

192. The Adams principles were opposed to “home shopping” as programming that could accommodate public service broadcasting. But nothing was filed by Adams in connection with the rule making, a failure which undercuts Adams’ claim of championing the public interest by filing against RBI’s renewal. The Commission did show concern for a lessening of community directed broadcasting at “home shopping” stations and issued a specific directive that such stations must provide public affairs programming that is responsive to issues confronting local communities. Home Shopping Order at Para. 9. Accordingly, RBI’s duty remains the same, and if the evidence in this case shows that RBI’s community directed programming was only “minimal”, then RBI receives no renewal expectancy. Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, 3 F.C.C. Rcd 5179, 5185 (1988).

193. The renewal expectancy paradigm has five criteria: (1) the efforts made to ascertain community needs and interests; (2) the programming response to those needs and interests; (3) the incumbent’s reputation in the community for serving the needs and interests; (4) the record of compliance with the Communications Act and the Commission’s rules and policies; (5) evidence of community outreach in providing a forum for the expression of local views. Fox Television Stations, Inc., 8 F.C.C. Rcd 2361, 2366 – 68 (1993), recon. denied, 8 F.C.C. Rcd 3583 (1993), modified, 9 F.C.C. Rcd 62 (1993), aff’d sub nom. Rainbow Broadcasting, Inc. v. F.C.C., 1995 WL 224866 (D.C. Cir 1995). Compare similar standards applied in Radio Station WABZ, Inc., 90 F.C.C. 2d 818, 840-842 (1982), aff’d sub nom. Victor Broadcasting v. F.C.C., 722 F. 2d 756 (D.C. Cir. 1983) (quantity of non-entertainment programming and extent it met identified needs and interests; amount of locally produced programming; and station’s local reputation). The later formulated and more extensive Fox Television standards will be applied in this case.

Ascertainment

194. From 1989 to 1990, RBI ascertained community needs by referrals and staff review of literature of community based organizations. In 1990, with the hiring of Mr. Mattmiller as Station Manager, the efforts expanded to include the polling of business and community leaders and organizations. Heavy reliance for ascertainment was placed on news items in the Times/Eagle, a newspaper of local distribution and interest. There were meetings and discussions with community organizations that were identified in the Station’s quarterly issues and programs. There were improvements made. But there was no showing of “extensive measures” that are necessary for the expectancy preference. See Fox Television Stations, Inc., supra, 8 F.C.C. Rcd at 2370-71 (formal interviews with community leaders and numerous contacts with community leaders). Nor do the efforts of RBI even approach those that were approved in other renewal cases. Cf. Metroplex Communications, Inc., 4 F.C.C. Rcd 8149, 8151-52 (Review Bd 1989) and Seattle Public Schools, 4 F.C.C. Rcd 625, 635 (Review Bd 1989) (subsequent histories omitted). Where a station takes short cuts, does not utilize direct contacts with local civic leaders, and tries to make up the difference with PSA type formats, the renewal expectancy is not to be expected.

Responsive Programming

195. RBI relies on its quantitative analysis of programming that it asserts was responsive to identified community issues or needs. But the programming is in large part in the PSA format:

A [PSA] is one for which no charge is made and which promotes programs, activities, or services of Federal, State or local governments (e.g. recruiting, sales of U.S. Savings Bonds, etc.) or the programs, activities or services of nonprofit organizations (e.g., UTGF, Red Cross Blood Donations, etc.) or any other announcements regarded as serving community interests. See [former] Section 73.1810(d)(4) of the Commission's Rules."

In the Matter of Airing of Public Service Announcements by Broadcast Licensees, 81 F.C.C. 2d 346 at n.1.

196. Under Commission doctrine, it is necessary to separate PSAs from programming. PSAs are important but are not to be "a broadcaster's primary method of responding to community needs" and are not to be considered to be "public affairs" programming. Id. at 349, 367. The Commission did not want PSAs to dilute or diminish "the airing of program-length material meeting community problems." Id. And the Commission made clear that while it encouraged PSAs, it did not want its approval to have any "negative effect on the broadcasting of public affairs material." Id. at 368. There were three categories for broadcasters to report in the Annual Programming Report: "news, public affairs and other." Since PSAs did not meet the first two categories, the Commission authorized their being reported (at the option of the licensee) in the third "other" category. Id. What was made clear by this prescribed reporting methodology was continuation of the policy that PSAs could not be claimed for credit as news or programming.

197. As deregulation evolved, the Commission repealed TV programming guidelines and permitted a laissez faire programming mix at the option of the licensee. Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 98 F.C.C. 2d 1076, 1087 (1984). But even with deregulation, the Commission recognized "the continuing obligation of all licensees to contribute issue – responsive programming." Id. at 1088. And even though RBI chose to use a short form of public programming as a matter of its "licensee discretion,"²⁹ it still must be held to the Commission's policy requiring issue responsive programming.

²⁹ See RBI's Proposed Findings of Fact and Conclusions of Law at 90 n.15 (WTVE's use of short form public programming is a matter of licensee discretion).

198. The record contains composite week analysis reflecting in accord with RBI's Program/Issues Reports [RBI Exh 8, Tabs C – X], that there was no local news and only a scant amount of issue programming at WTVE(TV). In three of the composite weeks, there was no more than three hours of non-entertainment programming. At best, the home shopping format was interrupted only 8% of the time in 1994. For noncommercial programming, the highest percentage of noncommercial programming in the entire renewal period. RBI's increased use of PSAs did not serve as a substitute for news or issue-responsive programming or local news. RBI's new children's programming and an expansion of religious programming were minimal improvements that were not shown to be issue responsive. State legislative reports were more in the nature of last ditch efforts by WTVE(TV) at the end of the period to give an appearance of responsive programming. In actuality, the legislative programming was in the "canned" format and was not shown to be community issue responsive.

199. Most of WTVE(TV)'s broadcast day was devoted to the "home shopping" format with the resulting effect of minimizing issues of concern to the Reading community. By comparison, a "substantial" record was found where the evidence showed regularly scheduled news and public affairs programming, specials and PSAs. See Fox Television Stations, Inc., supra, 8 F.C.C. Rcd at 2376. In this case, none of RBI's public service programs were offered on a regularly scheduled basis, its short form public service programming appeared at the end of each 30 minutes of home shopping, and its flagship programming such as "News To You" appeared in a variety of time slots with little or no notice given to viewers. The programming had such little respect in the community that the local newspaper did not carry program times. As a result, there was no way for viewers to keep informed through the programming of WTVE(TV). RBI has a programming record that for the category of responsive programming, fails to qualify for the preference. Cf. Harriscop of Chicago, Inc., 5 F.C.C. Rcd 6383, 6385 ("minimal" performance receives no preference).³⁰

Community Reputation

200. This criteria is relevant to renewal expectancy only if the programming is found to be substantial. Metroplex Communications, Inc., 4 F.C.C. Rcd 8149, 8153 (Review Bd. 1989), aff'd, 5 F.C.C. Rcd 5610 (1990) (public witness testimony cannot create a basis for renewal expectancy). But as a contingency, the evidence will be considered here.

³⁰ RBI relies on Radio Station WABZ, Inc., 90 F.C.C. 2d, 818, 836 (1982) as authority for awarding a renewal preference for short form public service programming. In fact, in that case, the Commission approved broadcasting with "a number of recorded public affairs series on a weekly basis, as well as a number of specials dealing with political, educational, religious, and health-related issues." Id. at 837 (fn. omitted). Also, in that case there was a record of composite week broadcasting of 3 hours and 40 minutes of noncommercial broadcasting for an average of 31 minutes per day. Compare the composite week of RBI's public affairs programs from all sources which showed nothing for the first three years and only a minimal amount for the last two years. (Adams Exh. 2-7.)

201. At best, RBI's reputation was mixed. To its credit, the Red Cross, the March of Dimes, and a local Children's Rights group were complimentary of the PSAs. Representatives of local government and police were also complimentary of responsive PSAs. A member of the Pennsylvania House of Representatives praised the Station's willingness to devote airtime to PSAs and to the presentation of prepared political statements of state representatives and state senators. But there was also criticism from others for the absence of local news. The Mayor of Reading was reticent about the Station's performance. One terminated employee testified about complaints that he received from members of the community about the lack of local newscasting from WTVE(TV). The nature of the positive evidence was one of gratitude for carrying PSA spots. Such qualified evidence is necessarily given lesser weight than positive testimony of programming that is found by viewers to be especially useful for the community. In that regard, the significant weakness found in the public witnesses on behalf of RBI was that none was a regular viewer of Station WTVE(TV). By comparison, the adverse testimony of Mr. Loos that there was no coverage of local emergencies and of Mr. Baldinger that there was no local news during the renewal period offset RBI's positive testimony.

Community Outreach

202. Recognition is given for efforts at community outreach. RBI assisted organizations such as the Red Cross, the March of Dimes, the Children's Rights of Pennsylvania, the Burn Prevention Foundation, and the Switchback Gravity Railroad Foundation, primarily through the airing of helpful PSAs. Station staff members also held career days for school children to encourage interest and careers in the fields of broadcasting. These activities merit some recognition. But they do not meet the efforts that the Commission found noteworthy in Fox Television Stations, Inc., supra, 8 F.C. C. Rcd at 2416-2418 and Seattle Public Schools, supra, 4 F.C.C. Rcd at 638. This evidence proffered by RBI of its record on community outreach is not sufficient to gain a renewal preference.

Record of Compliance

203. Compliance with the Communications Act and the Commission's Rules is a sine que non to qualify for a renewal expectancy preference. Metroplex Communications, Inc., 4 F.C.C. Rcd, supra at 8153 (licensee's record must reflect compliance with the strictures governing broadcasters' conduct). The Commission has an exacting standard:

[L]icensee misconduct may provide a more meaningful basis for preferring an untested challenger over a proven incumbent. Licensee misconduct pertinent to broadcast service may raise questions both as to the licensee's continued compliance with Commission rules and its dedication to serving the community.

Cowles Broadcasting, Inc., *supra*, 86 F.C.C. 2d at 1017. RBI falls short of the Commission's norm of "continued compliance." Because of the predictive nature of future compliance, there is no room to vacillate. Even if RBI's minimal programming qualified for a finding of "substantial service," RBI's intended or reckless noncompliance rebuts the preference. *Id.* The record contains substantial and credible evidence establishing that there were violations by RBI of the Act and the Rules during the renewal period.

Failures To File Timely And Accurately

204. RBI was inaccurate in reporting its ownership. RBI also transferred control to Mr. Parker before receiving authorization from the Commission and omitted material information from the transfer application. Finally, RBI lacked candor through the multiple delicts of its agent Parker and particularly when he responded in a misleading manner to a specific inquiry by Commission staff. RBI also failed to file with the Commission, prescribed documents that are required under specific Commission rules.

Reporting Violations

205. Section 73.3613(b)(3) requires:

Filing of contracts:

Each licensee ... of a commercial ... TV... station shall file with the F.C.C. copies of the following ... documents... within 30 days of execution thereof:

Ownership or control: Contracts, instruments or documents relating to the present or future ownership or control of the licensee... shall include but are not limited to the following:

Any agreement providing for the ownership or voting rights of the licensee's stock

Management consultant agreements with independent contractors; ... station management contracts with any persons, whether or not officers, directors, or regular employees, which provide for both a percentage of profits and a sharing in losses; or any similar agreements.

206. Section 73.3615(a) requires:

Ownership Reports:

Ownership Reports shall provide the following information [for a corporation] as of a date not more than 60 days prior to the filing of the Report:

The name, residence, citizenship, and stockholding of every officer, director

And in the case of all licensees:

A list of all contracts still in effect required to be filed with the F.C.C. by § 73.3613 showing the date of execution and expiration of each contract; ---.

The evidence establishes, and RBI admits, that the MSA was not filed within thirty days of its execution in violation of §73.3613. Nor did RBI list the MSA in its ownership reports until 1997, eight years after the MSA's execution, a gross violation of §73.3615. In addition, RBI did not correctly list its directors in its 1992 ownership report and it wrongfully certified in its 1993 filing that its 1992 report had been correct.

207. With respect to ownership reports, Mr. Parker, as RBI's president, certified recklessly to the accuracy of each noted document. Mr. Parker knew that he was providing ownership information to the Commission. He also knew that the information must be accurate. RBI asserts that Mr. Parker just did not pay attention to the accuracy of the information that he was providing. If failure to pay attention is accepted as an excuse, it could be used anytime a licensee is questioned about a deficient disclosure. In this case, that "excuse" is not acceptable because it is not supported by any fair view of the relevant evidence.

208. The Parker/RBI MSA was executed in May 1989, which a bankruptcy court approved in August 1990. Yet the MSA was not reported with an acceptable degree of candor until seven years later in 1997.³¹ There were many opportunities to set the record straight with the Commission between 1989 and 1997. But Mr. Parker chose to leave the Commission in the dark as to who was calling the shots at Station WTVE(TV).

209. In October 1991, a year after the MSA received court approval, Mr. Parker caused the issuance of a sufficient number of shares of RBI stock to effect a transfer of control in his favor. To secure this control, he caused a block of control stock to be voted in favor of a new slate of directors which included himself. Shortly after the election of those directors, the application for RBI's transfer was filed without disclosing any of those critical corporate decisions to the Commission. Nor were they disclosed while the Commission was considering a transfer application to bring RBI out of bankruptcy. One result of Parker's deficient disclosure was to hide from the Commission the fact that Mr. Parker was gaining control of RBI's

³¹ RBI claims that the MSA "was reported in an amendment filed by [RBI] on February 7, 1992". (RBI PFC at 96-97.) But there was only passing reference to the MSA in the February, 1992 amendment as an attachment. (Adams Exh. 30 at 8.) It did not mention that the "contract of employment" gave control of the station's operations to Parker. Nor did it disclose that such "contract of employment" included Partel or mention the contemplated RBI stock ownership for Partel. Such oblique hints do not qualify as a "report" to the Commission.

management. If while the transfer application was being considered the Commission had been presented with complete facts about Mr. Parker, a decision to consider the application might have been deferred until the significance of Parker's history with the Commission was assessed. The willingness on the part of RBI, through Parker, to hold back significant information on the truth about control while the Commission was considering a license transfer shows a motive to obtain the transfer before the Commission learned the facts about Parker's background. The willful withholding of such material corporate information also showed indifference or a reckless and wanton disregard of a licensee's obligation to be forthcoming with the Commission. RKO General, Inc. v. F.C.C., 670 F. 2d 215, 225 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 and 457 U.S. 1119 (1982).

210. There also is sufficient evidence indicating that Mr. Parker as prospective president and director of RBI understood that the MSA, a document required to be filed under §73.3613, had not been filed and that as a result erroneous information had been deliberately or recklessly provided to the Commission while it was considering a transfer application that it was being asked to approve. As a matter of law and as a matter of fact, those reporting violations were willful.³² Such willful transgressions or acts of indifferent disregard of truthfulness in filing detract from the renewal expectancy. Cowles Broadcasting, Inc. supra, 86 F.C.C. 2d at 1017.

Unauthorized Transfer Of Control

211. The evidence shows an unauthorized transfer of control. RBI's November 1991 transfer application and amendments thereto willfully or recklessly omitted material facts, namely, the MSA, the actual issuance of stock, and the subsequent election of new officers and directors. Those violations and failures to be fully informative to the Commission, particularly when coupled with an intentional failure to respond candidly to a staff inquiry, eliminates any hope of renewal expectancy. Fox Television Stations Inc., *supra*, 8 F.C.C. Rcd at 2390.

212. Section 310(d) of the Act provides:³³

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

³² The term "willful" means that the violator knew that it was taking the action in question, irrespective of any intent to violate the Commission's rules. Southern California Broadcasting Co., 6 F.C.C. Rcd 4387 (1991).

³³ 47 U.S. C. § 310(d).

Commission licensees first must seek and obtain the Commission's consent before transferring control of Commission licenses. Thus, prior to any consummation of a transfer of control of a license, the parties to the transfer must file a full and complete application with the Commission. The Commission then must grant the application before consummation of the transaction may take place. See, e.g., American Music Radio, 10 F.C.C. Rcd 8769 (1995).

213. A transfer of control includes a transaction in which a name remains the same, but control of the licensee-entity is transferred from one person or entity or group of persons-or entities to another. Control includes any act which vests in a new entity or individual the "right to determine the manner or means of operating the licensee and determining the policy that the licensee will pursue." WHDH, Inc., 17 F.C.C. 2d 856, 863 (1969), aff'd sub nom. Greater Boston Television Corp. v. F.C.C., 444 F.2d 841 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971). Full disclosure is required for a transfer of control even where as here, a corporation in bankruptcy transfers a license to a newly formed corporation using the same name. In this case, Mr. Parker had full managerial, operational and budgetary control under the MSA.

214. In October 1991, control of RBI passed from the shareholders who had taken RBI into bankruptcy to a new group of shareholders, appointed and led by Mr. Parker to effect his control as president of RBI. Parker's control took place prior to the filing of a transfer application which occurred in November 1991. And the change took place well before Commission approval which occurred in February 1992. RBI, under the direction and control of Mr. Parker, improperly issued its stock so that control of RBI was transferred to Partel/Parker without the Commission being adequately informed that Mr. Parker was back in business in control of another licensee.

215. It is instructive to observe the ways that the Commission was misinformed. The November 1991 transfer application indicated that stock had not yet been issued when in fact it had been issued. The application erroneously reported that 50,000 shares of RBI voting stock was currently outstanding which was not the case. It further reported erroneously that "consummation" of a previously granted short-form application (the August application) had not occurred. In fact, the opposite was true in all these respects. The referenced 50,000 shares had been cancelled on September 17, 1991; new stock had been issued four weeks later on October 15, 1991; and the new stockholders met and voted in new directors on October 30, 1991. A true and accurate transfer application would have disclosed those facts. The application also could have offered the explanation provided by Mr. Parker at the hearing, if it was true, that RBI felt it could not fully consummate the transaction and emerge from bankruptcy until it had satisfied secured creditors. But whether or not true, any deference to creditors had nothing to do with timely disclosing material facts to the Commission about control. The ultimate travesty was holding back from disclosing to the Commission until 1997, the fact and effect of the MSA.

Exculpatory Circumstances

216. The Bureau would offset Mr. Parker's reporting errors with his removing RBI from a debtor-in-possession status. The Bureau observes that the November 1991 application disclosed the basic parameters of the transaction inasmuch as all of RBI's "proposed"

shareholders were listed. A "consummation" of the short form grant could not occur because of an intervening garnishment of Dr. Aurandt's stock. But even under that scenario, the Bureau concedes that Mr. Parker would have had a motive to conceal the issuance of the stock. That being the case, the Bureau would count the lapses in disclosure against renewal expectancy but not against RBI's basic qualifications. While the Bureau does not believe that RBI's premature transfer of control and related failures to disclose are fatal to its license, the Bureau contends that the scope of RBI's non-disclosures significantly detracts from any renewal expectancy. But a finding of RBI's disqualification is not needed to resolve this case. Certainly, it would be unfair to charge RBI with the disclosure machinations of Mr. Parker who had succeeded in snatching control from an unwilling board of directors. It is evident that in 1991, there was intense corporate infighting over control and by October 1991, Mr. Parker had won.

Diversification

217. RBI fails to attain a renewal expectancy because of WTVE(TV)'s minimal performance during the renewal period and RBI's failures to comply with the communications laws. Therefore, diversification of control of media of mass communications has become relevant to the outcome. Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393, 394 (1965). See also Bible Broadcasting Network, Inc., 7 F.C.C. Rcd 4578, 4579 (1992). Here, Adams holds the advantage. Only one of its principals, Mr. Umans, has an interest in a medium of mass communications. He has pledged to divest himself of that interest in the event Adams prevails. By comparison, Mr. Parker, RBI's president, a director, and its largest shareholder, holds the licenses to two full-power television stations through 100% ownership of corporate licensees. RBI knew of Mr. Parker's holdings when it entered into the MSA and RBI must be aligned with Mr. Parker's objective qualifications for purposes of diversification. Accordingly, Adams is awarded a significant diversification preference. Pueblo Radio Broadcasting Service, 5 F.C.C. Rcd 4829 (Rev. Bd. 1990).

Comparative Coverage

218. Because RBI cannot be counted on to build a transmitter with the permit it holds, Adams gains a very slight preference for proposing to serve 33% more people than WTVE(TV) currently serves. Simon Geller, 90 F.C.C. 2d 250, 276 (1982) (slight preference to applicant with four times greater coverage to well-served areas); Global Information Technologies, Inc., 8 F.C.C. Rcd 4024, 4031 (Rev. Bd. 1993) (slight preference for 30% differential in overall population service); Christian Broadcasting of the Midlands, Inc., 99 F.C.C. 2d 578, 583 (Rev. Bd. 1984) (slight preference for 24% coverage differential to well-served areas).

Local Residence And Civic Activities

219. RBI is owned by a majority of shareholders who reside or have resided within the city limits of Reading or within the predicted Grade B contour of WTVE(TV). RBI is entitled to a preference for local ownership. Edward F. and Pamela J. Levine, 8 F.C.C. Rcd 8401 (1993).

Past participation by an owner in local civic affairs is considered a part of the local residence affiliation which indicates an interest in the community's welfare. Policy Statement on Comparative Broadcast Hearings, F.C.C. 2d 393, 396 (1965). Several of the stockholders have been involved in local civic activities in Reading or within the Grade B service area. Quarterly lists of issues and programs show that RBI also has participated in community activities. Adams, on the other hand, claims no credit for local civic activities. Accordingly, RBI also is entitled to a preference for civic involvement. Gloria Bell Byrd, 8 F.C.C. RCD 7124 (1993). Because RBI has failed to meet the criteria for a renewal preference, there should be lesser credit awarded for local residence or local civic involvement. It would be inconsistent to award RBI for sporadic civic involvement when it had fallen down on its primary duty to provide comparative credit for local residence and civic activities in view of its far greater failure as a broadcaster. Therefore, RBI receives only a marginal credit.

II

Misrepresentation/Lack Of Candor

220. The Phase II issue was added to resolve substantial questions concerning failures on the part of Mr. Parker to disclose in his filings with the Commission "the actual nature and scope of his previously adjudicated misconduct." Memorandum Opinion and Order, FCC 99M-61, released October 15, 1999. A finding and conclusion of a misrepresentation requires reliable evidence that false or materially misleading statements were made with an intent to deceive. Fox River Broadcasting Inc., 93 F.C.C. 2d 127, 129 (1983) ("Fox River"). Lack of candor, a more subtle form of misrepresentation, involves concealment, evasion or some other failure to be fully informative, but also carried out with an intent to deceive. Fox River, supra. The affirmative duty of candor, which has particular significance for a licensee, requires an applicant before the Commission to be "fully forthcoming as to all facts and information relevant" to its application. Swan Creek Communications, Inc. v. F.C.C., 39 F.3d 1217, 1222 (D.C. Cir. 1994). What is relevant is that which may be of "decisional significance." RKO General, Inc. v. F.C.C., 670 F.2d 215, 229 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 and 457 U.S. 1119 (1982). An intent to deceive can be found by direct evidence or when the evidence supports a reasonable inference. California Public Broadcasting Forum v. F.C.C., 752 F.2d 670, 679 (D.C. Cir. 1985). Such an inference arises from a false statement of fact coupled with proof that the party making it had knowledge of its falsity. David Ortiz Radio Corp. v. F.C.C., 941 F.2d 1253, 1260 (D.C. Cir. 1991). Intent can also be inferred from motive. Joseph Bahr, 10 F.C.C. Rcd 32, 33 (Rev. Bd. 1994). Finally, indifference and wanton disregard for accuracy are equivalent to an affirmative and deliberate intent to deceive. RKO General, Inc. v. F.C.C., supra, and Golden Broadcasting Systems, Inc., 68 F.C.C. 2d 1099, 1106 (1978).

221. Because of the regulatory need of a licensing agency to rely on licensees' representations, when a licensee is found to have intentionally misled the Commission whether through misrepresentation or lack of candor, that party may no longer be qualified to hold a Commission license. Policy Regarding Character Qualifications in Broadcast Licensing, 102 F.C.C. 2d 1179, 1210-11, 1231-32 (1986) ("Character Qualifications"); Center for the Study and Application of Black Economic Development, 10 F.C.C. Rcd 2836, 2837 (Review Bd. 1995)

(fundamental purpose for character inquiry is to make predictive judgment for honesty and future compliance). Deceptions take many forms. And whether the deception involves misrepresentation or lack of candor through affirmatively false statements or through evasion or failures to be fully honest and forthcoming, there must be an intent to deceive or mislead the Commission in order for the deceptive disclosure to be disqualifying. See Fox River, supra. Thus, it is well established that only an intentional misrepresentation or lack of candor can result in an adverse character finding. Fox River, supra.

222. The most relevant character traits in dealing with the Commission have always been “truthfulness” and “reliability.” The Commission’s main concern is with respect to licensing someone who will be forthright in dealing with the Commission and respectful of compliance with the law. Character Qualifications at 1209. In transfer application questions calling for disclosures of “fraud” by yes or no answers, the nature of the “fraud” to be disclosed is equated with deceit. Character Qualifications at 1196; Webster’s New Collegiate Dictionary 453 (1979); Black’s Law Dictionary 594, 903 (5th Ed 1979). See also Leflore Broadcasting Co., Inc. v. F.C.C., 636 F. 2d 454, 461 – 62 (D.C. Cir. 1980). Cf. United States v. Nill, 518 F. 2d 793 (7th Cir. 1975) (fraud connotes perjury, falsification, concealment, misrepresentation). The Commission may treat even an insignificant misrepresentation as disqualifying. See Leflore Broadcasting Co., Inc v. F.C.C., supra. Certainly, the nature of the violation, the circumstances surrounding it, and other pertinent considerations such as repetitiveness are relevant as to future reliability. Therefore, all of the facts and circumstances of Mr. Parker’s false or misleading disclosures or disclosures that were lacking in candor will be considered. Character Qualifications, 1210-11 and n. 76 and n.77.

Question 4 **False And Misleading “No” Answers**

223. Applying those principles to Mr. Parker’s multiple filings, the checking of a “no” to a direct question asking about “adverse final action taken” related to “fraud” results in a disqualification for intentional misrepresentation or lack of candor. Mr. Parker admits to having substantial experience in broadcast regulation compliance. He has made many filings with the Commission in connection with applications for licenses and license transfers. (RBI Exh. 46 at 1-2.) From 1989 to 1992, Mr. Parker was responsible for making disclosures to the Commission regarding five applications for the transfer of TV station licenses, and one amendment to an application for transfer of an international radio broadcast license. In each instance, Mr. Parker was responsible for providing truthfully complete information as it was called for by each form utilized. It would be unreasonable to require the staff to trace for truth and accuracy each and every checked answer in every transfer form that is filed at the Commission. This case presents a clinical illustration of how licensing regulation is fundamentally premised upon the Commission’s reliance on the truth, accuracy, completeness and candor of representations made by those owning and/or controlling licensees. See Leflore Broadcasting Company, Inc. v. F.C.C. supra, 636 F. 2d at 461.

224. An intent to deceive by providing false answers to direct questions can be inferred from this “special nature of the obligation of honesty that a licensee owes to the F.C.C.” Id. The gravamen here is that in each of five transfer forms, Mr. Parker answered “no” to specific questions as to whether an adverse finding was made by any administrative body relating to “fraud.”³⁴ Mr. Parker consistently answered “no” to the questions on the transfer application forms asking about “fraud. The “no” responses made repetitively by Parker with respect to the five transfer applications were false and misleading. A fair assessment of the evidence dictates that conclusion. A preponderance of the evidence establishes Review Board findings of “transpicuous sham” and “attempted fraud” and a Commission decision that Mr. Parker was a principal in “an effort to deceive” the Commission. Clearly, in order to be truthful with the Commission, Mr. Parker had to check off the “yes” answers to the question of whether he had been the subject of “an adverse finding” by an “administrative body.” To make matters worse, the false and misleading “no” answers were not even mentioned in Mr. Parker’s prepared written testimony. (RBI Exh. 46.) To escape responsibility, Mr. Parker slanted his testimony to protest that neither proceeding “raised a character issue as to [his] qualifications to hold Commission licenses” and that the San Bernardino proceeding “did not present an issue as to [his] qualifications.” (RBI Exh. 46 at 3. 7.)

225. Mr. Parker’s self serving explanations in RBI’s case in chief about “character issues” and “qualifications” amount to smokescreens that offer no credible defense for giving “no” answers to highly focused questions asking about “adverse findings.” Mr. Parker even persisted in cross examination when he was pointed to Question 4 and asked “whether an adverse finding has been made” to which he twice answered “no.” (Tr. 1944.) The answer, if given truthfully, clearly calls for a “yes” because Mr. Parker was a party to each of the five transfers and knew that both the Mt. Baker and the San Bernardino decisions had made unequivocal “adverse findings” as to himself and to the parties to those proceedings that he controlled. Under the circumstances, Mr. Parker, as a principal of RBI, must be found to have violated the requirement for absolute candor of licensees. Catoctin Broadcasting Corp. of New York, 2 F.C.C. Rcd 2126 (Review Bd 1987), aff’d, 4 F.C.C. Rcd 2553 (1989) (further citation history omitted). Also evident is the clear motive for Mr. Parker to falsify his answers to Question 4 because the Commission can refuse to renew a license where the applicant has made a knowing misrepresentation or lack of candor of the kind found in Mr. Baker and in San Bernardino. Leflore Broadcasting Company, Inc. v. F.C.C., supra, 636 F. 2d at 461. The courts recognize that the Commission would be derelict if it did not hold licensees such as RBI to a “high standard of punctilio.” Id. Mr. Parker has disregarded this standard of “punctilio” with his “no” answers to Question 4 in five applications which constitute a series of multiple misrepresentations in disclosure exacerbated by misleading written testimony and live hearing testimony.

³⁴ Mr. Parker’s “fraud” was committed at the Commission and not before another governmental unit. Therefore, there is no adverse finding or conclusion made with respect to Parker’s “no” answer to the “fraud” question in Form 346 used in the application for an LPTV license in Los Angeles. (See para. 124. supra.)

Question 7
Adequate Answers But
One Misleading Amendment

226. Acts of willful misrepresentation raise a “core concern of truthfulness.” Character Qualifications, *supra* at 1209. The narrative descriptions of the Mt. Baker and San Bernardino proceedings made or obtained by Mr. Parker in each of the application exhibits were incomplete. But in view of the questions asked, the narrative disclosures are not found to be willfully misleading. Parker answered “yes” to Question 7(a) and (b) which were literally correct answers. He then gave “exhibit 3” narratives for the follow-up questions on name, dates, nature of interest, and locations in Question 7(e). However, the information provided in an amendment in response to a broader staff inquiry for more information was deliberately inadequate and Mr. Parker intended thereby to mislead the Commission staff.

Negligent Omissions

227. There was no excuse for the total omission of the San Bernardino proceeding from the San Francisco and the Los Angeles applications. Mr. Parker thought it was Mr. Wadlow’s oversight and Mr. Wadlow denied any role in drafting the disclosures in those two applications. While the omission is highly disappointing, there is only evidence of poor recollection and negligence or a combination of both on the part of Mr. Parker. In a very close call, the overall evidence of incomplete disclosures in those two applications fails to show purposeful omission with intent to mislead. In another context, the element of deliberateness is lacking in proof and therefore there is no proven disqualifying conduct shown with respect to the minimal narrative disclosures made by Mr. Parker in the San Francisco, Los Angeles, Norwell, Reading, Twenty Nine Palms and Dallas applications. *See Schoenbohm v. F.C.C.*, 204 F. 3d 243, 247 (D.C. Cir. 2000). In the allegedly deficient narrative descriptions the alleged delict was in not providing sufficient detail. But as noted above, Parker properly checked “yes” to question 7(a) and 7(b). Those affirmative answers required Parker to take the next step and provide identifying data (name, interest, call letters, docket number, location). Parker went beyond that data and volunteered a narrative which while lacking significant details, was reasonably responsive to the question. So it would be improper to find willful acts of intentional deceit in the Parker narratives that responded to Questions 7(a) and (b) which were correctly answered “yes.”³⁵

Adequate Allegan Disclosure

228. The Allegan policy was adopted in a comparative proceeding in which qualifying issues were added against a competing applicant. In an attempt to settle the case before deciding the merits of the added issues, the Commission adopted a policy permitting settlement buyouts

³⁵ Question 7 does not ask for the details of findings of “fraud” as does Question 4 to which Parker falsely and repeatedly answered “no”.

where there are unresolved character issues which can be revisited in a later proceeding, license renewal, transfer or assignment. Allegan County Broadcaster, Inc., 83 F.C.C. 2d 371, 373 (1980). In other words, if there had been an unresolved issue in Mt. Baker as to whether Parker intended to deceive in his construction plans, the issue would be required to be fully disclosed under Question 7(d). Similarly, if there was an unresolved real party-in-interest issue in San Bernardino, then that issue would need be fully described. But in both cases, there was nothing that was unresolved: In Mt. Baker, Parker was found to have attempted to “deceive the Commission” and in San Bernardino he was found to have orchestrated a “transpicuous sham.” Question 7(d) asks only about “unresolved character issues.” There were no unresolved issues to be disclosed and Parker did not misrepresent by checking off “no” to Question 7(d) asking for a “yes” or “no” answer on whether there is “any Commission proceeding which left unresolved character issues against the applicant.”³⁶

False And Misleading Amendment

229. The Dallas disclosures in an application and particularly in an amendment, are treated separately because of aggravating circumstances. The “no” answer to Question 7(d) in the Dallas application could have prompted the staff to ask Mr. Parker to file an amendment stating whether basic character issues had been sought or added with respect to any of the applications listed. (Bureau Exh. 2. at 2.) The staff’s question about added issues was over and above information called for by Question 7 and was not limited by Allegan. The amendment that was filed on October 29, 1992, in response to the staff’s query was misleading and lacked candor in stating only:

This will confirm that no character issues had been added or requested against those applicants when those applications were dismissed.

(Adams Exh. 55 at 3.) The Mt. Baker case was not a comparative case and so an added issue would not have been procedurally necessary. But the Commission finding of a Parker contrived “effort to deceive” would have been responsive to the staff’s oral request for basic qualifying information that should have been provided. However, the more offending aspect of the amendment was with respect to San Bernardino. The staff’s question was more open-ended and was directly applicable to San Bernardino wherein a hearing Judge had added a character issue that directly implicated Parker as the undisclosed real party-in-interest who had engineered the scheme. In affirming that determination, the Review Board characterized the ploy as a “transpicuous sham” and an “attempted fraud.” One would be hard put to craft stronger language

³⁶ The Commission facilitated future consideration of unresolved issues by amending its forms (including Forms 314 and 315) “to require full disclosure by an applicant of any interest in an application “dismissed with prejudice” by the Commission, and the underlying circumstances thereof. See 83 F.C.C. 2d at 373. But in both Mt. Baker and San Bernardino, the request for extension of time and the SBBLP application were only “denied” and there were no “dismissals with prejudice.” In fact, Mr. Parker apparently was permitted the right to participate in a San Bernardino settlement. That will not be permitted in the Initial Decision in this case.

to make the point that a character issue had been added against an entity that was controlled by Mr. Parker, the undisclosed operative behind the sham. The aggravation starts with the failure of Mr. Parker to use an inquiry from the staff to finally come clean with respect to his role in San Bernardino. It was insulting under the harsh light that the Review Board had cast on Mr. Parker to advise the staff in a written formal amendment only that "no character issues had been added." One was not only added. It was decided "con brio" against Mr. Parker. Finally, it was a degrading tactic to deliberately withhold material adverse information from the attorney retained to make the filing.

Parker Disclosures Not Involving RBI

230. Phase II focused on Commission forms which required "yes" or "no" answers and narrative descriptions about the facts and circumstances related to filings that described the Mt. Baker and San Bernardino proceedings. It was a truth finding mission. There was no evidence found that Mr. Parker consulted any other officer or director about his disclosures in Commission filings, including the transfer application taking RBI out of bankruptcy. Nor is there any evidence that any other officer or director knew about or had participated in the Parker disclosures before this proceeding was set for hearing. Therefore, the record evidence does not support a separate finding of deceit (or intent to deceive) on the part of the licensed entity, Mr. Parker, as an individual applicant and as an officer of TIBS and RBI, should have provided more detail related to the Mt. Baker and San Bernardino proceedings. But his failure to do so in responding to Question 7 did not involve deceit attributable to RBI. On the other hand, when confronted directly with a staff question as to whether any character issues had been requested or added in any proceeding where he had been a party to the application, Mr. Parker, as president of TIBS, misled his attorney and responded in a less than candid fashion. The processing staff, in the course of its duty, was asking whether there were any questions about Parker's character that should be considered before approving the application. Mr. Parker is experienced and sophisticated in Commission applications and in making disclosures. He must be held to be aware of and responsible for his obligation to be forthright when asked a question by the Commission staff. But RBI should not bear the responsibility.

Parker Testimony Not Involving RBI

231. On a specific point of candor, the Presiding Judge formed an impression, made known in open court, that Mr. Parker appeared to believe that merely disclosing the San Bernardino proceeding's ultimate result was sufficient and that it was up to the staff to look up the case history and read for themselves what the hearing Judge and the Review Board had found as to Mr. Parker. (Tr. 2652.) Mr. Parker denied the accuracy of that impression but his explanation was off-the-point. He offered the circular explanation that when the Commission staff asked the question, the Dallas amendment provided a sufficient answer. (*Id.*) But the amendment could only provide a sufficient answer if the staff looked up the San Bernardino case

history.³⁷ So there is no reason to change that impression in light of Mr. Parker's wholly inadequate Dallas amendment and it is concluded here that the impression formed in hearing the testimony of Mr. Parker was justified. It also shows an added lack of candor for Mr. Parker to now deny the effect of what he clearly said under oath.

232. In contrast with the incomplete Dallas disclosure, there is reliable evidence in this record through the "Gaulke letter" showing that in a context outside of Commission disclosure, Mr. Parker has been selectively more sharing of the facts. (Bureau Exh. 1 at 9-10.) The evidence shows that when substantially the same information about prior character findings was requested and forwarded to Telemundo in connection with a contemplated business transaction, the disclosure was more extensive and, as a result, was closer to the truth about Mr. Parker and his previously adjudicated character. While the letter is not directly relevant to the Phase II issue, it illustrates the level of knowledge that Parker has with respect to the resolved character issues in Mt. Baker and San Bernardino and that the focus and scope of his disclosure depends entirely on his personal interest in making the disclosure. For purposes of this case, such contrasting disclosures illustrate how Parker's self-interested disclosures are not to be trusted. But his lack of candor for purposes of preserving his self-interest should not be attributed to RBI.

Parker's Exclusive Fault Mitigates Against RBI's Disqualification

233. There are mitigating circumstances for RBI to remain qualified to hold a license, provided Parker leaves the scene. See Character Qualifications, supra at 1210 n. 76 (circumstances and other considerations may attenuate consideration of further reliability and truthfulness). The record shows that RBI was in dire financial straits when Mr. Parker appeared on the scene. It was the fact of bankruptcy that brought RBI and Parker together. RBI needed an experienced manager to bring the enterprise out of bankruptcy. A factor that resulted in the court's approval of a Parker crafted reorganization plan included the MSA which gave Parker operational control and a substantial equitable position through Partel. It was soon after the MSA was executed that Mr. Parker challenged RBI's directors, took control, and appointed his own slate of directors. As a result, when he was filing misleading applications, including the transfer application removing RBI from bankruptcy, Mr. Parker was acting alone and without any input, direction or control from RBI's other officers and directors with regard to disclosure.

234. It is expected that Mr. Parker will voluntarily remove himself from all vestiges of control at RBI. As Mr. Parker testified:

if there is to be a penalty imposed, it should be against me alone,
not against RBI to the detriment of RBI's other stockholders.

³⁷ The fact that information is on file elsewhere at the Commission, does not relieve an applicant of its responsibility to furnish the Commission with complete and accurate information when asked. Vogel Ellington Corp., 41 F.C.C. 2d 1005, 1010 (Review Bd 1973), and Folkways Broadcasting Co., 27 F.C.C. 2d 614, 616-617 (Review Bd 1971).

(RBI Exh. 46 at 8.) If Mr. Parker does not honor that pledge, the other directors of RBI might wish to consider his removal from his position of control because as this record illustrates, he cannot be trusted to deal openly with this agency. Commission precedent shows the importance that would attach to Mr. Parker's removal. The Commission has acted favorably towards licensees taking remedial action to remove persons from ownership and control positions who are responsible for misconduct. See PCS 2000, L.P., 12 F.C.C. Rcd 1681, 1688 – 89 (1997) (disqualification not warranted where applicant expeditiously removed CEO responsible for misrepresentation); Faulkner Radio, Inc., 88 F.C.C. 2d 612, 618 (1981) (renewal conditioned on total exclusion of wrongdoer from station operations); and Teleprompter Cable Systems, Inc., 40 F.C.C. 2d 1027 (1973) (no disqualification in case involving criminal misconduct where applicant took rehabilitative step of hiring new management and board members). It is recognized that RBI was a party only to one transfer application and all other applications had no connection with RBI. And the Commission finds that character is more relevant “where an applicant is acquiring, as opposed to transferring.” See Character Qualifications, *supra*, at 1224 n. 103. Therefore, RBI's non-involvement is buttressed by the lesser harm of Parker's misconduct with respect to transfer applications, even though one of the tarnished transfers was for the purpose of gaining RBI's release from bankruptcy, an isolated event not likely to reoccur.

235. The Policy Statement on Character Qualifications, *supra*, 102 F.C.C. 2d at 1217-18 holds that mitigating factors are relevant and must be considered on a case by case basis to determine whether the removal of a principal as the sole wrongdoer will suffice without sanctioning a corporate licensee and its other stockholders. Here there was the further mitigating factor of RBI being subjected to the jurisdiction of a bankruptcy court that limited the authority of the directors. It was the court which approved the MSA that gave Mr. Parker the control, thereby giving judicial assurance to the directors that the licensee was in good hands. Mr. Parker operated alone on disclosures and he could not be effectively controlled by the board of directors. That is particularly true with respect to applications having nothing to do with the license of WTVE(TV) in which Mr. Parker gave false answers to a very specific Question 4. It also was Parker alone who gave inadequate disclosures in an amendment about the issues in the Mt. Baker and San Bernardino proceedings. Even in the case of the disclosures in connection with the transfer removing RBI from bankruptcy, there is no evidence that the directors were consulted or had any control over disclosures made to the Commission for that purpose. And Mr. Parker alone gave the testimony lacking in candor in this proceeding. Since the removal of Mr. Parker would be a sine qua non to RBI's qualification to hold a Commission license, there is no predictive value in Mr. Parker's misconduct insofar as RBI's future broadcast conduct is concerned. Therefore, RBI, removed from Mr. Parker's influence and control, need not be disqualified from holding a Commission license.

Parker's Misconduct Still Attributable To RBI's Renewal Expectancy

236. But RBI cannot disavow Mr. Parker's conduct for purposes of a renewal expectancy. One of the elements for a renewal expectancy is “licensee misconduct.” Cowles Broadcasting, Inc., 86 F.C.C. 2d 993, 1017 (1981). When misconduct is not an isolated event and is not counterbalanced by a showing of substantial broadcast performance, the renewal

expectancy is lost to the renewal applicant. Central Florida Enterprises, Inc. v. F.C.C., 683 F. 2d 503, 509 (D.C. Cir. 1982) affirming Cowles Broadcasting, Inc., supra. In this case, RBI's mediocre programming for the community was not close to substantial. In addition, RBI, through Mr. Parker, was subjected to an unauthorized transfer of control which was unreported. RBI also admitted failures to timely disclose to the Commission the MSA executed in May 1989, the Form 315 transfer application for Station WTVE(TV), an FCC Form 323 ownership report filed in 1992, an Annual Ownership Certification Letter for 1993, and an Annual Ownership Report for 1994. (RBI Exh. 14.) Mr. Parker's conduct as RBI's president must be attributed to RBI in the narrow context of license renewal and therefore, as a result of Mr. Parker's wrongdoings and the Station's deficient programming, RBI cannot receive a renewal expectancy.³⁸

III

Abuse Of Process

237. The Phase III issue was added to determine whether there was substantial evidence showing that Adams filed its application with a purpose of obtaining a payoff. The issue was added after the conclusion of Phase I and following the testimony of Mr. Gilbert on the "background" of the Adams application. (Tr. 994 to 1136.) Mr. Gilbert gave as reason for Adams' filing, his conviction that home shopping programming was inherently flawed in that it cannot meet the duty owed by a broadcaster to address the public interest needs of a community. He also testified to discussions with Telemundo's counsel about a possible settlement. As a result of that testimony, it became necessary to determine the motive or motives for the Adams application and the circumstances of the settlement discussions. See Memorandum Opinion and Order, FCC 00M-07, released January 20, 2000, appeal denied, Memorandum Opinion and Order, FCC 00M-19, released March 6, 2000.

238. The legal test of an "abuse of process" includes the use of a Commission process to achieve a result that the process was not intended to achieve or to make any use of that process to subvert the purpose that the process was intended to achieve. Broadcast Renewal Applicants, 3 F.C.C. Rcd 5179, n.2 (1988). Section 311(d)(1)(3) of the Act permits the Commission to approve a settlement agreement "only if it determines that --- (B) no party to the agreement filed its application for the purpose of reaching or carrying out such agreement." Thus, an abuse of process would include the filing of an application for the purpose of achieving a settlement which would also be a direct violation of §311 of Act. However, the Commission will not infer improper purpose without a specific showing of an improper motivation. WWOR-TV, Inc., 7 F.C.C. Rcd 636 (1992), aff'd sub nom. Garden State Broadcasting Limited Partnership v. F.C.C., 996 F. 2d 386 (D.C. Cir. 1993). It is necessary to evaluate and analyze the relevant evidence surrounding the application and testimony in order to determine motivation.

³⁸ Findings of fraud, misrepresentation and lack of candor require a specific intent and therefore those findings are not attributable to RBI.

239. Underlying this concern for Adams' motives were the circumstances involving these same principals and their earlier settlement. The Adams principals are virtually all the same principals as those of Monroe, the challenger in Chicago. The Monroe application was declared the winner. But rather than construct and operate a station, the principals opted to take a cash settlement of approximately \$17.5 million. The Monroe/Adams principals claim that they would have proceeded to construct and operate in Harriscope but they believed that Monroe would not have been able to produce similar quality Spanish language programming. The settlement order specified that there would be a continuation of Channel 44's "exemplary Spanish language programming."

240. Adams consists of experienced business persons and community leaders who were well aware of the substantial monetary reward that can be achieved as a renewal challenger. With millions of dollars obtained through a settlement and the continued use of the law firm that had succeeded for Monroe, the contest for WTVE(TV) might also result in a favorable monetary settlement. However, the relevance of that awareness is offset by the fact that in 1989, five years before Adams filed, the Commission had addressed shenanigans of renewal challengers and decided to limit settlements to costs and expenses and then only if a challenger remained in the case through an Initial Decision. See Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process, 4 F.C.C. Rcd 4780, recon. denied, 5 F.C.C. Rcd 3902 (1990). Counsel for Adams informed the principals of that policy change through a memorandum dated August 15, 1991. (Adams Exh. 62.) Therefore, with a policy against settlements in place, the Adams principals realistically could not have filed an application with a primary intention of obtaining a settlement. Rather, Adams' motivation for filing was primarily to obtain a construction permit and build a station in Reading, PA. The evidence shows that the Adams principals saw the renewal process as a means to acquire a valuable television broadcast authorization at less than market value. In an effort to achieve that legitimate business goal, the Adams principals were just as prepared to litigate in earnest here as they were in the decade long Harriscope challenge. (Tr. 2429-30, 2465.)³⁹ The mere fact that this cohesive group of experienced business people did not cobble together a written business plan does not convince otherwise.

241. In addition to their business outlook, the Adams principals have evidenced some concern for programming. The Commission has in the past carefully examined evidence of a repeat challenger's concern over programming as evidence of the bona fides of a lawful motive for a challenge. See WWOR-TV, supra at 638-639. In that case, the applicant had at first testified that a concern for programming was what drove the application. But when the date of a key meeting was shown to negate sufficient time to review programming, the challenging applicant lost all credibility. Id. In this case, the record contains un rebutted testimony establishing that Adams principals had concluded before filing that "home shopping"

³⁹ The Monroe principals litigated many years before the Commission and a federal court of appeals. In the order approving settlement, the Commission noted that the Monroe application was not filed to secure a settlement. (RBI Exh.22.)

programming was not providing locally-originated news programming or other programming that served a public interest. (Tr. 2457-58, 2467-68.) In addition, starting in August 1993, almost a year before filing the challenge, Adams' counsel was providing literature to Mr. Gilbert that was critical of "home shopping" programming. (Adams Exhs. 63, 64, 65, 67.) Mr. Gilbert studied the literature upon its receipt and before filing the application. (Tr. 2468-71.)

242. There are other indicia which reject settlement as the overriding motive. Adams considered a range of stations that carried home shopping and initially chose to file in California and later in Boston.⁴⁰ The steps taken to look into the available opportunities were those expected, including a serious search for antenna sites. The searches in California and in Boston would have been a waste of time and money if settlement was the only goal and those unproductive efforts negate an inference of an intent to file for a settlement in Reading. Other credible evidence shows that in addition to site searches, the venture obtained bank financing, hired an engineer to analyze a suitable site, instructed that engineer that local broadcasting capability was a prime concern, methodically reviewed the Station's programming, visited the Reading area and interviewed local persons. While there was a foul up in the taping of programming, it did not prevent Adams from undertaking a plausible assessment of familiar "home shopping" format that was broadcast by Station WTVE(TV). And while no one of these indications of interest is conclusive of motive, in the aggregate, these are significant objective facts that negate an intent to file for settlement.

243. The most significant circumstance of a settlement motive was the discussion in the Spring of 1999. Mr. Parker first approached Mr. Gilbert on a settlement proposal which was summarily rejected as not serious. Telemundo later contacted Mr. Gilbert through Ms. Swanson and broached the subject of settlement for credible business reasons. At that time, Telemundo had an affiliation agreement with RBI to provide Hispanic programming. Telemundo's counsel was aware that there was a serious challenge to RBI's renewal and that there would be a hearing commencing in May 1999. Telemundo saw its RBI affiliation to be in jeopardy and therefore had a business reason to initiate settlement discussions. Adams took the contact seriously enough to share in paying for an appraisal of the Station's market value. But there is no evidence that there was any activity beyond discussion which was never joined in by RBI. Telemundo was probing in order to protect its affiliation status. Adams would have given consideration to a serious settlement offer. With the primary impetus coming from Telemundo, there is no inference from that fact that Adams had filed to settle. Nor would settlement in 1999, or later, effect the convincing item of objective circumstantial evidence which is the Commission policy effectively banning "greenmail" that was in place when Adams filed.

244. In the final analysis, if Adams was primarily interested in repeating a hefty buyout by challenging another renewal, would this sophisticated syndicate have targeted a licensee that was emerging from bankruptcy and obviously short of cash? If a profitable settlement was its prime motive, Adams might have attempted a more ingenious "greenmail" against a renewal

⁴⁰ Adams relies on its certificate of incorporation in Massachusetts as evidence of a bona fide intent to conduct business. The fact that there was an inadvertent lapse in the charter, subsequently cured, is not entitled to any weight and will not be considered as adverse evidence against Adams.

applicant having deeper pockets than a financially wounded RBI. Viewed in a realistic light, a renewal applicant just coming out of bankruptcy would be a highly likely target to compete with for a license because of the likelihood of difficulty for such an incumbent to prove a meritorious renewal expectancy.

Adams' Testimonial Veracity

245. For a finding of an intentional misrepresentation or a lack of candor there must be substantial and reliable evidence that Adams intentionally distorted a hearing record. María M. Ochoa, 8 F.C.C. Rcd 3135, 3137 (1993), aff'd Marie M. Ochoa v. F.C.C., 98 F.3d 646 (D.C. Cir. 1996). Candor in a hearing is important. But there will not be a disqualification for "insignificant misstatements." Fox River Broadcasting, Inc., 88 F.C.C. 2d 1132 n.15 (Review Bd. 1982). It appears that in depositions, filings in this litigation, and in testimony at the hearing, there were varying accounts given by Mr. Gilbert. And in certain respects, Mr. Haag and Mr. Fickinger also gave different testimony than that of Mr. Gilbert. But none of those testimonial disparities significantly distorted the record. Any confusion caused may be attributed to the fact that this case has a complex hearing record that has been in assemblage since May 1999. The Commission recognizes that "errors and inconsistencies [in witness positions and emphasis] are not unusual in cases of this magnitude and complexity." ABC-ITT Merger Case, 9 F.C.C. 2d 289, 324 (1967). There has been a careful analysis of the testimony of Adams principals regarding motive for filing, the Telemundo settlement and programming discussions, the taping episode, and the temporary lapse of Adams' corporate status. The testimony of Adams principals, while not crisp, clear and concise in all respects, has not misrepresented any material facts, has not misstated any facts of decisional significance, has not distorted the record, has not been misleading, and has not been lacking in candor.

Ultimate Conclusions

246. Micheal Parker assumed control without authorization and serially caused RBI to violate the Commission's filing rules. Because of Mr. Parker's filings on behalf of RBI while in control of its management and its Station WTVE(TV), and because of the deficiencies found in WTVE(TV) programming during the renewal period, RBI cannot qualify for a renewal preference.

247. Adams did not file its application for purposes of a settlement. And there are no substantial questions raised with respect to Mr. Gilbert's testimony. Therefore, Adams is fully qualified to hold a license.

248. In light of RBI's failure to show by a preponderance of evidence that it merits a renewal expectancy, diversification, signal coverage and local residence/civic activities become the controlling standards under the "generally phrased standard comparative issue."⁴¹

249. Adams has only one principal with one existing media interest which is pledged to be divested if Adams is declared the winner. Mr. Parker, who is the largest shareholder of RBI and its president, holds licenses to two full power television stations through his ownership of their corporate licensees. Therefore, Adams must be awarded a slight comparative merit for diversification. Pueblo Radio Broadcasting Service, 5 F.C.C. Rcd 4829 (Review Bd. 1990).

250. RBI has failed to show by reliable evidence that it will be able to obtain a new antenna site and construct a new tower. Adams, by comparison, has shown a reasonable likelihood to construct an antenna that will serve 33% more people than Station WTVE(TV)'s current signal presently serves. Therefore, Adams is awarded a slight comparative credit for its projected slightly superior signal coverage. Compare Global Information Technologies, Inc., 8 F.C.C. Rcd 4024, 4031 (Review Bd. 1993) (slight preference for 30 % coverage differential) and Christian Broadcasting of the Midlands, Inc., 99 F.C.C. 2d 578, 583 (Review Bd. 1984) (slight preference for 24 % coverage differential).

251. RBI receives slight credit for local residence and related local civic activities. But those criteria receive a lesser credit than Adams' diversification and superior signal coverage. Policy Statement on Comparative Broadcast Hearings, *supra* at 394 (diversification merits primary significance). Compare Pueblo Radio Broadcasting Service, 5 F.C.C. Rcd 4829, 4832 (excluding credit for integration, diversification and superior coverage should surpass its local characteristics and civic affairs). (Review Bd 1990). RBI deserves an even lesser credit for local residence because of its failure to qualify for a renewal preference in that it failed to adequately service the local issues. The Commission has emphasized the relevance of local residency as showing an interest in the welfare of the community. Edward F. and Pamela J. Levine, *supra* at 8402. RBI has shown a disinterest in the welfare of the community by its meager public service programming and by not qualifying for the preference.

252. Based on the criteria of diversification and better signal coverage compared against local residency and civic affairs which are substantially discounted by unmeritorious programming, Adams is declared the winner.

⁴¹ Implementation of Section 309(j) of the Communications Act, *supra*, 13 F.C.C. Rcd at 16006; Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393, 394 (1965); Bible Broadcasting Network, Inc., 7 F.C.C. Rcd 4578, 4579 (1992).

Settlement Option

253. Both the renewal applicant (without Parker/Partel) and the challenger are found to be basically qualified to receive a Commission license. In view of the phasing out of comparative selection, the Commission has authorized “where the circumstances afford assurance that the competing applications were not filed for speculative or other improper purposes,” the waiving of limitations on settlement payments to dismissing applicants. Implementation of Section 309(j) of the Communications Act, supra at 16006. This expresses a policy permitting settlement of the remaining comparative cases. Id. The Bureau urges settlement as being in the public interest. In light of the findings that RBI, without Parker, is qualified to own or assign its license and that Adams has not abused the renewal process, the parties could settle this case while exception(s) to the Initial Decision are being prepared for submission or are filed and being considered by the Commission.⁴²

254. In deciding this case, Parker is found to be “unqualified” to control RBI’s license because of his unauthorized taking of control, his failures to report timely and accurately, and particularly because of his false answers to Question 4 denying “fraud,” his causing the misrepresented Dallas amendment to be filed, and his lacking in candor in his hearing testimony. Mr. Parker also is found to be “disqualified” from benefiting from any settlement that might be achieved between RBI and Adams. See SL Communications, Inc. v. F.C.C., 168 F3rd 1354, 1358 (D.C. Cir. 1999) (Commission policy was approved which denies the right of settlement to those who act “mendaciously” before the agency). As a result, Mr. Parker is not qualified either to hold any position of control in connection with RBI’s license, or to participate in a settlement between RBI and Adams.

ORDER

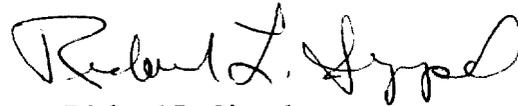
IT IS ORDERED that the renewal application of Reading Broadcasting, Inc. (File No. BRCT-940407KF) IS DENIED.

IT IS FURTHER ORDERED that the application of Adams Communications Corporation (File No. BPCT-940630KG) IS GRANTED.

⁴² Any settlement would be without reference to Mr. Parker who would be expected to honor his pledge and accept a result which is not to the detriment of RBI or to the detriment of RBI’s other stockholders. (RBI Exh. 46 at 8.)

IT IS FURTHER ORDERED that Micheal L. Parker IS FOUND NOT QUALIFIED to hold or control a broadcasting license allotted to Reading Broadcasting, Inc., or to participate in a settlement between Reading Broadcasting, Inc. and Adams Communications Corporation in connection with this proceeding, or in a settlement of this proceeding involving any assignee of either entity.⁴³

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel
Administrative Law Judge

⁴³ In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the decision on its own motion, this Initial Decision will become effective 50 days after its public release pursuant to 47 C.F.R. §1.276 (d).