

reports for the years 1991, 1993, and 1995.... While these three reports are all present in the file, the 1995 report is dated December 10, 1997..... SFUSD stands by Mr. Ramirez' certification, but is unable to prove today ... whether this particular supplemental report for 1995, bearing the correct January 1995 date, was in fact in the public inspection file as of August 1, 1997 (as Mr. Ramirez certified)....²¹⁸

Mr. Helgeson testified that he did not recall asking Jerry Jacob, the General Manager at the times such supplemental ownership reports should have been prepared, whether such reports had, in fact, been prepared.²¹⁹ Moreover, as noted above, Mr. Helgeson never spoke with Mr. Ramirez about the basis for his certification, nor does it appear that he ever read Mr. Ramirez's 1998 declaration to determine the asserted basis for that certification.²²⁰

74. In responding to LOI question 2, which, as noted above, asked whether required issues/programs lists were in the PIF as of August 1, 1997, SFUSD represented to the Commission in its Final LOI Response:

Response: Yes. SFUSD and the present management of KALW believe that its public inspection files, as of August 1, 1997, contained all required issues/program lists materials for the entire period in question. Mr. Ramirez, who reviewed the contents of the file ... [so] certified.... Neither KALW's present management nor SFUSD has any reason to disbelieve that certification.

However, when KALW's present management reviewed the issues/program lists file for the period in question ... they did not find ... specifically-prepared lists with respect to all locally-produced programs, but only the nationally-produced NPR issues/program lists....²²¹

²¹⁸ *Id.*, pp. 3-4.

²¹⁹ Tr. 654-55, 1118-24.

²²⁰ Tr. 979-80, 1077.

²²¹ EB Ex. 34, pp. 5-6.

Mr. Helgeson conceded that the statement that NPR lists were in the file when he first looked at it in 2001 was false.²²² Mr. Helgeson also testified that he did not recall anyone putting issues/programs lists in the PIF during either Mr. Jacob's or Ms. Levinson's tenure as General Manager.²²³

75. In responding to the second part of LOI question 2, which asked whether the lists that were in the PIF contained the information required by the rule, SFUSD represented to the Commission in the Final LOI Response:

Response: SFUSD and the present management of KALW(FM) believe that its issues/program lists file contained all information required by then-Section 73.3527, but, as stated above, cannot presently account for a limited number of lists of significant issues that were treated in locally-produced programs.

Details: A very large number of KALW's locally-produced programs contain significant treatments of issues of importance in the San Francisco community.... Likewise, KALW broadcasts a number of National Public Radio (NPR) and Public Radio International (PRI) programs, which, although nationally-produced and distributed, treat numerous issues that are of great significance to the people of San Francisco. Lists and other material regarding both categories of programs are placed and maintained in KALW's public file. Thus, while present management of KALW did not find discrete specifically-prepared program lists for every quarter during the period in question in a format that fits precisely with the language used in then Section 73.3527(a)(7), the file nevertheless contains (and did contain on August 1, 2001 [sic]) the documentation required by the rule and by Form 303's certification.

For each quarter of the period in question, the file contains, at a minimum, a copy of KALW's quarterly program guide.... Also included in this file, for each quarter in the period, are lists of issues of public importance that received significant treatment in nationally-produced programs provided to KALW by National Public Radio. SFUSD believes and avers that these materials were present in the file on August 1, 1997....

In order to permit the Commission to determine whether KALW's existing issues/program materials are sufficient documentation to satisfy the rule, we have enclosed herewith representative samples of what the file contains for each period. These include a copy of KALW's April/May/June 1997 program guide, a

²²² Tr. 1085-86.

²²³ Tr. 651-52, 659-63, 667-68.

list of issues from its locally-produced program *Aids Update* from that same period, the Spring and Summer 1997 Quarterly Issues/Programs List for *City Visions* (also locally-produced), and a representative sample of the NPR issues/program list for the same period....²²⁴

76. In responding to LOI question 4, which inquired about steps taken to correct any problems, SFUSD represented to the Commission in the Final LOI Response:

Steps Taken to Correct Problems. The present General Manager and Operations Manager of KALW(FM) have completely reviewed KALW's public inspection file and made sure that it contains all required documents, reports, and information through to the present. To the extent that any replacement or corrected reports or information might have been required, such corrections have been made. Additionally, the public inspection file is now located in a more secure area, in the general manager's office, where its contents can be made available for inspection to members of the public who request access, but where access can be monitored so that risk of future loss of documents can be prevented. The Operations Manager has been assigned responsibility for maintaining and keeping the public inspection files up-to-date....²²⁵

77. Finally, in responding to LOI question 5, which asked whether, as of the date of the LOI [February 5, 2001], the PIF was complete, and, if not, provide the date when the PIF contained all required materials, SFUSD represented to the Commission in the Final LOI Response:

Response: Yes. As of the date of this response, KALW's public inspection file is now complete. The KALW(FM) public inspection file contained all required materials as of April 5, 2001.²²⁶

78. A comparison of the draft LOI response prepared and sent by counsel to SFUSD and the Final LOI Response filed at the Commission reflects various changes. Notably, the draft response made various claims about what present management found

²²⁴ EB Ex. 34, pp. 6-7. Remarkably, SFUSD did not mention *AIDS Update* when Mr. Ramirez discussed PIF issues/programs lists in his January 17, 1998 Declaration. See SFUSD Ex. 4, pp. 50-51.

²²⁵ EB Ex. 34, p. 8.

²²⁶ *Id.*

or did not find when it reviewed the PIF for the period in question in connection with this inquiry by the Bureau. Specifically, the draft stated

SFUSD and the present management of KALW believe that its public inspection files, as of August 1, 1997, contained all of the issues/program lists for the entire period in question....

However, when KALW's present management reviewed the issues/program lists file for the period in question in connection with this inquiry by the Bureau, they did not find any such lists in that file. Also missing from the file was the original of an issues/program list for the program *City Visions* for the last quarter of 1997.... KALW's present management and SFUSD are unable to explain what may have happened to the missing lists.²²⁷

By comparison, the Final LOI Response represented to the Commission:

SFUSD and the present management of KALW believe that its public inspection files, as of August 1, 1997, contained all of the issues/program lists for the entire period in question....

However, when KALW's present management reviewed the issues/program lists file for the period in question in connection with this inquiry by the Bureau, they did not find for each and every quarter during that period, specifically-prepared lists with respect to all locally-produced programs, but only the nationally-produced NPR issues/program lists. Also missing from the file was the original of an issues/program list for the program *City Visions* covering the last quarter of 1997.

.... Significantly, however, KALW management has discovered that the public inspection file is presently missing one other particular document which should have been there – a three-page listing that summarized significant local issues that had been presented by KALW program producers during the period from June 1995 through July 1997. This list had been in the file in July 1997. In fact, a copy of the document in question had been provided to the Commission as an attachment to Golden Gate Public Radio's Petition to Deny (see Exhibit O to the Petition to Deny, November 3, 1997, but served on SFUSD on December 11, 1997).... SFUSD finds it curious and disturbing that this and other documents seem to be missing at the present time from its public inspection file and cannot account for these strange discrepancies.²²⁸

²²⁷ SFUSD Ex. 21, pp. 4-5.

²²⁸ EB Ex. 34, pp. 5-6. The referenced Exhibit O is the very document upon which Mr. Ramirez supposedly relied in support of his certification to the Commission that all required issues/programs lists had been placed in the PIF. See SFUSD Ex. 4, pp. 50-51.

According to Mr. Helgeson, he never told Mr. Sanchez or Mr. Jenkins that he had found NPR lists when he began reviewing the contents of the PIF in 2001, and he could not recall if he was the source of the claim that the Petition's Exhibit O was missing from the PIF.²²⁹

79. SFUSD's response to the LOI is dated April 5, 2001; however, as noted above, it was not filed with the Commission until April 6.²³⁰ Although Mr. Helgeson's accompanying Declaration is dated April 5, 2001, records of the Sanchez Law Firm reflect that editing of the Final LOI Response was still continuing on April 6.²³¹ Mr. Helgeson acknowledged that his Declaration's assertions that he had received and reviewed a copy of the Final LOI Response and that he had personal knowledge of the factual matters set forth in the response were not accurate.²³²

H. DEPOSITION RESPONSES

80. On September 28, 2004, during discovery in this proceeding, the Bureau deposed Ms. Sawaya in order to develop the record with regard to the three issues

²²⁹ Tr. 1086-91.

²³⁰ EB Ex. 34, p. 1.

²³¹ EB Ex. 35, p. 2 (04/06/2001, SMJ "Final edit and preparation for filing of letter to FCC." ETS "Call to Mr. Campos; conference with Ms. Sawaya; final edit work on FCC letter.").

²³² Compare EB Ex. 34, p. 11, ¶¶ 3 and 4 with Tr. 1071-72, 1107, 1109-11.

designated in the *HDO*.²³³ The Bureau's objectives in deposing Ms. Sawaya were to determine which SFUSD employees or agents provided the information that served as the basis for SFUSD's Final LOI Response, what information each person so provided, and how each person ascertained that information.

81. During her deposition, Ms. Sawaya recalled the details of her efforts to gain employment as Station KALW(FM)'s general manager,²³⁴ as well as many other facts regarding her prior employment.²³⁵ In addition, she recalled the specific activities in which she engaged during her first days on job at the station. For example, she recalled that, within her first few weeks, she worked on the station's upcoming Program Guide, prepared for a fundraiser, and completed and filed delinquent financial reports with the Corporation for Public Broadcasting.²³⁶ Ms. Sawaya also recalled that, when she first started, "Bill [Helgeson] was reviewing the Public File, the Issues Programs List

²³³ At the time of her deposition, the Bureau had opposed SFUSD's then-pending motion to add an issue as to whether meritorious service "is relevant to the Commission's consideration of SFUSD's license renewal application for KALW(FM), San Francisco, California ... and would provide mitigating evidence relevant to some or all of the issues contained in the *Hearing Designation Order*." Request Official Notice of SFUSD Motion to Enlarge, filed September 7, 2004, and Enforcement Bureau Opposition to Motion to Enlarge, filed September 21, 2004.

²³⁴ SFUSD Ex. 18, dep. pp. 361-367. Ms. Sawaya recounted her meeting Mr. Helgeson for coffee sometime in mid-2000 and discussing the job; her visiting SFUSD's website to view the job application; her needing to contact all prior employers for references, and how rigorous that was; the series of interviews in which she participated, and the fact that no one at any time prior to March 1 had advised her of the license challenge.

²³⁵ SFUSD Ex. 18, dep. pp. 356, 358-361. For example, when questioned about her responsibilities in preparing quarterly issues/programs lists when she managed Station KZYX during the latter half of 1995, Ms. Sawaya testified that "it was an NPR station, [so] we would pull the NPR stuff. Well, at that time NPR's website was just being birthed, so there were other ways they got that to us, they faxed it out or they sent it in a packet." *Id.* at 359.

²³⁶ SFUSD Ex. T-3, pp. 6-7.

specifically.”²³⁷ Ms. Sawaya discussed in detail the station’s process of generating quarterly issues/programs lists, which “was to pull from, at that point the NPR website, the Issues/Programs List from NPR, and to collect from the producers basically a who, what, how, when, where, why sheet for the public affairs programs.”²³⁸ She also related moving the PIF into a locked cabinet in her office sometime prior to the April 6 filing of the Final LOI Response.²³⁹

82. When presented with the LOI at her deposition, Ms. Sawaya was asked whether she had seen the letter before. Her response was:

I might have, I cannot say for sure. My guess is, and this is only a guess, that I have not or that I did not, but quite frankly, sir, I really don’t remember.²⁴⁰

Almost immediately thereafter, Ms. Sawaya was asked whether she had been asked by anyone to respond to the LOI’s first directive (question). Her response was: “No.”²⁴¹

She was then asked did she know whether anyone at the station was asked to respond to that question. Her response was: “I don’t know.”²⁴² Identical responses followed similar questions relative to the remaining questions in the LOI.²⁴³

83. Later in her deposition, Ms. Sawaya was shown SFUSD’s Final LOI Response and asked whether she had seen it before. She responded by stating that she

²³⁷ SFUSD Ex. 18, dep. p. 391.

²³⁸ *Id.*, p. 371.

²³⁹ *Id.*

²⁴⁰ *Id.*, p. 368.

²⁴¹ *Id.*, p. 369.

²⁴² *Id.*

²⁴³ *Id.*, pp. 369-70.

had seen it in draft form. She was then asked whether she had been asked to provide any information or comments relative to the letter. In response, Ms. Sawaya stated that she could not remember.²⁴⁴ A short while later, Ms. Sawaya was asked whether she had “any role, whatsoever, in providing substantive information that appears in the response....”²⁴⁵ She did not answer the question directly; instead, she replied that she had “wanted to talk to the station’s lawyer and find out what was going on.”²⁴⁶ Ms. Sawaya then recounted that she felt that she, Ms. Wright, and Dr. Ackerman needed to be briefed by Mr. Sanchez.²⁴⁷ Ms. Sawaya explained that she had wanted Mr. Sanchez to “get something happening with regard to the license challenge,” and that, when he promised to draft a response, she “never connected it to this [the LOI response].”²⁴⁸ Ms. Sawaya claimed that she “was still trying to figure out how to use the copier” and that, given the complexities of the situation, she “didn’t want to come to any quick judgments, especially given the fact that some people were still at the station that were involved in this.”²⁴⁹ Ms. Sawaya testified that she had not looked at the PIF until “like my second week there [at the station], because I had three days off, after I started I had a brief time

²⁴⁴ *Id.*, pp. 370-71.

²⁴⁵ *Id.*, p. 374.

²⁴⁶ *Id.*

²⁴⁷ *Id.*, p. 375.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

off . . . I couldn't be at work."²⁵⁰ Ms. Sawaya recalled that, by mid-March, the PIF appeared to be in good order:

[there were] nicely labeled Issues Programs Lists from the nineties, they had NPR and a couple of the public affairs shows, they also had a Program Guide in them, I saw that there was the contour map, I saw the engineer's statement, it looked like everything was fine.²⁵¹

84. In her April 29, 2005, direct testimony, however, which was prepared several months after SFUSD had turned over documents obtained from the Sanchez Law Firm, Ms. Sawaya acknowledged that she had drafted two memos on March 8, 2001, related to the Commission's LOI.²⁵² The lead sentence of one of her March 8 memos reads "In response to the letter from the FCC."²⁵³ This sentence is followed by five numbered paragraphs, each of which corresponds exactly with the five numbered questions of the LOI and discusses what Ms. Sawaya found, or did not find, in the PIF. Ms. Sawaya testified at the hearing that she had used the LOI as a guide in formulating the substantive responses she provided in preparing her memo.²⁵⁴ Ms. Sawaya further testified that she, Mr. Helgeson and Ms. Wright had been involved in bringing the 1999, 2000, and 2001

²⁵⁰ *Id.*, p. 376. At the hearing, Ms. Sawaya acknowledged that she was out of the office for only one work day – Friday, March 9, not the three work days that she had implied at her deposition. *See* Tr. 1388-90. *See also* SFUSD Ex. 16.

²⁵¹ SFUSD Ex. 18, dep. pp. 375-76.

²⁵² SFUSD Ex. T-3, p. 9. *See also* EB Ex. 20, EB Ex. 21. As noted earlier, the Bureau's First Document Request, which called for production of documents including those related to the "preparation, approval, filing and maintenance" of issues/programs lists and ownership reports, had been served on SFUSD on September 14, 2004. *See* EB Ex. 41, p. 5 (Requests 7 and 9). Subsequent document requests, served on SFUSD on December 29, 2004 and January 27, 2005, ultimately resulted in production of Ms. Sawaya's memos as well as additional documents related to her activities in March 2001.

²⁵³ EB Ex. 21.

²⁵⁴ Tr. 1365.

ownership reports up to date, which were enclosed in the memorandum she mailed to Mr. Sanchez.²⁵⁵ Ms. Sawaya also testified that she and others were involved “in the process” of completing the PIF, by which she meant that quarterly issues/program lists were being created.²⁵⁶

85. An e-mail from Mr. Sanchez to Ms. Jenkins dated March 6, 2001, reports that:

Nicole and Bill called today to review their work on the FCC’s questions. They will be sending draft answers by the end of the week. They are pleased we are asking the 30 day extension.²⁵⁷

Billing records from the Sanchez Law Firm confirm that: Mr. Sanchez, Mr. Helgeson, and Ms. Sawaya had a conference “re work on responses to recent letter from the FCC mass media bureau [sic]; review request for extension of time to Commission.”²⁵⁸ On March 15, billing records from the Sanchez Law Firm reflect that Ms. Jenkins “[r]eviewed memo and attachment from Ms. Sawaya and Mr. Helgeson for response to FCC re public file,” and that, on the following day, she and Ms. Sawaya had a 15 minute telephone conference.²⁵⁹ On April 2, Ms. Jenkins billed SFUSD 10 hours for “[w]ork on response to FCC letter, including numerous telephone conversations with Mr. Helgeson and Ms. Sawaya.”²⁶⁰ And on April 5, the day before SFUSD filed its Final LOI Response, Mr. Sanchez billed SFUSD for five and one half hours, which included

²⁵⁵ Tr. 1346.

²⁵⁶ Tr. 1361.

²⁵⁷ EB Ex. 17.

²⁵⁸ EB Ex. 35, p. 1.

²⁵⁹ *Id.*

²⁶⁰ *Id.*, p. 2.

“conference with Ms. Sawaya; work on response to FCC; numerous conferences with Mr. Helgeson.”²⁶¹

86. In a memo dated March 20, 2001, to David Campos and Jackie Wright, Mr. Helgeson reported that “[w]orking with Nicole Sawaya, Mr. Sanchez is answering” questions to the FCC’s February 2001 letter.²⁶² In her e-mail inquiry about Mr. Sanchez’s progress in drafting the LOI response, Ms. Sawaya notes that the “public file is now in excellent order including past years in question.”²⁶³ Two days later, Mr. Sanchez advised Ms. Sawaya and others by e-mail that he would be circulating the draft reply shortly.²⁶⁴ On April 3, Ms. Sawaya sent an e-mail to Mr. Sanchez, with copies to Mr. Campos, Ms. Wright, and Mr. Helgeson regarding background discussions related to the license challenge.²⁶⁵ On April 3, Mr. Helgeson sent another e-mail to Ms. Sawaya, Mr. Campos, and Ms. Wright, advising them that he had had a one-hour conversation with Mr. Sanchez and Ms. Jenkins regarding the LOI response and “what documents were (or should be) in KALW’s public file ... ownership reports, quarterly issue reports and donor lists.”²⁶⁶ Later that day, Mr. Sanchez sent his draft response to the LOI to Mr. Campos

²⁶¹ *Id.*

²⁶² EB Ex. 48.

²⁶³ SFUSD Ex. 19, e-mail dated March 26, 2001, from Ms. Sawaya to Mr. Sanchez with copies to Mr. Campos, Ms. Wright, and Mr. Helgeson.

²⁶⁴ EB Ex. 24, e-mail dated March 28, 2001, from Mr. Sanchez to Ms. Sawaya, copies to Mr. Campos, Ms. Wright, and Mr. Helgeson.

²⁶⁵ SFUSD Ex. 20.

²⁶⁶ EB Ex. 27. That same day, Mr. Helgeson sent another e-mail to Mr. Sanchez, with a copy to Ms. Sawaya, in which he described the impact of the 1989 earthquake on the stations. *See* SFUSD Ex. 9.

with copies to Ms. Sawaya, Ms. Wright, and Mr. Helgeson.²⁶⁷ On April 5, Mr. Helgeson sent Ms. Jenkins an e-mail, with a copy to Ms. Sawaya, advising that he would be faxing various quarterly NPR and other issues reports to the law firm.²⁶⁸

87. In her written testimony, Ms. Sawaya stated that she prepared for her deposition by reading GGPR's Petition to Deny and the *HDO*.²⁶⁹ Both documents discuss in detail what was, or was not, in the PIF at various relevant times. Most notably, paragraph 17 of the *HDO*, within the section titled "Misrepresentation," specifically references excerpts from SFUSD's Final LOI Response of April 6, 2001, such as the licensee representation to the Commission that "SFUSD and its present management also believe that all required supplemental reports were" in the PIF.²⁷⁰ The *HDO* even contains a footnote explaining that "present management," as defined in SFUSD's March 6, 2001, letter requesting an extension, would have included the "new general manager," Ms. Sawaya.²⁷¹ Nevertheless, Ms. Sawaya attributes her deposition testimony to the fact that:

[b]ecause I arrived so late in the renewal process, I did not anticipate that I would be asked detailed questions from the March/April 2001 period or the April LOI response, and I did not review the LOI or the response prior to my deposition.²⁷²

Rather, she testified that she had expected to be "asked to discuss what the Station was

²⁶⁷ SFUSD Ex. 21.

²⁶⁸ SFUSD Ex. 10.

²⁶⁹ SFUSD Ex. T-3, p. 9.

²⁷⁰ *HDO*, 19 FCC Rcd 13326, 13333.

²⁷¹ *Id.*, note 37.

²⁷² SFUSD Ex. T-3, p. 9.

doing on the programming front and its fiscal situation and [her] role in bringing it to its current status.”²⁷³ In an e-mail dated sometime on or after July 19, 2005, a mere two months before her deposition, however, Ms. Sawaya articulated her understanding of the issues in the *HDO*, including that “the issue at hand is FCC regulations around what must be in a station’s public file, not whether we ‘think’ our programming is public service or not.”²⁷⁴ Moreover, at the time of her deposition, the issue of whether evidence of meritorious service would be permitted had not yet been ruled upon.

88. Finally, with regard to her failure to recall her efforts in providing information responsive to the LOI, Ms. Sawaya attributed her loss of memory to the claim that she “had not seen the March 8 memo in over three and a half years,” that she “wasn’t asked about the memo at the deposition,”²⁷⁵ and that she “was not told of the document until some time afterwards.”²⁷⁶ Ms. Sawaya also claimed that she did not keep a hard copy of her March 8, 2001, memo, because “it is not my practice to print paper

²⁷³ SFUSD Ex. T-3, p. 9.

²⁷⁴ EB Ex. 57 (e-mail from Ms. Sawaya to Mr. Sanchez and Jackie Minor, copy to Mr. Helgeson, dated on or after July 19, 2004).

²⁷⁵ At the time the Bureau deposed Ms. Sawaya, SFUSD apparently had not authorized the Sanchez Law Firm to turn over its files related to KALW’s license challenge. Request Official Notice of Declaration of Nicole Sawaya, executed March 2, 2005, included in SFUSD’s “Opposition to Enforcement Bureau’s Motion to Enlarge Issues,” filed March 2, 2005. (According to Ms. Sawaya, Mr. Campos did not send a written request authorizing the Sanchez Law Firm transfer SFUSD’s files to Hogan & Hartson until January 2005, in connection with the Bureau’s Second and Third Requests for Documents.

²⁷⁶ SFUSD Ex. T-3, p. 9.

copies of electronic documents and place them in a file.”²⁷⁷ Ultimately, however, Ms. Sawaya admitted that her March 8 memo was, in fact, stored in her computer, although supposedly in a directory, “MyDocs” (which she claims she typically did not access), as a result of a technician’s filing them there after restoring her computer’s hard drive.²⁷⁸ Ms. Sawaya did not provide any explanation as to her failure to recall having even seen the LOI, notwithstanding her having had multiple conversations regarding the LOI with Mr. Helgeson and attorneys from the Sanchez Law Firm during the relevant time period.

²⁷⁷ SFUSD Ex. T-3, p. 10. Ms. Sawaya’s explanation that it is not her “practice to print documents” does not address the fact that the March 8 Memoranda had been printed and physically mailed to the Sanchez Law Firm.

²⁷⁸ SFUSD Ex. T-3, p. 10.

III. PROPOSED CONCLUSIONS OF LAW

A. OVERVIEW

89. As noted above, the two basic issues specified in the *HDO* focus on whether SFUSD falsely certified to the Commission that its public file was complete and, whether SFUSD thereafter misrepresented facts or lacked candor with regard to the Renewal Application's certification about Station KALW(FM)'s PIF. Subsequently, the Presiding Judge added an issue that focused on the truthfulness of SFUSD's responses to the Bureau's deposition questions in this proceeding. The Bureau submits that the record evidence establishes that SFUSD's Renewal Application certification that its public file was complete was knowingly false. In addition, in attempting to defend that certification, SFUSD repeatedly misrepresented facts or lacked candor in an effort to persuade the Commission that the PIF was complete or that its employees and agents may have misunderstood the relevant Commission requirements. Consequently, notwithstanding Station KALW(FM)'s meritorious service to its community, SFUSD's repeated deceptions warrant denial of the station's Renewal Application.

B. FALSE CERTIFICATION/MISREPRESENTATION/LACK OF CANDOR

90. A potentially disqualifying false certification is a misrepresentation or lack of candor made by an applicant in the context of an application.²⁷⁹ Misrepresentation and lack of candor are simply different aspects of deceit. They differ only in that the former involves false statements of fact, while the latter involves concealment, evasion, and

²⁷⁹ See *In re Application of LUJ, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 16980, 16982 (2002); *In the Matter of Certification of Financial Qualifications By Applicants for Broadcast Station Construction Permits*, Public Notice, 2 FCC Rcd.2122 (1987).

other failures to be fully informative.²⁸⁰ To be disqualifying, the false statement or failure to be fully informative must be accompanied by intent to deceive. Intent can be shown in many ways. If a party makes a false statement that he knows is false, that is sufficient proof of intent to deceive. "[T]he fact of misrepresentation coupled with proof that the party making it had knowledge of its falsity [is] enough to justify a conclusion that there was fraudulent intent."²⁸¹ Intent to deceive can also be inferred when a party has a clear motive to deceive.²⁸² Moreover, intent can be found when the surrounding circumstances clearly show the existence of intent to deceive, even if there is no direct evidence of a motive.²⁸³ On the other hand, false representations that result from negligence, while not condoned, do not rise to the level of disqualifying misconduct.²⁸⁴

1. FALSE CERTIFICATION

91. The record evidence establishes that SFUSD's unqualified "Yes" response to Section III, Question 2 of the Renewal Application – "Has the applicant placed in its public inspection file at the appropriate times the documentation required by Section 73.3526 and 73.3527? If No, attach as an Exhibit a complete statement of explanation." – was knowingly false. The record evidence shows that SFUSD did not create or place in Station KALW(FM)'s PIF at least two required supplemental ownership reports until

²⁸⁰ *Fox River Broadcasting, Inc.*, Order, 93 FCC 2d 127, 129 (1983).

²⁸¹ *Leflore Broadcasting Co. Inc. v. FCC*, 636 F.2d 454, 462 (D.C. Cir. 1980).

²⁸² *See, e.g., RKO General, Inc.*, 4 FCC Rcd 4679, 4684 (Rev. Bd. 1989).

²⁸³ *American International Development, Inc.*, 86 FCC 2d 808, 816 n.39 ("The Board is correct that the absence of direct evidence of motive is not significant where the record otherwise clearly establishes that deceptive conduct has occurred.")

²⁸⁴ *In re Application of Pinelands, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 6058, ¶ 25 (1992).

months after it certified and filed the Renewal Application.²⁸⁵ Likewise, the record evidence establishes that, once Daniel del Solar left as the Station's General Manager in 1992, SFUSD did not create or place in Station KALW(FM)'s PIF anything that remotely resembled the required quarterly issues/programs lists until July 1997, and at that time only a partial effort was made.²⁸⁶ The record evidence further shows that Mr. Ramirez, who was Station KALW(FM)'s General Manager in 1997 and the SFUSD agent who prepared the Renewal Application, knew that such was the case.²⁸⁷

92. At the time of SFUSD's 1997 renewal application, then-section 73.3615 of the rules required, *inter alia*, that the Station KALW(FM) PIF contain certain ownership reports. Specifically, the rule required, *inter alia*, that licensees file supplemental ownership reports with the Commission whenever there was a change in the members of the governing body of the licensee and that they also place such reports in their station's public inspection file.²⁸⁸ Thus, because of elections in 1992, 1994 and 1996, all of which resulted in some changes in the membership of the BOE,²⁸⁹ SFUSD should have filed supplemental ownership reports with the Commission and placed them in Station KALW(FM)'s PIF within 30 days after the new BOE members officially assumed their duties in 1993, 1995, and 1997, respectively. However, SFUSD provided no evidence whatsoever that it ever filed supplemental ownership reports with the Commission in

²⁸⁵ Findings, ¶¶ 16, 20, 36.

²⁸⁶ Findings, ¶¶ 13, 16, 19-20, 26, 28, 32.

²⁸⁷ Findings, ¶¶ 16, 18-23, 26, 28, 34-35.

²⁸⁸ 47 C.F.R. § 73.3615(f), (g) (1996) (EB Ex. 59).

²⁸⁹ See, e.g., EB Ex. 5, p. 77.

1993 or 1995, and the only evidence regarding the placement of those two reports in the Station KALW(FM) PIF shows that such did not occur until December 1997, after GGPR had filed its Petition alleging that the station's PIF lacked those reports and other required materials.²⁹⁰

93. Similarly, then-section 73.3527(a)(7) of the rules required SFUSD to place issues/programs lists on a quarterly basis in the Station KALW(FM) PIF during the license term under review.²⁹¹ Again, the evidence shows that SFUSD did not do so. In this regard, SFUSD provided no evidence whatsoever that the Station KALW(FM) General Managers following Mr. del Solar and prior to Mr. Ramirez, or that Mr. Helgeson, the station's long-time Operations Manager, oversaw the creation of such lists or their placement in the PIF. Moreover, although SFUSD provided declarations from various program producers that station programs served the public interest during the 12-month period prior to the filing of the Petition, none made any claim that he or she prepared quarterly lists regarding those programs, gave such lists to anyone at Station KALW(FM), or placed any such lists in the Station KALW(FM) PIF.²⁹² Further, of the three producers who ultimately prepared such lists, John Covell, Chuck Finney, and Alan Farley, only Mr. Covell did so by the time of the Renewal Application. Even then, the first list created by Mr. Covell, which covered *City Visions* programs since the show's inception in 1992, was not placed in the Station KALW(FM) PIF until July 1997. Mr.

²⁹⁰ Findings, ¶ 36. SFUSD did not submit the supplemental ownership report due after the 1996 election until August 1997 when such report was included with the captioned renewal application.

²⁹¹ 47 C.F.R. § 73.3527(a)(7) (1996) (EB Ex. 59).

²⁹² See Findings, ¶ 26 and n. 68, and ¶ 45 and n. 121.

Covell only began to create quarterly lists for *City Visions* programs after the Renewal Application was filed.²⁹³ Moreover, there is no evidence that Mr. Farley or anyone else created a quarterly list regarding the *AIDS Update* program until such a list appeared as an attachment to SFUSD's Final LOI Response in April 2001.²⁹⁴ Finally, Mr. Finney's Declaration and accompanying exhibits make plain that he did not create quarterly lists for the *Your Legal Rights* program until 2004. The lists that he had previously created were annual ones, and there is no evidence as to when any portions of such lists were actually placed in the PIF.²⁹⁵

94. The PIF's incomplete state was first brought to Mr. Ramirez's attention by Station KALW(FM)'s long-time Chief Engineer, Mr. Evans, in August 1996.²⁹⁶ Mr. Ramirez acknowledged in his January 17, 1998 Declaration that Mr. Evans had spoken to him about the PIF.²⁹⁷ Shortly after receiving the Renewal Application Materials from the Commission in May 1997, Mr. Ramirez finally focused on the PIF and became more acutely aware of its shortcomings.²⁹⁸ Following his reading of the pertinent rule, an NAB memo and, presumably, the pertinent Renewal Application instructions, Mr. Ramirez

²⁹³ See Findings, ¶ 26 and n. 68. Had such lists been created earlier, one would expect that Rose Levinson, the host of *City Visions* and the station's General Manager immediately before Mr. Ramirez, would have attested to doing so. She did not.

²⁹⁴ Given Mr. Farley's long tenure and role at Station KALW(FM), one would expect that he could attest to when the *AIDS Update* program list was first created. He provided no such information.

²⁹⁵ See Findings, ¶ 26 and n. 68, *citing* EB Ex. 2.

²⁹⁶ See Findings, ¶¶ 16, 41.

²⁹⁷ See *id.*

²⁹⁸ See Findings, ¶¶ 18, 22.

knew that the PIF had not been kept up-to-date as the rules required, as he had not done anything in that regard since his becoming General Manager.²⁹⁹ In addition, Ms. Hecht's June 1997 report to Mr. Ramirez, after she had reviewed the state of the PIF at his request, later verified by Mr. Lopez, made plain that supplemental ownership reports after 1991 had not been placed in the PIF and that issues/programs lists had not been placed in the PIF after the summer of 1992.³⁰⁰ Mr. Ramirez's own review of the PIF verified the information contained in Ms. Hecht's report.³⁰¹ Consequently, he then knew that previous General Managers had not placed required documents in the PIF at the times required by the rules. Had there been any question about what his predecessors had or had not done, Mr. Ramirez could have consulted with Ms. Levinson and/or with Mr. Jacob. There is no evidence that Mr. Ramirez did not do so even though the former still worked at the station and the latter remained in the San Francisco area following his departure from Station KALW(FM).³⁰² Finally, to the extent that he conversed at all about the PIF with Mr. Sanchez – and the evidence derived from the Sanchez Law Firm billing records and the reasonable inferences drawn from SFUSD's failure to produce any statement from Mr. Sanchez or anyone else connected with the law firm suggests that such conversations were extremely brief, if they occurred at all³⁰³ – Mr. Ramirez also

²⁹⁹ See Findings, ¶¶ 15-16, 22-25, 35.

³⁰⁰ See Findings, ¶¶ 20-21, 32.

³⁰¹ See Findings, ¶¶ 18, 21.

³⁰² See EB Ex. 41, p. 2 (Jacob)

³⁰³ See Findings, ¶ 25.

knew that he could not truthfully certify that required documentation had been placed in the PIF at the times required by the rules.

95. Further evidence that Mr. Ramirez knew of the PIF's shortcomings appears when he responded to GGPR's Petition Memo insofar as it attacked the PIF's shortcomings in early October 1997 and acknowledged to Mr. Sanchez that the PIF did not contain required ownership information or issues/programs lists.³⁰⁴ To the extent that Mr. Sanchez had any doubts about Mr. Ramirez's assessment, such doubts would have been dispelled by the PIF's inventory that Mr. Ramirez sent to Mr. Sanchez in mid-October 1997.³⁰⁵ In this regard, had the inventory shown that the PIF contained the proper documentation one would have expected SFUSD to have produced it. SFUSD did not do so, nor did it argue in its Opposition that an inventory of the PIF showed it to be complete.

96. In sum, the record evidence demonstrates that SFUSD's certification about the PIF was knowingly false. Moreover, the inferences that can reasonably be drawn from SFUSD's failures to address evidentiary gaps are entirely consistent with that evidence and support the conclusion that SFUSD's Renewal Application certification was

³⁰⁴ See Findings, ¶¶ 34-35.

³⁰⁵ See Findings, ¶ 37.

knowingly false.³⁰⁶

2. ADDITIONAL MISREPRESENTATIONS/LACK OF CANDOR

97. In addition to the false certification, SFUSD repeatedly averred or suggested deceitfully that the Station KALW(FM) PIF had been maintained in accordance with the Commission's rules and that, if anything was subsequently missing from the PIF, it was because GGPR took it from the PIF and did not return it. SFUSD's deceitful representations occurred in its January 1998 Opposition, its Final LOI Response, and during the testimony of Station KALW(FM) managers in depositions and during the hearing.

98. SFUSD's Opposition falsely claimed that SFUSD did not violate any Commission rule. In disputing GGPR's allegations that SFUSD failed to maintain the PIF in accordance with the rules and that Mr. Ramirez knew such when he falsely certified otherwise, SFUSD's approach was to make light of GGPR's evidence and, as a fall-back position, blame GGPR for any missing materials, and/or argue that Mr. Ramirez might have made an honest mistake.

99. More particularly, with respect to supplemental ownership reports, SFUSD side-stepped GGPR's allegation that such reports had not been timely placed in the PIF

³⁰⁶ See *Washoe Shoshone Broadcasting*, Decision, 3 FCC Rcd 3948, 3953 (Rev. Bd. 1988) ("The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party. 2 WIGMORE ON EVIDENCE § 285 (1940); see also McCORMICK ON EVIDENCE § 272 (1984) (espousing the 'classic' statement of the law to be that 'if a party has it peculiarly in its power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable' (footnote omitted)).")

by pointing out that the Renewal Application question upon which GGPR relied concerned only the filing of the most recent ownership report with the Commission. SFUSD lacked candor by saying nothing about creating 1993 and 1995 supplemental ownership reports and placing them in the PIF in December 1997, just one month before its Opposition, even though Mr. Ramirez knew that such had occurred.³⁰⁷ Likewise, with respect to issues/programs lists, SFUSD in its Opposition argued that Ms. Hecht's report could not be trusted, that Mr. Ramirez learned nothing of substance from either Mr. Evans or Ms. Hecht, and that, in any event, Mr. Ramirez had honestly answered the Renewal Application question about the PIF.³⁰⁸ In this regard, SFUSD relied on Mr. Ramirez's January 17, 1998 Declaration and Mr. Helgeson's companion Declaration to claim that both of them undertook efforts to maintain the PIF in accordance with the rules throughout Mr. Ramirez's tenure as General Manager, which began in August 1996.³⁰⁹ In effect, SFUSD argued that it had properly maintained the PIF; however, if any rule violations occurred, they were minor in nature, as its current General Manager had, throughout his tenure, maintained the PIF, as required by the rules. This scenario was pure fiction.

100. The record evidence shows that, contrary to his January 17, 1998 Declaration representation that review and updating of the PIF had occurred from the time he had been alerted to the PIF by Mr. Evans in August 1996, Mr. Ramirez did not

³⁰⁷ See Findings, ¶¶ 39, 43.

³⁰⁸ See Findings, ¶ 44.

³⁰⁹ See Findings, ¶¶ 41, 46.

even look at the PIF until May or June 1997.³¹⁰ Hence, his claim and that of Mr. Helgeson that review and updating of the PIF were part of an ongoing process that had begun since Mr. Ramirez had become General Manager³¹¹ were flatly untrue. Moreover, with respect to the supplemental ownership reports, Mr. Ramirez's January 17, 1998 Declaration lacked candor by failing to disclose that he had not found the 1993 or 1995 supplemental ownership reports in the PIF, by failing to acknowledge the accuracy of Ms. Hecht's report, which noted that the last supplemental ownership report for SFUSD was dated January 31, 1991, and by failing to disclose that he had overseen the placement of supplemental ownership reports for SFUSD as of 1993 and 1995 in the PIF in December of 1997. Likewise, with respect to issues/programs lists, Mr. Ramirez's January 17, 1998 Declaration lacked candor by failing to disclose that he had not even asked anyone to prepare issues/programs documentation until July of 1997.

101. The deception continued when Mr. Ramirez declared that he believed that he had fully accounted for all public issues/programs during his tenure listed in the Petition's Exhibit O.³¹² On the contrary, Mr. Ramirez knew full well that Station KALW(FM)'s public/issues programming during his tenure covered many more programs than *City Visions*, the only program referenced in the Petition's Exhibit O.³¹³ Additional deception occurred when Mr. Ramirez falsely claimed that he had relied on advice of counsel, an NAB memo and his own review of the PIF to support his

³¹⁰ See Findings, ¶ 18, 22.

³¹¹ See Findings, ¶ 46.

³¹² See Findings, ¶ 44.

³¹³ See Findings, ¶ 45.

certification that the licensee had placed all required documentation in the PIF at appropriate times.³¹⁴ His claims of reliance are incredible. First, there is no evidence as to what advice, if any, Mr. Sanchez provided that Mr. Ramirez could possibly have relied on. SFUSD never proffered anything from Mr. Sanchez that suggested that he had any knowledge whatsoever about the contents of the PIF until October 1997, when Mr. Ramirez answered GGPR's Petition Memo's points about the deficiencies in the PIF and sent Mr. Sanchez an inventory of the PIF.³¹⁵ Second, the NAB memo, as well as the Renewal Application instructions and the pertinent rule (47 C.F.R. § 73.3527), clearly informed Mr. Ramirez that issues/programs lists had to be placed in the PIF on a quarterly basis, something that Mr. Ramirez knew had not occurred during his tenure or those of his immediate predecessors.³¹⁶ Finally, Mr. Ramirez's own review of the PIF (as opposed to his first glance), which did not occur until at least late May of 1997, made clear to him that the PIF was missing required documentation.³¹⁷ Consequently, even if he gave no credence to Ms. Hecht's report – a claim which the Bureau submits is not credible – Mr. Ramirez knew that the PIF had not been maintained in accordance with the rules. His claims and suggestions to the contrary to the Commission were knowingly deceptive.

102. As noted above, SFUSD's deception in its January 1998 Opposition did not end with Mr. Ramirez. Mr. Helgeson's January 16, 1998 Declaration correctly identified

³¹⁴ See Findings, ¶ 44.

³¹⁵ See Findings, ¶¶ 34-35.

³¹⁶ See Findings, ¶¶ 22-24

³¹⁷ See Findings, ¶¶ 18, 22.