClish), the representative of a tower construction company, and arranged to have a new 180 foot tower constructed at the Harris County site. By May 1, 1995, McClish had constructed the tower at the Harris County site, at coordinates slightly different from those specified in the STA request. He did not, however, install the antenna ground system or the folded unipole antenna at that time. Werlinger testified at the hearing that he believed that he could comply with Commission policy, as explained by Vu, by building a "nonbroadcast" tower and later converting it to a "broadcast" tower. 12 FCC Rcd at 19356 ¶ 19.

12. On May 2, 1995, Chameleon filed an amendment to its STA request describing the originally proposed tower at coordinates N 29-38-10, W 95-32-22 and requesting the STA at a nearby "existing" tower at coordinates N 29-38-14 W 95-32-24. The amendment did not disclose that Chameleon had arranged for the construction of the "existing" tower. The ALJ noted that, because the April 21 STA request gave incorrect coordinates for the current Bay City site, the amendment gave the misleading impression that the proposed site was only 0.25 km from the licensee's currently authorized site, rather than in a different community entirely. When the Division granted the STA for Chameleon to operate from the proposed "existing" tower, the Division erroneously specified the coordinates N 29-38-10, W 95-32-22 that had been given in the original April 21, 1995 STA request, rather than those in the May 2,

---

<sup>1</sup> The actual coordinates of Chameleon's authorized site are N 28-59-51 W 95-54-42 (official notice taken).

amendment. However, relying on the information Chameleon had provided in the STA request and the amendment, the Bureau noted (erroneously) that the STA site was only 0.25 km from the authorized Bay City site. Chameleon did not notify the Commission of either error. On May 7, the ground system and the folded unipole antenna were installed and on May 8, Chameleon began operation from the Harris County site. 12 FCC Rcd at 19356-57 ¶¶ 20-22.

13. Within a month, the Division discovered its errors. On May 18, it rescinded the STA because it discovered that Chameleon could not provide city grade coverage of Bay City, as required by 47 C.F.R. § 73.24(i), from the Harris County site. In the July 25 letter of inquiry discussed above, the Division, in addition to inquiring about the claimed "loss" of the Bay City site, also asked Chameleon whether it was responsible for construction of a tower at the Harris County site. 12 FCC Rcd at 19357 ¶¶ 23-24.

14. The ALJ found that, in its August 4, 1995 response to the Bureau's inquiry, Chameleon falsely claimed that McClish, not Werlinger, had taken the initiative in building the tower. The response indicated that McClish approached Werlinger and sought permission to build a tower on land that Chameleon had leased. Chameleon also claimed that the tower had been built at McClish's expense and that no funds had passed between Chameleon and McClish. 12 FCC Rcd at 19357 ¶ 25. The ALJ concluded that this response was lacking in candor. Werlinger admitted at hearing that he was "instrumental" in making arrangements with McClish for construction of the tower. He also admitted that he had approached McClish after Vu told him that the STA would not be granted if new construction was involved. He also admitted that \$5000 of the money used by McClish to construct the tower was money that Werlinger had previously paid to McClish for other purposes and that after the work was finished, Werlinger paid McClish for and owns the tower. Id. at 19357-58 ¶¶ 26-27.

15. Based on these findings, the ALJ concluded that Chameleon had engaged in a pattern of outright falsehoods, evasiveness, and deception, which rendered it unqualified to be a Commission licensee. He concluded that Chameleon had falsely claimed in its STA request that the STA was necessary due to "loss" of the Bay City site. He further concluded that Chameleon had compounded this false claim with deceptive and evasive responses in written submissions to the Commission and in hearing testimony. Ultimately, the facts established that Chameleon had not "lost" the Bay City site but had voluntarily abandoned it. Similarly, the ALJ concluded that Chameleon acted deceptively after Werlinger learned that the Division would not grant an STA because it proposed new construction. The ALJ concluded that Werlinger concocted a scheme of constructing a tower and falsely claiming that it was an existing tower. In the ALJ's view, Chameleon compounded this conduct with false and candorless statements in response to the Division's inquiry and by being unwilling at the hearing to take responsibility for its deceptive conduct. 12 FCC Rcd at 19358-61 ¶¶ 29-38.

16. Now before the Commission are the Exceptions and Brief of Chameleon Radio Corporation, filed November 4, 1997, and the Mass Media Bureau's Reply to Exceptions, filed November 19, 1997.

### III. DISCUSSION

17. In its exceptions, Chameleon raises two principal points. First, Chameleon faults the ALJ for rejecting evidence concerning the merit of its programming. Chameleon contends that its international, ethnic, and religious programming has provided a unique public service to the Houston community. Second, Chameleon disputes the ALJ's conclusion that Chameleon cannot be trusted. Chameleon asserts that a "complete review" of its Proposed Findings of Fact and Conclusions of Law establishes that Werlinger acted in good faith, providing "ample and open" responses to the Commission. Chameleon maintains that, at most, it should pay a \$50,000 forfeiture. The Mass Media Bureau supports the Initial Decision.

18. Chameleon's assertions regarding its programming may be disposed of quickly, since the ALJ's rejection of this evidence is clearly consistent with Commission policy. The Commission has a long-standing policy that meritorious programming does not mitigate serious deliberate misconduct such as misrepresentation. See, e.g., KQED, Inc., 5 FCC Rcd 1784, 1785 ¶ 6 (1990), and cases cited therein. Similarly, Werlinger's purportedly "long and unblemished" record before the Commission does not mitigate the serious misconduct found in this case. See KOZN FM Stereo 99, Ltd., 59 RR 2d 628, 629 ¶ 6 (1986). We are also not convinced to alter the outcome by Chameleon's assertion that "Chameleon's actions beginning in April, 1995 were all aimed at preserving this unique and singular programming service within the community." Exceptions at 4 ¶ 11. We reject any suggestion that the "ends justifies the means" in this regard. As the many cases cited by the ALJ (12 FCC Rcd at 19361 ¶ 37) thoroughly explain, honesty and trustworthiness are fundamental obligations of Commission licensees.

19. Turning to the question of Chameleon's conduct, Chameleon's exceptions contain several generalized assertions without specific reference to the evidentiary record or the ALJ's initial decision (Exceptions at 4 ¶¶ 12-13, 7 ¶ 20):

. . . Chameleon demonstrated throughout the process while (sic) it aggressively held [its] line on matters before the Commission and spared no effort to present its case to the Commission staff. Bad actors do not present themselves in person not once, but five times before Commission staff to plead their case and ask for help. And in all but the final ruling, the STA in question was reinstated and continued.

\* \* \* \*

With two notable exceptions . . . every Commission staff member contacted by Chameleon during the course of the now two and a half years since the STA was granted has worked to settle the case.

\* \* \* \*

. . . a complete review of both Chameleon's Findings of Fact and Conclusions of Law and Reply Comments provides a view of the situation regarding the KFCC STA much different from that presented by the Commission staff. Mr. Werlinger was both aggressive and challenging in his response [to Commission staff members]. However, rather than attempting to conceal and mislead, Mr. Werlinger provided ample and open responses to the staff throughout the process.

These exceptions do not conform to 47 C.F.R. § 1.277(a), which provides that:

The consolidated supporting brief and exceptions to the initial decision . . . , including rulings upon motions or objections, shall point out with particularity alleged material errors in the decision or ruling and shall contain specific references to the page or pages of the transcript of hearing, exhibit or order if any on which the exception is based. Any objection not saved by exception filed pursuant to this section is waived.

Moreover, the rule does not permit citation to or incorporation by reference of earlier filed pleadings, such

as proposed findings and conclusions, as an alternative to specific references in the exceptions.<sup>2</sup> See United Broadcasting Co., 93 FCC 2d 482, 505 n.97 (1983). Thus, the generalized, unsupported contentions above provide no basis to question the ALJ's findings and conclusions, which contain a thorough analysis of Chameleon's conduct amply supported by record evidence and Commission precedent.

20. Similarly, Chameleon asserts generally, with reference only to its proposed findings and conclusions, that the STA here was treated differently from the one granted to KVCJ(AM). The ALJ, however, amply distinguished the two matters. 12 FCC Rcd at 19354 ¶ 15, n.9. Moreover, Chameleon's exceptions do not explain how the alleged inconsistencies negate the egregious misconduct found by the ALJ.

21. Chameleon's exceptions do not specifically address the ALJ's findings and conclusions with regard to Chameleon's claims that it had "lost" the Bay City site. That misconduct is disqualifying by itself. By failing to file exceptions on this point, under 47 C.F.R. § 1.277(a), it has waived any objection to the ALJ's conclusion that Chameleon made misrepresentations and lacked candor in this regard.

22. Chameleon's exceptions address the matter of its proposed tower in somewhat greater detail, although again without any specific reference either to the evidentiary record or the ALJ's initial decision. Chameleon alleges that Vu erred in his interpretation of Commission policy regarding the construction of new towers.<sup>3</sup> Whether or not Vu's understanding of Commission policy was correct, however, does not justify Werlinger's course of conduct. As the ALJ found, Werlinger clearly understood from Vu that the STA would not be granted if construction of a new tower was required. Werlinger, however, did not discuss his disagreement with Vu with any other member of the Division's staff or with any other office within the Commission. 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. 12 FCC Rcd at 19355-56 ¶ 18. Misrepresentation and lack of candor cannot be justified as the only avenues by which to express disagreement with the staff. See Exceptions at 5 ¶ 16. As noted above, honesty and reliability are fundamental obligations of a licensee.

23. Similarly, Chameleon's exceptions claim that Werlinger's actions were only a good faith attempt to conform to Vu's mistaken policy. Chameleon contends that the tower's construction was complete "before its use was presented to Mr. Vu"<sup>4</sup> and that "No use of the tower was made for broadcast use and no construction of the folded unipole antenna was attempted prior to the grant of the original STA on May 5, 1995." The ALJ, however, concluded that Werlinger's actions were motivated by an intent to conceal material facts from the Commission because he knew that the Commission would deny the STA if the facts were known. 12 FCC Rcd at 19359-60 at ¶ 33. Chameleon provides no basis to overturn this conclusion, which is based on detailed findings supported by record evidence.

---

<sup>2</sup> Nevertheless, we have examined Chameleon's proposed findings of fact and conclusions of law and its reply to the extent that Chameleon relies on specific portions of these documents in its exceptions. We find that these references provide no reason to materially alter our analysis of the exceptions.

<sup>3</sup> Chameleon also criticizes a second staff member, but includes no specific allegations in its exceptions.

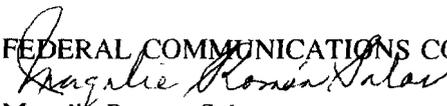
<sup>4</sup> Chameleon is apparently referring to the fact that the tower was constructed after Werlinger spoke to Vu but before Chameleon filed the May 2, 1995 amendment to its STA request referring for the first time to an "existing" tower.

**IV. ORDERING CLAUSES**

24. ACCORDINGLY, IT IS ORDERED, That the Exceptions and Brief of Chameleon Radio Corporation, filed November 4, 1997, ARE DENIED and the Initial Decision of Administrative Law Judge Joseph Chachkin, FCC 97D-11 (Sept. 18, 1997), 12 FCC Rcd 19348 (1997) IS AFFIRMED.

25. IT IS FURTHER ORDERED, That pursuant to 47 U.S.C. § 312, the license of Chameleon Radio Corporation to operate station KFCC(AM), Bay City, Texas, IS REVOKED; and that Chameleon Radio Corporation IS AUTHORIZED to continue to operate station KFCC(AM) until 12:01 a.m. June 4, 1998 to enable the licensee to conclude station affairs, PROVIDED, HOWEVER, that if the licensee seeks reconsideration or judicial review of our action revoking its license, it is authorized to operate station KFCC(AM) until final disposition of all administrative and/or judicial appeals.

25. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION  
  
Magalie Roman Salas  
Secretary