DOCKET FILE COPY ORIGINAL

Shainis & Peltzman, Chartered

88-577

Counselors at Law

Suite 240
1850 M Street, N.W.
Washington, D.C. 20036

(202) 293-0011
Fax (202) 293-0810
e-mail: shainispeltzman@s-plaw.com

Aaron P. Shainis
Lee J. Peltzman

Of Counsel
William H. DuRoss, III
Robert J. Keller

June 13, 2001

RECEIVED

JUN 13 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie R. Salas, Esq.
Secretary
Federal Communications Commission
Portals II - 12th Street Lobby
Filing Counter - TW-A325
445 12th Street, S.W.
Washington, D.C. 20554

Re: Biltmore Forest, North Carolina
Channel 243A
Motion for Pendente Lite

Dear Ms. Salas:

Transmitted herewith, on behalf of Orion Communications, Limited, is an original and fourteen (14) copies of its Motion for Stay Pendende Lite. Please contact the undersigned in the event the Commission has any question with respect to this filing.

Sincerely,

Lee J. Peltzman
Counsel for
ORION COMMUNICATIONS, LIMITED

Enclosure

No. of Copies rec'd 0+14
List A B C D E

ORIGINAL

\\Sandpntsrv\userdata3\# GC\WZLS017.sbc.doc

RECEIVED
JUN 13 2001
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In re Applications of	)	**MM Docket NO. 88-577**
	)	
LIBERTY PRODUCTIONS, A LIMITED PARTNERSHIP	)	**File BPH-870831MI**
	)	
WILLSYR COMMUNICATIONS LIMITED PARTNERSHIP	)	**File BPH-870831MJ**
	)	
BILTMORE FOREST BROADCASTING FM, INC.	)	**File BPH-870831MK**
	)	
SKYLAND BROADCASTING COMPANY	)	**File BPH-870831ML**
	)	
ORION COMMUNICATIONS LIMITED	)	**File BPH-870831ME**
	)	
For A Construction Permit For A New FM Broadcast Station On Channel 243A At Biltmore Forest North Carolina	)	

To: The Commission

ORION COMMUNICATIONS, LTD.'S MOTION FOR STAY PENDENTE LITE

Stephen C. Leckar
Butera & Andrews
Suite 500
1301 Pennsylvania Ave., NW
Washington, DC 20004
202-347-6785

Lee J. Peltzman
Shainis & Peltzman
Suite 240
1850 M Street, NW
Washington, DC 20036
202-293-0011

Counsel for Orion Communications, Ltd.

TABLE OF CONTENTS

I. SUMMARY 1

II. STATEMENT OF FACTS 4

A. Background. 4

B. Ms. Utter's Testimony Is Consistent In Showing She Made Clear To Ms. Klemmer and Mr. Warner that No Tower Site Was Available. 4

1. Ms. Utter Leases A Tower Site To The Lee Family. 5

2. Ms. Utter Was Not Interested In Further Tower Leases. 5

3. Ms. Utter's Brief Casual Encounter With Liberty Could Not Have Given It The Idea That A Site Was Reasonably Assured. 6

C. The Commission Distorted Ms. Utter's Account And Overlooked Liberty's Effort To Get Her To Sign An Untrue Affidavit. 7

D. Ms. Utter's Prior Consistent Statements. 8

E. The ALJ Heard Liberty's Witnesses And Found Them Dissembling. 9

1. Liberty Was A Hastily Constructed Concoction Whose Purported General Partner Was A "Front" For the Limited Partner. 9

2. Ms. Klemmer Utterly Lacked A Reasonable Assurance Of A Site. 11

III. ARGUMENT 12

A. The Commission Incorrectly Concluded That The ALJ Did Not Make Credibility Findings. 13

B. **The Commission's Reversal of the ALJ's Adverse Credibility Findings Against Liberty Is Not Supported By Substantial Evidence.** 15

1. There Is No Sufficient Evidence To Support Liberty's Claim Of Reasonable Assurance Of Site Availability. 15

2. There Is No Basis To Discredit Ms. Utter's Testimony. 17

C. The Commission Awarded The Station To Liberty, An Unqualified Bidder. 19

D. The Equities Favor A Stay. 20

IV. CONCLUSION 21

Orion Communications Limited ("Orion") requests the full Commission to stay FCC Order, No. 01-129, __ FCC Rcd __ (2001), released May 25, 2001. The Commission intends to grant a construction permit to Liberty Productions, L.P. A stay is requested pending judicial review by the United States Court of Appeals for the District of Columbia Circuit. Absent a stay, Orion will suffer clear irreparable injury.

SUMMARY

In 1990, an Administrative Law Judge (ALJ) found that Liberty had misrepresented and dissembled in claiming site availability both in its license application and in its trial testimony. In 2001, the Commission re-weighed the evidence and the ALJ's findings. Rejecting the ALJ's findings, the Commission decided that Liberty had not misrepresented its site availability. What the original hearing officer viewed as clear and intentional fraud eleven years ago is viewed as a benign mistake today.

Without hearing a single witness, the Commission, by selective quotation and *ipse dixit*, proclaimed that a key witness's testimony was vague and inconsistent. The Commission also reinterpreted the ALJ's adverse credibility findings as to the two Liberty witnesses, and suddenly found them "clear and unequivocal." The Commission's about-face is couched in "Newspeak."[1] It wants to end this drawn-out case and reap as much revenue as possible from its decision, however misguided.[2]

The dissenting Commissioner correctly emphasized that this decision sends the wrong sort of message. But there is something else at stake here: evading regulatory

---

[1] *See George Orwell, 1984* pp. 7, 246-256 (Signet Classic ed. 1981).

[2] The agency may, of course, claim if Liberty's high bid were rejected Liberty would pay a penalty equal to the difference between its bid and the next high bid. Since Liberty's general partner is a schoolteacher and Liberty claims no other assets other than its application, the facial likelihood recovering the difference appears slim in the extreme.

responsibility and eroding administrative credibility. Ms. Vicki Utter, the site owner whom Liberty sponsored, proclaimed time and again that she had given Liberty no reason to think she was offering it a tower site. To re-interpret her testimony, the Commission distorted the ALJ's obvious credibility findings by calling these findings something else. Judges who find a party has "strained credulity" through "feeble" statements *are* making adverse calls on credibility.[3]

To rehabilitate Liberty's witnesses, the Commission issued an administrative ukase that they reasonably believed a site was available. This pronouncement is unsupportable. Liberty's witnesses' testimony not only conflicted with that of Ms. Utter, but also made no sense, since, according to the Commission case law, far more than a "vague willingness to deal" is required before a broadcast applicant can claim reasonable site availability.[4] As the ALJ found, there was not anything approaching that meager level. Liberty's witnesses admitted having no written agreement with the site owner, no agreement on a specific site, and not even discussing the lease's duration. At best, if Liberty were to be believed - which the ALJ declined to do - a vague and uncertain verbal agreement to consider agreeing emerged from a 15-minute chit-chat one day – a day Liberty couldn't even pinpoint.

As the ALJ found, but the Commission ignored, Liberty's application was hurriedly constructed at the last moment. Its purported "General Partner," a schoolteacher named Valerie Klemmer, had no grasp of her obligations as a general partner. Her limited partner, one David Murray, was a shadowy figure to whom she only

---

[3] *See WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1139 (D.C. Cir. 1985).

[4] *Progressive Communications, Inc.*, 3 FCC Rcd 5758, 5759 (Rev.Bd. 1988).

spoke with for about 30 minutes, and only met Mr. Murray for the first time the day of the hearing, years after filling Liberty's application. She knew nothing about Murray's background and to her knowledge he knew nothing about hers. At trial, she demonstrated a woeful ignorance about the industry and indeed, her own application. It was little wonder the ALJ characterized her testimony as "blatantly dissembl[ing]."[5] What she did know is that these licenses are valuable. She was, in essence, a shill being used to get a license to be "flipped."

The Commission cannot reverse the ALJ's credibility-laden factual findings without very substantial reasons.[6] The Commission can only place a different interpretation on the witnesses' accounts, while giving substantial deference to the ALJ's credibility findings. If the Commission's interpretation were correct, if a story the ALJ found "feeble [and] half-hearted"[7] now were credited, it would presumptively mean that Ms. Utter was a chiseler to boot, being willing to formally lease a specific transmitter site for Orion's tower, something everybody recognized,[8] and then less than a week later leading Liberty to believe it was assured the same site. The ALJ saw right through this tale as being a misrepresentation.[9]

Awarding the license to a ringer such as Liberty is further marred by its failure to meet publicly-announced bidding qualifications relating to media interests of immediate

---

5 *In re Nat'l Communications Industries*, 5 FCC Rcd 2862, 2879 ¶ 8 (ALJ 1990), *aff'd*, 6 FCC Rcd 1978 (Rev. Bd. 1981), *aff'd*, 7 FCC Rcd 1703 (1992), *recon. den'd.*, 7 FCC Rcd. 7581 (1992), *remanded Biltmore Forest Broadcasting FM, Inc. v. FCC*, 1994 WL 116196 (D.C. Cir. 1994).

6 *See WHW Enterprises, Inc.*, 753 F.2d at 1141 (citation omitted).

7 *In re Nat'l Communications Industries*, 5 FCC Rcd at 2867, ¶ 49 (Findings).

8 *See id.* at 2867, ¶ 47 & Orion Ex. 4 (Findings and Lease).

9 *See id.* ("Because the Lee lease is for a variable piece of property, a large portion, if not all of the site specified in Liberty's application is probably already leased to Brian Lee") (citations omitted).

family members. However, the terms set forth in the advertisement of an auction for government property prohibit the government from changing auction rules after the hammer has come down.

STATEMENT OF FACTS

A. Background.

In 1991, the Review Board (Board) rejected Liberty's exceptions from the ALJ's findings. The Board found that Liberty's own testimony supported the ALJ's findings that it had no reasonable assurance of a site. Just six days before Liberty's application was due, its witnesses had vague discussions with Ms. Utter, whose "firm denial ... that she had ever given assurance to Liberty that the property would be available" was found credible and controlling.[10]

The Board did not explicitly review the ALJ's findings that Liberty also had lied about having reasonable assurance of a site. But only the element of intent separates showing that Liberty could not meet the basic qualification and the proof necessary to find misrepresentation. The ALJ, who heard Liberty's witnesses, had no difficulty assessing it. He found Liberty's story "strained credulity" and that Ms. Klemmer had "blatantly dissembled in a manner that doesn't befit a prospective broadcast permittee."[11]

B. Ms. Utter's Testimony Is Consistent In Showing She Made Clear To Ms. Klemmer And Mr. Warner That No Tower Site Was Available.

In the spring of 1987, Ms. Utter leased two tracts by her house; one to a Greenville, SC TV station, [12] the other to station WCQS to use a corner of her property as

---

[10] *In re Nat'l Communications Industries*, 6 FCC Rcd 1978, 1979, ¶¶ 9-11 (Rev.Bd. 1991).

[11] *In re Nat'l Communications Industries*, 5 FCC Rcd at 2866-67¶¶ 40-51, 2879 ¶ 8.

[12] *See* Utter Dep. at 6. Extracts from Ms. Utter's deposition, which Liberty presented at the hearing, are attached as Exhibit A.

an easement to access its tower, situated on an adjacent plot.[13] Warner negotiated for that right of way through a lot of telephone calls.[14] Both towers were erected promptly.[15]

1. Ms. Utter Leases A Tower Site To The Lee Family.

Later, Brian Lee telephoned Ms. Utter about leasing a piece of her land to put up an FM radio tower.[16] Shortly afterwards, Mr. Lee, his counsel and Ms. Utter discussed leasing a particular plot for a tower and orally agreed to a five year lease with an option to renew, at an annual rate of $1,500 before the tower was built and $3,000 afterwards.[17] About a week later, about August 21st, Ms. Utter and Mr. Lee executed a lease and she was paid the rent that day.[18]

2. Ms. Utter Was Not Interested In Further Tower Leases.

"[A] lot of people" also telephoned Ms. Utter during this time asking about leasing or buying her property for the new FM tower site.[19] Ms. Utter was absolutely clear as to her intent and what she told people. Two towers were enough:

> Q. They just called on the phone.
> And did any of them indicate that they were interested in possibly leasing the property, since you weren't interested in selling it, for a tower?
>
> A. Yeah.
>
> ***
>
> Q. So you were willing to have two, I guess, because of the lease with Mr. Lee, but you weren't interested in having three; is that right?

---

[13] *See id.* at 6-7.

[14] *See id.* at 7-8.

[15] *See id.* at 10.

[16] *See id.* at 11.

[17] *See id.* at 11-13; 14-15. 18-20.

[18] *See id.* at 15, 16, 19.

[19] *Id.* at 21-22.

A. No, I don't think so. There's not that much room up there.

***

Q. So you basically, in those conversations, told them that you had already entered into two leases and didn't want to enter into any more.

A. Right.[20]

3. Ms. Utter's Brief Casual Encounter With Liberty Could Not Have Given It The Idea That A Site Was Reasonably Assured.

A few weeks after Ms. Utter had leased the property to Brian Lee, Tim Warner and a woman walked down the hill from the WCQS tower. They stood in Ms. Utter's yard for a few minutes, just chit-chatting.[21] The conversation was "just small talk, you know, nothing drastic. And I don't know really. It was – they knew that I had leased Brian a piece of land, and we talked about that."[22]

Ms. Utter pointed out where the Lee tower was to be situated.[23] Ms. Klemmer "just kind of stood there. She didn't say much at all."[24] Neither Ms. Klemmer nor Mr. Warner sought to lease space for a tower site on her property. As Ms. Utter testified, they did not talk "about anything to do with, you know, them and the new FM station."[25] Asked if there was "any discussion about whether [she was] interested in leasing any . . . more of [her] property for a tower," Ms. Utter responded: "I said 'If I ever do this again,

---

20 *Id.* at 22-23.

21 *Id.* at 25-26.

22 *Id.* at 25.

23 *See id.* at 41.

24 *Id.* at 43.

25 *Id.* at 27. *See also id.* at 44 ("This was not like a long, drawn-out conversation.")

I'll get more money out of it, or something to that effect.'"[26] As Ms. Utter testified, the conversation never got down to specifics, such as a lease arrangement similar to the one with Brian Lee.[27]

C. The Commission Distorted Ms. Utter's Account And Overlooked Liberty's Effort To Get Her To Sign An Untrue Affidavit.

Ms. Utter's account of events and her deportment have been consistent. In February 1989, Ms. Utter attested that she had no recollection of meeting Valerie Klemmer or hearing the name "Liberty Productions."[28] Her statement then continued:

> To the best of my knowledge and belief I have never spoken to Ms. Klemmer of any other representative of Liberty. I am certain that I did not give any assurance to Ms. Klemmer, or to any representative of Liberty, that my property would be available to it. At no time did I ever discuss use of my property, much less specific terms of any proposed use, with Ms. Klemmer or any other representative of Liberty.[29]

The majority claimed that "the substance of that statement was largely withdrawn, however after a visit from Warner and Klemmer on March 10, 1989."[30] This is easily deflated. About March 10, 1989, Warner telephoned Ms. Utter. She first thought he was calling to discuss the expiring lease on the WCQS tower site.[31] The next day, he brought Ms. Klemmer by. This jogged Ms. Utter's recollection that she had met Ms. Klemmer briefly and she wrote a correcting statement to that effect.[32] Ms. Utter never retracted

---

26 *Id.*, at 28-29.

27 *See id.* at 30.

28 *See id.* at 33-34 & Ex. 1.

29 Utter Aff. 2/22/89 (emphasis original) (Ex. B attached).

30 *In re Applications of Liberty Productions, L.P., et al*, No. 01-129, _FCC Rcd _ at 31, ¶ 67 (2001).

31 *See* Utter Dep. at 37, 39.

32 *See id.* at 38, 39; *see also* Utter Aff. 3/13/89 (Ex. C attached).

her sworn statement that she never negotiated with Warner and Klemmer and that no one had mentioned Liberty. The majority also overlooked Liberty's effort to get Ms. Utter to sign an untrue statement:

> Q. So then, at that time, when they came back and – came back to the house again, then that was the first time that you remembered.
>
> A. And they had – yes. And they had another document they wanted me to sign saying that yes, I –
>
> Q. That you remembered that you did meet her?
>
> ***.
>
> A. But I didn't sign it, because the last paragraph over on the back said that I would be willing to lease this piece of land to Liberty Productions and Valerie Klemmer. And I told her – I said, "I can't sign that."[33]

D. Ms. Utter's Prior Consistent Statements.

The Commission described Ms. Utter's deposition testimony as "inconsistent."[34] It overlooked, however, Ms. Utter's prior consistent statements and her plausible explanation of why she did not remember meeting Ms. Klemmer. In her statement of March 29, 1989, Ms. Utter wrote that "[a]t that time [when she first encountered Klemmer] or any other time I never gave Valerie the promise or assurance that she could use my land or my name when she filed the application with the FCC."[35] She added "If we had discussed this or I had given her this assurance I certainly would have remembered and I would have been looking for her to make a commitment of some sort. As this did not happen therefore I had forgotten even meeting the lady."[36]

---

33 Utter Dep. at 38.

34 *In re Applications of Liberty Productions, L.P., et al*, No. 01-129, _FCC Rcd_, at 30, ¶ 66.

35 Utter Aff. (3/29/89) (Ex. D attached).

36 *Id.*

The Commission ignores the material consistency in her February 22nd and March 29th affidavit and statement. Ms. Utter consistently stated she never "promise[d] or assure[d] Ms. Klemmer that Ms. Klemmer could use her land, or even her name, for the purposes of Liberty's FCC application."[37]

E. The ALJ Heard Liberty's Witnesses And Found Them Dissembling.

The Commission denigrated the ALJ's adverse credibility findings against Liberty by calling them non-findings.[38] In fact, the ALJ's found that Ms. Klemmer had "blatantly dissembled in a manner that doesn't befit a prospective broadcast permittee"[39] and noted that Mr. Warner was her friend and neighbor,[40] which sheds light on his bias. Further, the Commission's depiction of Ms. Klemmer as having a consistent and detailed account showing her honest, albeit mistaken, belief that she had reasonable assurances of a site does not withstand examination.

1. Liberty Was A Hastily Constructed Concoction Whose Purported General Partner Was A "Front" For The Limited Partner.

Ms. Klemmer, Liberty's purported general partner, is a schoolteacher who, at the time Liberty's application was filed, was married to a real estate lawyer.[41] The Biltmore Forest opening was publicly announced in June 1987. Back then Ms. Klemmer evinced

---

37 *In re Nat'l Communications Industries*, 5 FCC Rcd at 2866 , ¶ 42 (Findings) (citing Utter Aff. 3/29/89; Utter Dep. at 37-38).

38 *See In re Applications of Liberty Productions, L.P., et al,* No. 01-129, _FCC Rcd _ at 25, ¶ 55.

39 *In re Nat'l Communications Industries*, 5 FCC Rcd at 2879, ¶ 8.

40 *See id.* at 2867, ¶ 44 (Findings). Klemmer and Warner were "good friends whose families socialized and took care of one another's babies." Trial Transcript, *In re Nat'l Communications Industries*, at 715-16, 734 (Ex. E attached).

41 *In re National Communications Industries*, 5 FCC Rcd at 2872, ¶ 117; Tr. at 694-95, 703.

no interest. She could not remember when exactly she had learned of this opening.[42] On about August 18, 1987, Mr. Murray telephoned her husband after being referred by a mutual friend. They first discussed the pending opening, and then Ms. Klemmer spoke with Mr. Murray for half an hour.[43] She did not learn anything about his background or broadcast experience and they neither discussed finances nor exchanged financial statements.[44] She only first met Mr. Murray during the July 1989 hearing.[45]

Ms. Klemmer was neither working full-time nor seeking such work when she, her husband, and Murray confabulated.[46] But Murray said the station might be worth $1.5 million[47] and there might be a female preference.[48] Suddenly, Ms. Klemmer decided to become a broadcaster. Her husband or Mr. Murray decided a limited partnership was the way to go.[49] Her understanding of her rights and liabilities was minimal. She held a 35% interest as the General Partner and Mr. Murray a 65% interest as the limited partner.[50] Yet just prior to trial she thought she was only responsible for 35% of the partnership debt.[51] She claimed that she could freely admit more limited partners to the

---

42 *See* Tr. at 702-04.

43 *See id.* at. 702-04, 717.

44 *See id.* at 717, 7 37, 773-78.

45 *See id.* at 738.

46 *See id.* at. 725.

47 *See id.* at 719.

48 *See id.* at 721.

49 *See id.* at 735-36, 816.

50 *See id.* at 728.

51 *See id.* at 728-30.

partnership although the partnership agreement specifically required Murray's consent.[52] Indeed, she didn't know whether Murray would have to pass on any amendment to the agreement, although the document grants him that right.[53] When asked about the projected budget Liberty submitted to the Commission, Ms. Klemmer had no idea whether Liberty obtained any estimates from equipment vendors, did not think she had considered whether there would be a cost for employees, had not considered where the studio would be located or whether it would be built or leased, and couldn't even say what the proposed wattage would be.[54]

2. Ms. Klemmer Utterly Lacked A Reasonable Assurance Of A Site.

Ms. Klemmer also cannot remember when she met Ms. Utter. She also claims, contrary to Ms. Utter, that they arranged in advance to meet.[55] They also conflict over whether Ms. Utter mentioned Brian Lee's lease that had been made days before.[56]

The ALJ's making a credibility choice favoring Ms. Utter over Ms. Klemmer is understandable: Ms. Klemmer never discussed getting a written lease with Ms. Utter or paying her money to lock in the ostensible deal she claimed to have negotiated. Nor did she talk with Mr. Warner afterwards about getting a written lease.[57] In fact, it never occurred to her, or so she said, to get anything in writing.[58] Ms. Klemmer also didn't

---

52 *See id.* at 766-68.

53 *See id.* at 781-82.

54 *See id.* at 745-46, 751-54.

55 *See id.* at 651-52, 654, 685-86.

56 *See id.* at 659, 677.

57 *See id.* at 659-60, 666-67.

58 *See id.* at 680-81.

know how much space Liberty would need for a tower and conceded there was no meeting of the minds about that.[59] A specific site was not "pinned down," either.[60] Nor did anyone even discuss the term of any proposed lease.[61] The most that she had, by her admission, was an "agreement to agree."[62] Even then, she neither asked Ms. Utter to let her know if someone else wanted the space nor asked Warner to monitor developments.[63]

ARGUMENT

A federal court reviewing an agency's decision will set it aside if the decision is "unsupported by substantial evidence" or "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." [64] Therefore, while an agency is not bound by the ALJ's findings, the agency's reversal of the ALJ's decision clearly must be supported by substantial evidence.[65] Moreover, if the agency disagrees with the ALJ's purely factual determinations, such as credibility findings, the reviewing court will customarily give more deference to the ALJ's findings[66] and view the evidence supporting the agency's findings as "less substantial."[67] Such reversals are usually scrutinized more

---

[59] *See id.* at 812-13.

[60] *See id.* at 663.

[61] *See id.* at 810-11.

[62] *See id.* at 661, 673.

[63] *See id.* at 682-83.

[64] 5 U.S.C. §§ 706(2)(A) –(E); *see also Universal Camera v. NLRB,* 340 U.S. 474, 488-91 (1951); *WHW Enterprises, Inc*, 753 F.2d at 1139.

[65] *See WHW Enterprises*, 753 F.2d at 1141. *Universal Camera* defined "substantial evidence" as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." 340 U.S. at 477.

[66] *See Rockwell Int'l Corp. v. NLRB,* 814 F.2d 1530, 1532 (11th Cir. 1987); *Bosma v. U. S. Dept. of Agriculture,* 754 F.2d 804, 808 (9th Cir. 1984).

[67] *Universal Camera*, 340 U.S. at 496.

critically.[68] Some courts even subject the agency's decision to a "special"[69] or "heightened"[70] scrutiny, reasoning that a hearing officer always has a considerable advantage over the agency to make credibility determinations.[71] ALJ's findings are considered even more significant in cases where credibility played an important role.[72]

A. The Commission Incorrectly Concluded That The ALJ Did Not Make Credibility Findings.

The Commission observed that the ALJ did not make any credibility findings against Liberty.[73] It reasoned that since the ALJ did not make any "specific finding addressing the credibility of either Ms. Klemmer or Tim Warner . . . [, and did not] cite any aspect of Ms. Klemmer's demeanor,"[74] the ALJ did not base his conclusion "on any specific credibility findings that are entitled to special deference on review."[75] The Commission erred.

The ALJ's findings 36-51 and his Ultimate Finding 8 were solely devoted to an analysis of the false site certification issue.[76] When deciding that Liberty had made misrepresentations to the Commission about the site availability, the ALJ found:

---

68 *See Chen v. General Accounting Office*. 821 F.2d 732, 734 (D.C. Cir. 1987) (citations omitted).

69 *See Weather Shields Mfg., Inc. v. NLRB*, 890 F.2d 52, 57 (7th Cir. 1989)(*citing Universal Camera*).

70 *See, e.g., Sorenson v. Bowen*, 888 F.2d 706, 711 (10th Cir. 1989).

71 *See, e.g., Parker v. Bowen*, 788 F.2d 1512, 1521 (11th Cir. 1986) (stating that "[t]he notion that special deference is owed to a credibility finding by a trier of fact is deeply imbedded in our law").

72 *See, e.g., Universal Camera*, 340 U.S. at 496.

73 *In re Applications of Liberty Productions*, _FCC Rcd _ at 25, ¶ 55.

74 *Id.* at 25, ¶ 55.

75 *Id.*

76 *See National Communication Industries*, 5 FCC Rcd 2862, 2866-67 ¶¶ 36-51 & 2879 ¶ 8 (ALJ 1990).

"The record clearly justifies the conclusion that when Valerie Klemmer represented to the Commission that Liberty had available the transmitter site specified in their application, she had absolutely no basis for doing so. Moreover, she knew she had no basis for so certifying. To argue that her feeble, half-hearted effort to obtain some of Vicki Utter's land on Bushbee Mountain constitutes 'reasonable assurance' *strains credulity*. No, Valerie Klemmer has blatantly dissembled in a manner that doesn't befit a prospective broadcast permittee."[77]

It is puzzling why the ALJ's findings that (1) Ms. Klemmer had "no basis" for claiming the site availability, and (2) her insistence that there was "reasonable assurance" of the site availability "strain[ed] credulity" did not strike the Commission as the obvious credibility determinations that they are.

The expression that a testimony "strained credulity" was, in fact, used previously by the ALJ in making credibility findings, but never questioned by the Commission or this Court as insufficient.[78] Thus, the Commission arbitrarily concluded that the ALJ did not make any explicit credibility determinations deserving a special deference. Moreover, as other federal courts have held on numerous occasions, the ALJ may, unless directed otherwise by a well-established rule,[79] resolve issues involving credibility implicitly rather than explicitly, particularly where his "treatment of the evidence is

---

[77] *Id.* at 2879 ¶ 8 (emphasis added).

[78] *See WHW Enterprises*, 753 F.2d at 1139. While the ALJ did make other determinations as to the witness' demeanor and lack of candor, any attempt to distinguish this case would be unsuccessful, since the ALJ's conclusion that the witness's testimony "strained credulity" was made in the same breath as the other findings, thus indicating that it was a part of credibility determinations. *See id.*

[79] *See Anderson v. Sullivan*, 914 F.2d 1121, 1123 (9th Cir. 1990) ; *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990) (stating that in cases involving entitlements to social security benefits, the ALJ is required to make explicit credibility findings since a claimant's credibility is a critical factor in the determination of entitlement).

supported by the record as a whole,"[80] as it is here. There is no doubt that the ALJ's conclusions that Ms. Klemmer had "no basis" for certifying that a site was available, and that her testimony "strained credulity" amount to at least an implicit credibility determination, if not an explicit one.

B. The Commission's Reversal of the ALJ's Adverse Credibility Findings Against Liberty Is Not Supported By Substantial Evidence.

The Commission erred in not deferring to the ALJ's credibility findings, as well as in reversing the findings without demonstrating substantial evidence for the reversal. The evidence in support of the reversal does not amount to "more than a mere scintilla" which would be considered by a reasonable person sufficient to make a conclusion.

1. There Is No Sufficient Evidence To Support Liberty's Claim of Reasonable Assurance Of Site Availability.

The Commission first described Ms. Klemmer's testimony as "detailed and lengthy."[81] While her testimony could fit the description of "lengthy," it would be a blatant conjecture to conclude that the detail (and length) of her testimony indicate her true belief that she had reasonable assurance of a site. In fact, Ms. Klemmer only was detailed in demonstrating her ignorance of the basic aspects of being a broadcaster,[82] as

---

[80] *NLRB v. Katz's Delicatessen*, 80 F.3d 755, 765 (2nd Cir. 1996) (citations omitted). *See also NLRB v. Beverly Enterprises-Massachusetts*, 174 F.3d 13, 26 (1st Cir. 1999) (The ALJ does not have to "make 'explicit credibility findings' . . . , so long as his factual findings as a whole show that he 'implicitly resolved' such findings); *Lavernia v. Lynaugh*, 845 F.2d 493, 500 (5th Cir. 1988) ("When . . . trial court fails to render express findings on credibility but makes a ruling that depends upon an implicit determination that credits one witness's testimony as being truthful, or implicitly discredits another's, such determinations are entitled to the same presumption of correctness that they would have been accorded had they been made explicitly").

[81] *In re Applications of Liberty Productions, L.P., et al*, No. 01-129, _FCC Rcd _ at 27, ¶ 58.

[82] *See* Tr. at 745-46, 751-54.

well as miniscule knowledge of the legal consequences of Liberty's business arrangement.[83]

When discussing the really critical portion of Ms. Klemmer's testimony relating to her and Mr. Warner's meeting with Ms. Utter, the Commission fully ignored the facts that Ms. Klemmer: (1) could not remember when she met with Ms. Utter;[84] (2) admitted an exact site was never pinpointed;[85] and 3) claimed that she called in advance to arrange a meeting with Ms. Utter but admitted that she and Mr. Warner found Ms. Utter busy outside getting ready to paint her house and just ended up chatting for 15-30 minutes.[86]

These apparent inconsistencies did not escape the attention of the ALJ, who heard all the evidence and found Ms. Klemmer's claim of reasonable assurance simply not credible. While her testimony about the meeting with Ms. Utter could also be described as "detailed and lengthy," it only demonstrates the meeting's briefness, informality, and vagueness, therefore confirming that such a fleeting chitchat could not have generated reasonable assurance of site.

The Commission also stressed that Ms. Klemmer's testimony was corroborated by the testimony of Tim Warner.[87] The Commission, however, disregarded the fact that Mr. Warner's relationship with Ms. Klemmer as her admitted "good friend and neighbor" clearly indicates his potential bias to testify in Ms. Klemmer's favor. [88] Moreover, the

---

[83] *See id.* at 728-30, 766-68.

[84] *See id.* at 655, 685-86.

[85] *See id.* at 663.

[86] *See id.* at 651-55, 674, 684

[87] *See id.* at 728-30, 766-68.

[88] *See, e.g.*, 3 *Weinstein's Evidence* ¶ 607[3], at 607-37-39 (1996) (citing cases).

Commission should have considered as even a stronger indication of potential bias Mr. Warner's willingness to consider transferring from public to commercial broadcasting.[89]

In any event, the Commission showed no substantial evidence that the ALJ erred in concluding that Ms. Klemmer's testimony "strain[ed] credulity" and that she had "no basis" to claim reasonable assurance of the site availability.

2. There Is No Basis To Discredit Ms. Utter's Testimony.

The Commission also discussed Ms. Utter's testimony during her deposition and the substance of her affidavits.[90] Making conclusory statements about Ms. Utter's testimony, it engaged in purely arbitrary and unsubstantiated reweighing of the evidence.

To demonstrate inconsistencies in Ms. Utter's testimony, the Commission stated that that Ms. Utter's second affidavit substantially retracted the statements in the first one in which she denied having met Ms. Klemmer and Mr. Warner.[91] The Commission, however, failed to observe that the substance of Ms. Utter's insistence that she had never given Ms. Klemmer any reasonable assurance of the site remained unchanged.[92] As Ms. Utter explained with great clarity in her Affidavit of March 13, 1989, she recalled meeting Ms. Klemmer and Mr. Warner only after he had refreshed her recollection.[93]

---

[89] *See* Tr. at 856-57. *See also United States v. Frankenthal,* 582 F.2d 1102, 1106 (7th Cir. 1978) (acknowledging that a witness's interest in the litigation establishes a stronger motivation to testify falsely than does a possible friendship bias).

[90] *See In re Applications of Liberty Productions, L.P., et al,* No. 01-129, _FCC Rcd _ at 30-34, ¶¶ 66-72. While stating that no adverse inferences will be derived from the fact that Ms. Utter did not testify at trial, and acknowledging the fact Liberty sponsored Ms. Utter's testimony, the Commission nevertheless boldly claimed that this will not "obscure the inconsistencies in Utter's various statements and deposition testimony and that, by her own admission, she has little recollection of the events in question." *Id.* at 33 n. 80.

[91] *See id.* at 31.

[92] *See* Utter Aff. 2/22/89; Utter Aff. 3/13/89.

[93] *See* Utter Aff. 3/13/89.

She also explained that because the meeting was so brief, without any anticipated follow-up from either party, she had forgotten about it.[94] Therefore, while the Commission attributes the inconsistency between Ms. Klemmer's and Ms. Utter's testimonies to Ms. Utter's vague memory about what she agreed to during the meeting, Ms. Utter's affidavits and her deposition show that she forgot about it because of its informality and brief duration. The meeting did not result in any legal consequences for Ms. Utter (e.g. an agreement to agree) worthy of remembering. Her testimony and affidavits consistently show that she forgot about the meeting because she did not agree to anything, not that she did not remember what she agreed to during the meeting.

As Ms. Utter explained in her Affidavit of March 29, 1989, "[i]f we had discussed this if I had given her this assurance[,] I certainly would have remembered and I would have been looking for her to make a commitment of some sort. As this did not happened[,] therefore I had forgotten even meeting the lady."[95] The Commission, in fact, outright conceded that "[i]t is in fact *problematic* that Utter, having just signed a lease providing for up-front payments before the license was awarded, would have been willing to consider leasing Valerie Klemmer a portion of her property, for the same purpose without requesting a similar monetary commitment."[96] Instead of acknowledging how this *problematic* fact corroborates Ms. Utter's testimony, the Commission disregarded it and focused on discussing Ms. Klemmer's understanding

---

[94] *See id.*

[95] Utter Aff. 3/29/89. *See also* Utter Dep. at 41-42, 45.

[96] *In re Applications of Liberty Productions, L.P., et al,* No. 01-129, _FCC Rcd _ at 32, ¶ 58.at 71 (emphasis added).

instead.[97] This further demonstrates the Commission's selective and arbitrary treatment of material facts, outside any permissible scope of review of the ALJ's decision.

Therefore, the Commission did not show substantive evidence to conclude that Ms. Utter's refreshed recollection of a very brief and inconsequential meeting with Ms. Klemmer and Mr. Warner almost two years before the trial was in fact a faulty recollection of a vague and undefined "agreement to agree" she simply forgot about. The Commission's overruling of the ALJ's findings was not warranted.

C. The Commission Awarded The Station To Liberty, An Unqualified Bidder.

In its Public Notice announcing the procedures for the Closed Broadcast Auction,[98] the Commission set forth precise and detailed requirements regarding the contents of the Form 175 "short form" application which had to be filed as a precondition to participating in the auction. The Notice in boldface font required "All applicants" to certify under penalty of perjury that the bidder complies with the Commission's policies relating to media interests of immediate family members.[99] Applicants were warned of 47 C.F.R. § 1.2105(b), which provides that a failure to submit required information by the resubmission date will result in dismissal of the application and an inability to participate in the auction.

Liberty's short form application lacked the mandatory certification. It should not have been permitted to participate in the auction. As the Supreme Court has recognized,

---

[97] *See id.* at 32.

[98] *See Notice and Filing Requirements for Action of AM, FM, TV, LPTV, and FM and TV Translator Construction Permits Scheduled for September 28, 1999,* DA 99-1346, released July 9, 1999.

[99] *Policy Statement, Clarification of the Commission's Policies regarding Spousal Attribution,* 7 FCC Rcd 1920 (1992).

once the terms and conditions of an auction are announced, they bind the bidders and the Government alike and cannot be changed after the hammer falls.[100] That concept of basic equality of treatment is a hallmark of administrative law.[101]

D. The Equities Favor A Stay.

Turning to the equities, Orion meets the traditional test for a stay articulated in *Virginia Petroleum Jobber's Association v. FPC* and *Washington Metropolitan Area Transit System v. Holiday Tours, Inc.*[102] If the underlying regulation is flawed by demonstrably faulty reasoning and the irreparable injury, as confirmed here by the accompanying Declaration of Betty Lee, a stay will issue.[103]

A stay will not materially impact any other party. Liberty has not broadcast and will not suffer overriding injury by maintaining the status quo pending review. Nor will the FCC be harmed by a stay of a decision that suffers from facial infirmities. There is a strong public interest in ensuring that administrative agencies obey the law. Conversely, after eleven years, there is no need for haste until judicial review is complete.

---

[100] *See Erie Coal & Coke Corp. v. United States*, 266 U.S. 518, 520 (1925); *Commodities Recovery Corp. v. United States*, 34 Fed. Cl. 282, 290-91 (1995); 7 Am. Jur. 2d *Auctions and Auctioneers* § 17 at 372-73; &A C.J.S. *Auctions and Auctioneers* § 9b at 86-68.

[101] *See Melody Music, Inc. v. F.C.C.*, 345 F.2d 730 (D.C. Cir. 1965).

[102] *Virginia Petroleum Jobber's Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958); *Washington Metro. Area Transit Sys. v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

[103] *Nat'l Ass'n of Farmworkers v. Marshall*, 628 F.2d 604 (D.C.Cir. 1980)(reversing district court and granting stay).

Certificate of Service

I caused a copy of the foregoing to be served this 13th day of June, 2001 to:

By Messenger: Daniel M. Armstrong, Esq., Office of the General Counsel, FCC, 445-12th St., SW, Washington, D.C. 20024; Donald J. Evans, Esq., Fletcher, Heald & Hildreth, 11th Floor, 1300 North 17th St., Arlington, VA 22209 ; and Stephen Yelverton, Esq., Stephen Yelverton, Esq., Yelverton Law Firm, 601 Pennsylvania NW, Suite 900, D.C. 20004.

By First Class Mail: Robert Depont, Esq., P.O. Box 386, Annapolis, MD 21404

By Federal Express Overnight: Timothy Brady, Esq., P.O. Box 71309, Newman, GA 30271;

Stephen C. Leckar

CONCLUSION

The Commission's decision should be stayed.

Respectfully submitted,

Stephen C. Leckar
Butera & Andrews
Suite 500
1301 Pennsylvania Ave., NW
Washington, DC 20004
202-347-6786

Lee J. Peltzman
Shainis & Peltzman
Suite 240
1850 M Street, NW
Washington, DC 20036
202-293-0011