

389. In order to have “disqualifying misconduct” the Commission must find that “the fact of misrepresentation” is “coupled with proof that the party making it had knowledge of its falsity,” the *sine qua non* factors necessary for finding fraudulent intent. *Leflore Broadcasting Co. v. FCC*, 636 F.2d 454, 462 (D.C. Cir. 1980). The record evidence establishes that at the time Messrs. Ramirez and Helgeson affirmed their January 1998 Declarations that neither intended to deceive the Commission.

**C. There was No Misrepresentation or Lack of Candor by SFUSD with Respect to SFUSD’s April 2001 Response to the LOI**

390. The weight of the evidence also establishes that SFUSD did not intend to mislead or deceive the Commission in connection with the April 2001 Response to the LOI.

391. The April 2001 Response discussed the 1989 Loma Prieta earthquake and its deleterious effect on the Station and its subsequent relocation in temporary facilities. The April 2001 Response also reiterated the Station’s belief that its files had been compromised in 1997 by the actions of GGPR and its members. (EB Exh. 34 at 2.)

392. Although the April 2001 Response answered “Yes,” in response to LOI Questions Nos. 1 and 2, it also stated that materials relating to the license term were not presently in the PIF or were dated after the application certification date. For example, the April 2001 Response specifically acknowledged that the 1995 Ownership Report was dated December 10, 1997 instead of 1995, and that there were not for each quarter during the period specifically-prepared issues/programs lists. (EB Exh. 34 at 3-5.)

393. The April 2001 Response also explicitly explained the basis for the “Yes” responses to the LOI questions as to the completeness of the PIF as of August 1, 1997 (Questions

Nos. 1 and 2), namely that such “Yes” responses were based on the fact that Mr. Ramirez had certified compliance in August 1, 1997 and “SFUSD and KALW’s present management have no reason to disbelieve Mr. Ramirez’s certification.” (EB Exh. 34 at 3-5.)

394. Mr. Helgeson provided a Declaration to the April 2001 Response, certifying as to its accuracy. (EB Exh. 34 at 11.) However, Mr. Helgeson has testified that he did not personally inventory the contents of the PIF in 1997, and generally had no substantive involvement in the preparation of the License Renewal Application, which was a role handled by then-GM Ramirez. (SFUSD Exh. T2 at 7, 15.) As a consequence, Mr. Helgeson did not have personal knowledge as to whether the PIF was in compliance with the Commission’s requirements when the License Renewal Application was submitted on August 1, 1997. Mr. Helgeson understood that SFUSD’s counsel knew that he “had no independent basis in 2001 for reaching a conclusion about the completeness of the PIF in 1997.” (SFUSD Exh. T2 at 15-16.)

395. Mr. Helgeson testified that while he knew that the PIF was incomplete when he reviewed it in February/March 2001, but he relied on the assumption that Mr. Ramirez had done his job properly when he prepared the PIF certification in 1997. “Believing that Jeff [Ramirez] and the lawyers would have handled the renewal application process carefully and appropriately, I did not doubt Jeff’s statements in the renewal application. I simply thought if Jeff said the file was complete on July 30, 1997, it had been.” (SFUSD Exh. T2 at 15-16.)

396. As noted above, Mr. Helgeson assumed that if documents were missing from the PIF after Mr. Ramirez had filed the License Renewal Application, and GGPR had removed documents from many of KALW’s files, than GGPR also could have removed items from the PIF. (Tr. 767-68.) There is no evidence that Mr. Helgeson received a copy of Mr. Ramirez’s

October 1997 Memo that acknowledged mistakes made in the License Renewal Application certification, nor that he was involved in discussions between Mr. Ramirez and Attorney Sanchez in the Fall of 1997 that acknowledged those errors, nor that Mr. Helgeson read Mr. Ramirez's January 1998 Declaration. (SFUSD Exh. T2 at 15-16; Tr. 979-80,1186-87, 1197.)

397. Ms. Sawaya, who began her employment at the Station on March 1, 2001, also did not have personal knowledge of the contents of the PIF as of August 1, 1997. (SFUSD Exh. T3 at 7-8.) Notwithstanding her lack of personal knowledge, she provided communications counsel her candid assessment of the state of the PIF in her March 8 Memo, in which she assumed that due to the incompleteness of the file at the time of her review, and the late-dated 1993 and 1995 Ownership Reports, that the responses to Question Nos. 1 and 2 to the LOI should be "No." (EB Exh. 21 at 1.)

398. The other personnel at SFUSD involved in the process of responding to the LOI, Ms. Wright and Mr. Campos, also were new to duties involving the Station (SFUSD Exh. 20) and as a consequence could not be expected to have personal knowledge of the state of the PIF in 1997.

399. At the time of the response to the LOI, Mr. Ramirez was not employed by SFUSD, and was not consulted to review the responses to the LOI. (SFUSD Exh. T1 at 19; Tr. 1021, 1077.) There is no evidence that Mr. Ramirez gave the October 1997 Memo to anyone else besides the Sanchez Law Firm.

400. Thus, the only individuals involved in the response to the LOI who had interacted on a substantive basis with Mr. Ramirez regarding his personal knowledge of the state of the PIF as of August 1, 1997, were the attorneys at the Sanchez Law Firm.

401. Nor at that time had there been an amendment filed to the License Renewal Application that, consistent with Mr. Ramirez's October 1997 Memo and January 1998 Declaration, would have revised the response to Question 2 of Section III to "No" with an explanation of the violation. It was not until after new counsel was retained and the conduct of discovery in this proceeding that such an amendment was filed. (SFUSD Exh. 76.) (June 2, 2005 Renewal Application Amendment updates Question 2 of Section III of the Form 303-S to reflect that the correct response should be "No, with explanation.")

402. That certain requisite items were missing from the PIF in 2001 does not inexorably lead to the logical conclusion that such items were missing from the PIF on August 1, 1997. That is particularly the case given that the PIF was not maintained in a secure area at the Station and because of the history of antagonistic acts by Station employees and volunteers, including the documented access and copying of private, confidential files and e-mail correspondence to support the GGPR Petition to Deny. (SFUSD Exh. 4 at 74-75; Tr. 767.)

403. Thus, it was not unreasonable that the individuals at SFUSD involved in the response to the LOI would defer to the legal assessment of the Sanchez Law Firm as to the appropriate response as to the state of the Station's PIF as of August 1, 2001.

404. In particular, it was not unreasonable for Mr. Helgeson, the only SFUSD employee whose tenure dated back to 1997, and who knew that the Sanchez Law Firm had worked directly with Mr. Ramirez in submitting the License Renewal Application and responding to the GGPR allegations (SFUSD Exh. T2 at 15) to assume the appropriateness of the Sanchez Law Firm's drafting of "Yes" responses to LOI Questions 1 and 2, and that such

responses were based on the knowledge obtained by the Sanchez Law Firm while working with Mr. Ramirez.

405. It is unfortunate that, for whatever reason, the Sanchez Law Firm failed to address the patent inconsistency between the affirmative responses in the April 2001 Response to LOI Questions Nos. 1 and 2 and the contrary statements in Mr. Ramirez's October 1997 Memo and January 1998 Declaration when either drafting or finalizing the April 2001 Response. (*Compare SFUSD Exh. 5 at 3 with SFUSD Exh. 6 at 1.*)

406. As noted above, the April 2001 Response attached a Declaration from Mr. Helgeson attesting to the accuracy of the factual statements in the Response. (EB Exh. 34 at 11.) Mr. Helgeson was directed to execute his declaration – which had been prepared by the Sanchez Law Firm – without reviewing the final draft of the April 2001 Response. (Tr. 1065.) Mr. Helgeson believed that the District's communications counsel, who had a long history and extensive knowledge of the Station, would prepare a response to the LOI informed by the information he provided. Consequently, he executed the declaration without carefully reviewing the draft response, and without receipt of the final response that was still being edited by the Sanchez Law Firm. (SFUSD Exh. T2 at 14; Tr. 1012, 1187.)

407. In reviewing the final April 2001 Response at hearing, however, Mr. Helgeson identified several items that, given the opportunity, he would have advised the Sanchez Law Firm were incorrect. (Tr. 1086, 1096.)

408. Mr. Helgeson, who provided the supporting declaration to the April 2001 Response, should have exercised more diligence by carefully reviewing the Draft Response and by insisting on receiving a copy of the final response before executing his declaration. While as

noted above Mr. Helgeson did not have independent knowledge of the state of the PIF in 1997 and therefore would not have been expected to correct the inappropriate “Yes” responses, he did have knowledge that certain items, such as the downloaded NPR lists, had been recently placed in the PIF. If Mr. Helgeson had carefully reviewed the April 2001 Response before it was submitted, he would have been able to correct the mistaken narrative that stated that materials such as the NPR lists “were present in the file on August 1, 1997.” (See EB Exh. 34 at 7.)

409. Persuasive evidence of Mr. Helgeson’s innocent intent is that he made no attempt to change the date of download (3/14/01) printed on the NPR quarterly programs lists placed in March 2001 in the PIF, including the sample list provided to the Sanchez Law Firm to file with the April 2001 Response. (See, e.g., EB Exh. 34 at 71-82). Likewise, the notes of Attorney Jenkins of her March 2001 conversation with Mr. Helgeson that the issues/programs lists were “All done now,” and that the 1995 Ownership Report was placed in the PIF on December 10, 1997, confirms Mr. Helgeson’s direct testimony that he discussed with the Sanchez Law Firm that there were items missing from the file and he would recreate records to bring the PIF up-to-date. (EB Exh. 25; SFUSD Exh. T2 at 12.)

410. The Station’s and District officials’ reliance on the Sanchez Law Firm for responses relating to the state of the PIF as of August 1, 1997 was reasonable. Attorney Sanchez was the Station’s long-standing communications counsel and had the only knowledge derived directly from Mr. Ramirez about the state of the PIF in August 1997.

411. However, Mr. Helgeson inappropriately placed too much faith in the ability of SFUSD’s communications counsel to draft a factually correct response to the LOI without his careful review as it pertained to the state of the PIF in 2001.

412. Mr. Helgeson also assumed that others at SFUSD and the Station (specifically, Mr. Campos, Ms. Wright and Ms. Sawaya) would be in a better position than himself to carefully review the response to the LOI, notwithstanding that they were all too new to their positions to overrule factual statements or legal conclusions laid out by the Sanchez Law Firm in the April 2001 Response.

413. Mr. Helgeson may be an able Operations Manager but he is not sophisticated in legal matters; the mistake by Mr. Helgeson in assuming accuracy by long-standing, knowledgeable counsel does “not have the malignant quality of gross neglect . . . .” *See Empire Broadcasting Corp.*, 63 F.C.C.2d 634, 639 [¶ 16] (1977). 10/

414. The record evidence, including confirming notes taken by legal counsel, is that Mr. Helgeson was frank with outside communications counsel as to the contents of the PIF in 2001, and assumed those facts would be accurately conveyed by such counsel to the Commission in the response to the LOI. *See Abacus Broadcasting Corp.*, 8 FCC Rcd 5110, 5113 (1993) (“Although the Commission is reluctant to excuse an applicant’s procedural deficiencies because of the alleged malfeasance of counsel . . . the Commission has been equally reluctant to impute a disqualifying lack of candor to an applicant where the record shows good faith reliance on counsel.”). Furthermore, Mr. Helgeson’s admission that there were errors in the April 2001 Response and his failure to make any effort to back-date additions made to the PIF are further evidence that Mr. Helgeson did not intend to deceive the Commission. Thus, this case is readily

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<sup>10/</sup> Moreover, following Mr. Helgeson’s deposition testimony in which he frankly admitted that the attested statement in the April 2001 Response that the NPR program lists would have been in the PIF in August 1997 was inaccurate (SFUSD Exh. 15 at 319-20), he was relieved from any further duties relating to the PIF at the Station. (SFUSD Exh. 45.)

*distinguishable* from those instances where the Commission has found acts of intentional misrepresentation. *Cf. Eastminster Broadcasting Corp.*, 58 F.C.C.2d 24 (1976) (licensee found to have made misrepresentations where principal regularly signed a supply of blank affidavits of performance without controlling their use; continued to do so even after learning they had been misused to double bill; and recklessly disregarded his bookkeeper's warning that affidavits requested by another principal were inconsistent with station records.)

**IV. THERE WAS NO MISREPRESENTATION OR LACK OF CANDOR IN DEPOSITION TESTIMONY BY MS. SAWAYA OR MR. HELGESON**

415. The Presiding Judge also set for hearing the added issue of whether there was intentional deception during deposition testimony taken by the Enforcement Bureau on September 28, 2004. *Order*, FCC 05M-17 (ALJ Sippel rel. April 1, 2005), *as revised, Addendum*, FCC 05M-20 (ALJ Sippel rel. April 5, 2005) ("Enlargement Order"). On that date, at deposition, Ms. Sawaya indicated that she was not involved with the substance of SFUSD's response to the LOI. *Enlargement Order* at 3-4. Similarly, Mr. Helgeson testified that he did not know or did not recall supplying certain factual details in connection with April 2001 Response to the LOI. (EB Motion to Enlarge at ¶¶ 5-6.)

416. Both Ms. Sawaya and Mr. Helgeson appeared at hearing and were the subject of lengthy examination. There was ample opportunity to evaluate candor and demeanor. *Ronald Brasher*, 18 FCC Rcd 16707 (ALJ Steinberg 2003); *Gerard Turro*, 15 FCC Rcd 14649 (2000); *TeleSTAR, Inc.*, 2 FCC Rcd 5 (Rev. Bd. 1987). There was no evidence adduced in the record or at hearing to suggest that Ms. Sawaya or Mr. Helgeson intentionally attempted to deceive the

Commission as part of the deposition process. To the contrary, their depositions and hearing testimony were candid, forthright and consistent with the record.

417. Months after Ms. Sawaya's deposition, SFUSD received several documents from the Sanchez Law Firm including a single page memorandum that Ms. Sawaya had prepared on March 8, 2001 (the "March 8 Memo") which set forth her initial impressions as to how the LOI should be answered. *See* Declaration of N. Sawaya in Support of SFUSD's Opposition to Enlarge Issues, dated March 2, 2005 at ¶ 5. The March 8 Memo was not provided to Ms. Sawaya in advance of her deposition. *Id.* There were no questions asked regarding the memo at her deposition, nor was it presented to her or her counsel -- Ms. Sawaya did not, on her own, recall it. *Id.* at ¶ 10.

418. Ms. Sawaya's failure to – on her own – recall a single, specific, three-and-a-half-year old document, without being asked about it or provided a copy, does not approach the level of willful misrepresentation or a lack of candor. "The Commission demands of its licensees and applicants absolute candor, but it cannot and does not expect infallibility." *Swanco Broadcasting, Inc.*, 40 F.C.C.2d 753, 755-56 [¶ 6] (1973). At her deposition of September 28, 2004, Ms. Sawaya never denied or minimized her involvement in the response to the LOI prepared by the Sanchez Law Firm. To the contrary, Ms. Sawaya repeatedly described her review of the PIF and her review of a draft of the LOI response prepared by the Sanchez Law Firm. (SFUSD Exh. 18 at 355, 376, 389, 390, 391, 394, 396.)

419. With respect to Mr. Helgeson's deposition testimony, the Bureau alleged that Mr. Helgeson "stated that he did not know or did not recall supplying the factual details set forth

in [the April 2001 LOI] response, notwithstanding that he had supplied the only verifying declaration to the response.” (Motion to Enlarge at ¶¶ 4-6.)

420. Mr. Helgeson was legally blind at the time of his deposition and while he can with difficulty review documents, or have them read to him, he has explained that he generally does not receive the mental impressions of documents that sometimes help people refresh their memories. (SFUSD Exh. T2 at 16-17.) Mr. Helgeson’s visual handicap was also evident at hearing during live testimony at the hearing.

421. Mr. Helgeson testified at his deposition and confirmed at hearing that he did not (and did not presently) have personal knowledge of what was in the KALW PIF on August 1, 1997. (SFUSD Exh. 15 at 24, 32, 36-37.) All of Mr. Helgeson’s knowledge regarding the contents of the PIF on August 1, 1997 stems from reviewing the certification signed by Mr. Ramirez. (SFUSD Exh. 15 at 36-37) (“I based my ‘yes’ on his ‘yes.’”) (*see also*, SFUSD Exh. 15 at 11, 15, 23-24, 52, 54.) Mr. Helgeson did not receive a copy of the Berchenko Letter, nor was Mr. Helgeson privy to communications between Mr. Ramirez and Mr. Sanchez regarding the accuracy of the August 1, 1997 certification, nor had Mr. Helgeson read Mr. Ramirez’s January 1998 Declaration. (SFUSD Exh. T2 at 15-16; Tr. 979-80, 1186-87, 1197.)

422. There was no evidence adduced at hearing to suggest that Mr. Helgeson made any intentional misrepresentations and/or lacked candor with respect to his involvement in the Opposition, the April 2001 Response to the LOI or in any other representation to the Commission during his tenure at KALW.

**V. SFUSD HAS ESTABLISHED THAT KALW HAS SERVED THE PUBLIC INTEREST, CONVENIENCE, AND NECESSITY, THERE HAVE BEEN NO SERIOUS VIOLATIONS OF THE COMMUNICATIONS ACT OR THE COMMISSION'S RULES, AND THERE HAVE BEEN NO VIOLATIONS THAT, TAKEN TOGETHER, SHOW A PATTERN OF ABUSE, THEREBY WARRANTING RENEWAL OF ITS LICENSE TO OPERATE KALW**

**A. The Commission Has Broad Discretion in its Choice of Remedies and Sanctions For Violations of Its Rules**

423. The Commission has broad discretion in its choice of remedies and sanctions for violations of its rules. *RKO General, Inc. v. FCC*, 670 F.2d 215, 237 (D.C. Cir. 1981); *Leflore Broadcasting Co., Inc. v. FCC*, 636 F.2d 454, 463 (D.C. Cir. 1980); *Lorain Journal Co. v. FCC*, 351 F.2d 824, 831 (D.C. Cir. 1965). The Commission relies on the truthfulness and reliability of licensees. These traits are demonstrated by the willingness or unwillingness to comply with the law generally and the Communications Act and the Commission's rules in particular. *Policy Regarding Character Qualifications In Broadcast Licensing*, 102 F.C.C.2d 1179, 1188-91 (1986) ("Character Policy Statement"); see also *Policy Regarding Character Qualifications In Broadcast Licensing*, 5 FCC Rcd 3252 (1990), modified, *Memorandum Opinion and Order*, 7 FCC Rcd 6564 (1992).

**B. The Commission Has Held That Forfeiture, Rather than Non-Renewal Is the Proper Sanction for Violations of the PIF Rules**

424. Where required documents were not placed in the PIF -- including situations where significant portions of the public inspection file were incomplete, or even where the entire file itself was missing -- the Commission has repeatedly held that forfeiture, rather than non-renewal, is the appropriate sanction. See, e.g., *Letter to James P. Riley, Esq.*, 19 FCC Rcd 11242 (Audio Div., Media Bur. 2004) (assessing forfeiture for seven years of missing

issues/programming lists); *Letter to Susan A. Marshall, Esq.*, 19 FCC Rcd 11222 (Audio Div., Media Bur. 2004) (assessing forfeiture for three years of missing issues/programming lists); *Tralyn Broadcasting, Inc.*, 19 FCC Rcd 4709 (Enforcement Bur. 2004) (assessing forfeiture for PIF missing station authorization, the Public and Broadcasting Manual, letters from the public, and two years of issues/programming lists); *Hemmingford Media, Inc.*, 14 FCC Rcd 2940 (Compliance and Information Bur. 1999) (assessing forfeiture where PIF was either non-existent or, at mislabeled; when FCC agents requested and described the PIF, the station operator “had never heard of such a file”); *Letter to Central Coast Communications, Inc.*, 14 FCC Rcd 10024 (Mass Media Bur. 1999) (forfeiture for PIF deficiently maintained for three to four years).

425. Despite an earthquake, office moves and ultimate relocation, the District maintained a PIF throughout the license term. (SFUSD Exh. T2 at 4-5.) As acknowledged elsewhere, the PIF was not always maintained in accordance with applicable Commission rules. (SFUSD Exh. 76.) Nonetheless, former GM Ramirez attempted to bring the PIF into compliance prior to submitting the License Renewal Application. (SFUSD Exh. T1 at 14.) Subsequent to learning that the PIF may have been incomplete, the Station has endeavored to maintain the PIF in accordance with applicable rules and regulations. (SFUSD Exh. T1 at 18-19, SFUSD Exh. T2 at 12-13, SFUSD Exh. T3 at 23; SFUSD Exh. 76.)

426. Consequently, at most, forfeiture, as opposed to non-renewal is the appropriate sanction for SFUSD’s admitted violation of 47 C.F.R. Section 73.3527.

**C. SFUSD Has Acted in Good Faith in Its Representations to the Commission**

427. When looking towards the appropriate sanction for misdeeds by licensees, the FCC has looked to the good faith of the licensee, as shown by its taking remedial measures, *Barinowski Investment Co.*, 20 FCC Rcd 1361, 1363 (Enforcement Bur. 2005) (reduction in forfeiture when remedial measurements were planned), consultation with counsel, *Asheboro Broadcasting Co.*, 20 F.C.C.2d 1, 2 (1969), and compliance programs or procedures, *Bay Broadcasting Corp.*, 18 FCC Rcd 20207, 20208 (Media Bur. 2003) (licensee's correction of internal procedures with regard to PIF warranted reducing forfeiture); *cf. WSUA Broadcasting Corporation*, 20 FCC Rcd 4231 (Media Bur. 2005) (consent decree resolves issues of PIF violation and misrepresentation when renewal applicant, *inter alia*, adopted PIF compliance plan). SFUSD has demonstrated such good faith.

428. SFUSD made reasonable efforts to comply with a complicated and confusing area of law. Mr. Ramirez is not a lawyer and had not previously been tasked to complete a renewal application. (SFUSD Exh. T1 at 10.) Mr. Ramirez reviewed and relied upon several sources in preparing the License Renewal Application. (SFUSD Exh. T1 at 13; SFUSD Exh. 4 at 50.) For many sections of the application, Mr. Ramirez looked to the expertise of others to inform his responses. (SFUSD Exh. T1 at 13-14; SFUSD Exh. 4 at 50.) Mr. Ramirez acknowledges that he did not recognize or appreciate the complex nuances of the PIF requirements. (SFUSD Exh. 4 at 50.) Nonetheless, the reasonable efforts of Mr. Ramirez to comply with a complex regulatory scheme constitutes good faith. *Chicago Federation of Labor and Industrial Union Council*, 54 F.C.C.2d 477, 482-83 [¶¶ 20-22] (ALJ Fitzpatrick 1975) (efforts made to classify "public affairs

programming” were reasonable given that the definition of “public affairs” is “confusing” and the Commission itself acknowledges that “classification is not an easy task”).

429. Moreover, promptly after discovering that Mr. Ramirez may have misunderstood the application requirements, the Station took remedial steps to supplement the PIF. (SFUSD T1 at 18; Tr. 544; SFUSD Exh. 7.) *See also Barinowski Investment Co.*, 20 FCC Rcd 1361, 1363 (Enforcement Bur. 2005) (remedial measures taken prior to inspection or citation by the Commission are indications of good faith). Again, when documents were determined to be missing from the PIF in 2001, the Station again sought to restore the PIF. (SFUSD Exh. T2 at 13; Tr. 688-89.) Also in 2001, with the arrival of a new Superintendent and General Manager, SFUSD implemented a series of procedures to ensure compliance with FCC requirements. (SFUSD Exh. 48.) The PIF was placed in a secure location. (SFUSD Exh. T3 at 19.) The Operations Manager was specifically tasked to collect the required issues/programs lists, ownership reports, and other materials required in the PIF. (SFUSD Exh. T3 at 19-20.) That these measures were taken years before the issuance of the *HDO* is indicative of SFUSD’s good faith efforts to comply with FCC regulations. *See Radio One Licenses, Inc.*, 18 FCC Rcd 15964, 15965 (2003) (identifying violation and ordering equipment to fix it prior to inspection); *Max Media of Montana, LLC*, 18 FCC Rcd 21375, 21378 (Enforcement Bur. 2003) (taking corrective action to repair tower lights prior to notification by inspection agent); *Rotijefco, Inc.*, 18 FCC Rcd 14629, 14631 (Enforcement Bur. 2003) (identification of EAS equipment failure and sending equipment out for repairs prior to FCC inspection).

430. Furthermore, SFUSD’s reliance on advice of the Sanchez Law Firm was not unreasonable. *See Asheboro Broadcasting Co.*, 20 F.C.C.2d 1, 2 (1969) (client consulted

counsel prior to filing, and counsel interpreted Commission law to permit such filing). Attorney Sanchez had been the Station's long-time communications counsel and harbored institutional knowledge that transcended any of the other District agents or officials involved with the FCC submissions. (SFUSD Exh. 22 at 2; Tr. 1398-99.) Relying on Attorney Sanchez's advice and approval, SFUSD filed its License Renewal Application and authorized Attorney Sanchez's Opposition to GGPR's Petition to Deny. There was no indication at the time that any of these steps were inappropriate. Viewed another way, SFUSD's deference to Attorney Sanchez's advice actually buttresses the evidence of SFUSD's good faith efforts at the time to comply with FCC regulations. *See Abacus Broadcasting Corp.*, 8 FCC Rcd 5110, 5113 (Rev. Bd. 1993) ("Although the Commission is reluctant to excuse an applicant's procedural deficiencies because of the alleged malfeasance of counsel . . . the Commission has been equally reluctant to impute a disqualifying lack of candor to an applicant where the record shows good faith reliance on counsel.")

431. Finally, the appropriate sanction also takes into account the compliance procedures implemented since the *HDO*. *Cf. WSUA Broadcasting Corporation*, 20 FCC Rcd 4231 (Media Bur. 2005) (consent decree resolves issues of PIF violation and misrepresentation when renewal applicant, *inter alia*, adopted PIF compliance plan). The administration of SFUSD has retained new legal counsel and substantially modified its procedures for making sure that FCC-required filings are timely and accurately made. (SFUSD Exh. 48.) Those procedures are designed to ensure that any applications to the FCC, and any responses to Commission inquiries, are accurate and complete.

432. The evidence strongly demonstrates that the SFUSD's dealings with the Commission have been taken in good faith.

433. Given SFUSD's good faith effort to comply with the Commission's Rules and to make accurate statements to the Commission, given that the Station has served the public interest, convenience and necessity, given there have been no serious violations of the Communications Act or the Commission's Rules, and given there have been no violations that, taken together, show a pattern of abuse, grant of the License Renewal Application is warranted.

**VI. EVEN IF ACTS OF INTENTIONAL MISREPRESENTATION WERE DEEMED TO HAVE OCCURRED, THE RECORD SUPPORTS RENEWAL OF SFUSD'S LICENSE TO OPERATE KALW**

434. Even assuming *arguendo*, that there was a finding of misrepresentation and/or lack of candor, the sanction of non-renewal would not be justified when the Commission considers the weight of the mitigating factors in SFUSD's favor. *See The Lutheran Church/Missouri Synod*, 12 FCC Rcd 2152, 2166-67 (1997) (sanction for lack of candor is based on willfulness, frequency and currentness of the behavior, as well as its seriousness, the participation of station owners and managers, and other relevant factors; license renewal granted when Commission determines on the record "that the licensee can reasonably be expected to deal truthfully with the Commission in the future"), *vacated on other grounds, The Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998); *see also Normandy Broadcasting Corp.*, 8 FCC Rcd 1, 10 [¶ 53] (ALJ Sippel 1992) ("[I]n drawing conclusions about misrepresentation, the Commission will consider mitigating factors because the Commission has broad discretion in its choice of sanctions."); *In the Matter of Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1210-11 [¶ 60] (1986) ("While the Commission has

considered mitigating factors, if any, in drawing conclusions regarding the treatment of misrepresentation in a case, the choice of remedies and sanctions is an area in which we have broad discretion.”); *Letter to CBS, Inc.*, 69 F.C.C.2d 1082 (1978) (finding that the licensee lied to the Commission regarding whether it had violated Commission rules and declining to designate licenses for hearing, instead concluding that short-term renewal was an adequate sanction based on subsequent corrective measures designed to prevent the recurrence of the violations); *WSUA Broadcasting Corporation*, 20 FCC Rcd 4231 (Media Bur. 2005) (resolving issues of misrepresentation and lack of candor concerning PIF violation when renewal applicant made voluntary contribution and adopted PIF compliance plan).

435. The Commission has denied renewal in only the most egregious circumstances. *See, e.g., Catocin Broadcasting Corp. of New York*, 2 FCC Rcd 2126, 2137 (Rev. Bd. 1987), *aff'd* 4 FCC Rcd 2553, *recon. denied* 4 FCC Rcd 6312 (1989) (applicant for renewal did not allow members of the public to view the PIF, among other serious file violations); *Radio Moultrie, Inc.*, 18 FCC Rcd 22950, 22957 [¶¶ 17-18] (Enforcement Bur. 2003) (unlawful relinquishment of control, and failure to respond to Commission inquiries on multiple other rule violations); *Ronald Brasher*, 18 FCC Rcd 16707, 16750-51 [¶ 170] (ALJ Steinberg 2003) (abuse of Commission process by filing applications in names of surrogates, false testimony, and document falsification); *Contemporary Media, Inc.*, 13 FCC Rcd 14437 (1998) (repeated sexual abuse of children by station’s sole owner, and misrepresentations by licensee); *Algreg Cellular Engineering*, 12 FCC Rcd 8148 (1997) (lying about foreign citizenship of a partner); *Augusta Radio Fellowship Institute*, 6 FCC Rcd 4823 (1991) (principal’s drug conviction, lying about conviction, lying to judge and bribery of policeman); *RKO General, Inc. v. FCC*, 670 F.2d 215,

229 (D.C. Cir. 1981) (egregious stonewalling); *Walton Broadcasting, Inc.*, 78 F.C.C.2d 857, 870-71 [¶ 35] (1980) (licensee's failure to exercise control over hoax newscasts). There is no evidence of comparable transgressions by SFUSD.

436. The Commission has looked to several balancing factors when determining the appropriate sanction for misconduct by a licensee, including:

- meritorious programming (*KQED, Inc.*, 3 FCC Rcd 2601, 2607 [¶ 26] (Rev. Bd. 1988); *CS WIGO, Inc.*, 85 F.C.C.2d 196, 209-11 [¶¶ 41-46] (1981));
- history of overall compliance and lack of prior violations (*Fisher Broadcasting, Inc.*, 15 FCC Rcd 24903, 24904-05 [¶ 7] (Enforcement Bur. 2000); *Dan J. McLean*, 9 FCC Rcd 1902, 1903 [¶ 12] (Field Operations Bur. 1994));
- instituting procedures to ensure future compliance (*Fisher Broadcasting, Inc.*, 15 FCC Rcd 24903, 24904-05 [¶ 7] (Enforcement Bur. 2000));
- the deterrent effect of a sanction less than non-renewal (*Character Policy Statement*, at ¶ 103 (“Sanctions imposed may deter future misconduct . . . a range of sanctions short of revocation or failure to renew a license can be imposed by the Commission . . . Only in the most egregious case need termination of all rights be considered.”)).

The overwhelming case for each of these factors strongly mitigates – even under a finding of misconduct – of a sanction less severe than non-renewal.

**A. KALW Provided Meritorious Service During the Relevant Time Period**

437. Both the Commission and courts have long recognized the relevance of past meritorious programming in deciding whether to renew a broadcast license. The D.C. Circuit has affirmed the Commission's policy that “renewal expectancy is to be a factor weighed with all the other factors, and the better the past record, the greater the renewal expectancy ‘weight.’ ”

*Central Florida Enterprises, Inc. v. F.C.C.*, 683 F.2d 503, 506 (D.C. Cir. 1982); *Normandy Broadcasting Corp.*, 8 FCC Rcd 1, 12 [¶ 66] (ALJ Sippel 1992).

438. While this is not a comparative renewal proceeding, meritorious service is relevant to the decision of whether to renew a license. *See, e.g., Arkansas Educations Television Commission*, 6 FCC Rcd 478, 481 [¶ 13] (1991) (deciding to renew license despite violations, including failure to issues/programs lists, where “licensee has made substantial efforts . . . to be aware of community issues and has . . . provided issue-responsive programming in the public interest throughout the entire license period”); *CS WIGO, Inc.*, 85 F.C.C.2d 196, 212-13 [¶ 50] (1981) (rejecting ALJ’s recommendation of revocation despite serious violations based, in part, on “the station’s otherwise meritorious programming”). In fact, the Commission has “frequently held that a renewal applicant should be afforded the opportunity to show meritorious programming in mitigation of adverse findings under issues relating to the past operation of its facilities.” *Norjud Broadcasting, Inc.*, 55 F.C.C.2d 808, 808 [¶ 2] (Rev. Bd. 1975).

439. Pursuant to Added Issue No. 1, SFUSD was permitted to introduce evidence related to meritorious service for one year prior to the filing of the Petition to Deny (November 3, 1996 – November 3, 1997) and one year prior to the issuance of the *HDO* (July 17, 2003 – July 17, 2004). *Memorandum Opinion and Order*, FCC 04M-30 (rel. Oct. 8, 2004). The testimony provided through the Declarations of Lorna Ho, Special Assistant to the Superintendent in the Office of Public Engagement and Information of SFUSD, Superintendent Dr. Arlene Ackerman, former General Manager Mr. Ramirez, present General Manager Ms. Sawaya, and volumes of supporting materials from listeners, producers and other members of the community – combine

to present uncontroverted evidence that KALW provided meritorious service during the time periods in question. (SFUSD Exh. T1, T3, T4, T6, 49 – 73, 79.)

440. As a result of public notice of the pending hearing for KALW's renewal, hundreds of additional listeners wrote to the Commission to describe the meritorious service that KALW has provided to the community and urged the Commission to renew the Station's license. (SFUSD Exh. 79.)

441. By Stipulations between SFUSD and the Enforcement Bureau, the parties stipulated, *inter alia*, that "that the evidence in the record of this proceeding [...] establishes that KALW provided meritorious service during the periods of November 3, 1996 to November 3, 1997 and July 16, 2003 to July 16, 2004." (SFUSD Exh. 79.) Also moved into evidence were a portion of the several hundred public comments extolling the programming of KALW and the Station's contribution to the San Francisco community, and/or which urge the Commission to renew the KALW license. (SFUSD Exh. 79.) By *Order*, FCC 05M-42 (rel. Sep. 16, 2005), the Presiding Judge accepted such Stipulations.

**B. KALW(FM) Has Not Been Subject to Any Other Notices of Violation**

442. Aside from the *HDO*, KALW has not been the subject of any notices of violation, notices of apparent liability or forfeiture for violation of FCC rules during the license term. (SFUSD Exh. T1 at 19; SFUSD Exh. T1 at 16; SFUSD Exh. T3 at 25.)

**C. SFUSD has Implemented Procedures to Ensure Future Compliance**

443. Since the arrival of Superintendent Ackerman and GM Sawaya in 2000 and early 2001, respectively, the District has taken several significant steps to ensure proper maintenance

of the PIF. In March 2001, Ms. Sawaya secured the PIF in her office so that its access was monitored during business hours. (SFUSD Exh. T3 at 19.) At that time, the Operations Manager was specifically tasked to collect the required issues/programs lists, ownership reports, and other materials required in the PIF. (SFUSD Exh. T3 at 19.) Station programmers and producers were instructed to complete issues/program lists in a timely manner and provided form guidelines. (SFUSD Exh. T3 at 19-20; SFUSD Exh. 44; SFUSD Exh. 45.) The administration of SFUSD has also retained new legal counsel and substantially modified its procedures for FCC submissions. (SFUSD Exh. 48.) Those procedures are designed to ensure that FCC reporting requirements are timely met and that any applications to the FCC, and any responses to Commission inquiries, are accurate and complete.

**D. A Sanction of Less Than Non-Renewal Will Have A Significant Deterrent Effect**

444. A sanction short of non-renewal will unquestionably have a significant deterrent effect on SFUSD. *Character Policy Statement*, at ¶ 103 (“Sanctions imposed may deter future misconduct . . . a range of sanctions short of revocation or failure to renew a license can be imposed by the Commission . . . Only in the most egregious case need termination of all rights be considered.”). This proceeding has come at great cost to SFUSD. As Ms. Sawaya explained, “it is like a cloud hanging over the Station.” (SFUSD Exh. T3 at 16.) This proceeding has required a deficit-laden public school district to absorb the significant cost of making a strong legal defense for renewal. (Tr. 1524.) These are critical monies that in the future would be spend on other critical needs of the District. That alone is a significant deterrent against future violations.

445. The issuance of the *HDO* illustrated the need for the District to retain new counsel to represent it in matters of FCC compliance. It has done so. As part of that new representation, prior to the commencement of this hearing the District submitted an amended License Renewal Application which clearly answered “No” to Section III, Questions 1 and 2 recognizing that -- with what it now knows -- it could no longer certify that the PIF was complete on August 1, 1997. (SFUSD Exh. 76.) In conjunction with new legal counsel, the District has also established new protocols to ensure continued compliance with all FCC matters. (SFUSD Exh. T3 at 23; SFUSD Exh. 48.)

**E. Other Factors Mitigate Against Non-Renewal**

446. Another factor the Commission has considered in determining whether non-renewal is an appropriate sanction is the extent to which the principal actors of the licensee participated in or had reason to know of the misconduct. See *The Lutheran Church/Missouri Synod*, 12 FCC Rcd 2152, 2166-67 (1997), *vacated on other grounds*, *The Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998); *Empire Broadcasting Corp.*, 63 F.C.C.2d 634, 637 [¶ 11] (1976). In *Empire*, the Commission was persuaded that non-renewal was an excessive sanction for conduct which, “though serious, [resulted from] the failure of supervision on the part of the licensee[.]” *Id.* at 638 [¶ 13]. Although the licensee in *Empire* failed to exercise reasonable diligence to see that its agents and employees were acting in conformance with FCC regulations, that action was not “tantamount to intentional disregard of [FCC] Rules.” *Id.* at 638-39 [¶ 15].

447. Here, SFUSD’s reliance on advice of counsel was reasonable under the circumstances. Attorney Sanchez had served as the District’s FCC specialist for many years

without incident. (SFUSD Exh. 22 at 2; Tr. 1398-99.) The Station's staff and management provided the requested information to Attorney Sanchez so that he would prepare responses to the Commission. In short, the District's conduct does not even approach the level of abdication of responsibility evidenced in the rare cases where a license was not renewed. *See United Broadcasting Co. of Florida*, 55 F.C.C.2d 832 (1975).

**VII. DUE TO THE DISTRICT'S FINANCIAL STATE, AND THE HARDSHIP ALREADY INCURRED RELATING TO THIS PROCEEDING, NO MONETARY FORFEITURES ARE BEING IMPOSED**

448. When the Commission determines that a monetary sanction is warranted, its forfeiture guidelines specify a base amount of \$10,000 for violations of its PIF rules. 47 C.F.R. § 1.80. The Commission's forfeiture guidelines do not specify a base amount for violations of Section 73.1015; instead the forfeiture must be assessed taking into account the relevant statutory factors in Section 503(b)(2)(D) of the Communications Act of 1934, as amended. *See The Curators of the University of Missouri*, 16 FCC Rcd 1174, 1181 [¶ 26] (2001) (factors include "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."). The amount of \$27,500 is the statutory forfeiture maximum for a single violation by a broadcast station licensee. *See Amendment of Section 1.80(b) of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, 15 FCC Rcd 18221 (2000).

449. The Commission has routinely considered the inability to pay as a factor in reducing forfeiture penalties in PIF, and other rule violation, cases. *See e.g., MRJ, Inc.*, 19 FCC Rcd 8528, 8530 [¶ 11] (Enforcement Bur. 2004) (canceling forfeiture because would impose financial hardship); *Hunt Broadcasting Group, Inc.*, 18 FCC Rcd 26295, ¶ 5 (Enforcement Bur.

2003) (reducing forfeiture); *M&R Enterprises, Inc.*, 17 FCC Rcd 14608, 14609 [¶ 4] (Enforcement Bur. 2002) (reducing forfeiture).

450. As noted at hearing, it is the District, as licensee, against whom any forfeiture is assessed. (Tr. 644.) SFUSD proffered undisputed evidence that the District has been and is projected to continue operating at a significant budget deficit and thus does not have the funds available to absorb more than a nominal forfeiture. To demonstrate its present and continuing financial hardship, the District submitted the Declaration of the District's Chief of Policy and Planning, Myong Leigh, (SFUSD Exh. 78) explaining that the District's 2004 Annual Financial Report showed a deficit of \$6.9 million as of June 30, 2004. (SFUSD Exh. 78-A.) The Report identifies several causes of the deficit, including reduced State revenues, costs of fringe benefits and declining enrollment which has reduced revenues, and the increase in charter schools which cost the District more than the revenues it receives for such schools. (SFUSD Exh. 78-A.)

451. The 2004 Annual Financial Report reports that District management is investigating and/or implementing hiring freezes, reductions in central office staff, furloughs, reductions in all discretionary budgets, and decreases in special education and child development programs. (SFUSD Exh. 78-A.)

452. Moreover, the projected deficit at the District is expected to be \$4.9 million for fiscal year 2004-05 and is expected to rise to \$22.3 million in fiscal year 2005-06 unless cost saving measures are implemented. (SFUSD Exhibit No. 78-B.) Among the possible gap closing strategies are reducing District contributions to special programs, special education, transportation, child development and student nutrition programs; elimination of central office positions, furloughs and school closures. (SFUSD Exh. 78-A.)

453. Thus, while under usual circumstances, a \$10,000 base forfeiture would be imposed on the District for its admitted violation of the PIF rule, given its current and projected budget deficits, the District has demonstrated its inability to pay and such forfeiture is hereby waived. Clearly, as evidenced by the District's remedial steps, the *HDO* itself and the time, effort and expense expended in the conduct of this proceeding has served as adequate admonishment to the District for its violation of the PIF rule.

**SAN FRANCISCO UNIFIED SCHOOL DISTRICT'S**  
**PROPOSED ULTIMATE CONCLUSIONS**

454. Section 309(k) provides that if, upon consideration of a renewal application and related record, the Commission finds that (1) the station has served the public interest, convenience, and necessity; (2) there have been no serious violations of the Communications Act or the Commission's Rules; and (3) there have been no violations that, taken together, show a pattern of abuse, the Commission will grant the renewal application. The record here warrants renewal of SFUSD's license to operate KALW.

455. KALW has more than served the public interest, convenience and necessity by providing meritorious service during the periods of November 3, 1996 to November 3, 1997 and July 16, 2003 to July 16, 2004. (SFUSD Exh. 79.) *See In re Applications of Arkansas Educational Television Commission*, 6 FCC Rcd 478, 481 [¶ 13] (1991) (deciding to renew license despite violations, including failure to file issues/programs lists, where "licensee has made substantial efforts . . . to be aware of community issues and has . . . provided issue-responsive programming in the public interest throughout the entire license term.").

456. The admitted PIF violations here are not serious violations of the Communications Act or the Commission's Rules and did not significantly harm the public. Any mistake on the August 1, 1997 License Renewal Application was made in good faith and without the intent to falsely certify. *See Swanco Broadcasting, Inc.* 40 F.C.C.2d 753, 755-56 [¶ 6] (1973) (“The Commission demands of its licensees and applicants absolute candor, but it cannot and does not expect infallibility.”); *Letter to Kathleen N. Benfield, Glenn C. Benfield, and M. Anne Swanson, Esq.*, 13 FCC Rcd 4102, 4106 (Audio Div., Mass Media Bur. 1997). While such PIF violations would be subject to a base forfeiture of \$10,000, here, the District has established an inability to pay.

457. The record overwhelming demonstrates that, at the time Mr. Ramirez submitted SFUSD's License Renewal Application on August 1, 1997, through and including the submission of SFUSD's April 2001 Response to the LOI, there was no intent by SFUSD to mislead or withhold information from the Commission. Under established Commission precedent, SFUSD did not make misrepresentations of fact or lacked candor with regard to its certification regarding the PIF. *Cannon Communications Corp.*, 5 FCC Rcd 2695, 2700 [¶ 26] (Rev. Bd. 1990); *Swanco Broadcasting, Inc.*, 40 F.C.C.2d 753, 755-56 [¶ 6] (1973) (no misrepresentation where lack of oversight or carelessness results in the unfortunate filing of inaccurate applications.); *Fox River Broadcasting, Inc.*, 93 F.C.C.2d 127, 129 [¶ 6] (1983) (noting that both misrepresentation and lack of candor require “deceptive intent”). In fact, even “[c]arelessness, exaggeration or slipshoddiness... do not constitute misrepresentation.” *F.B.C. Incorporated*, 3 FCC Rcd 4595, 4597 (1988).

458. Further, the uncontroverted evidence demonstrates that neither Ms. Sawaya nor Mr. Helgeson intentionally misrepresented or lacked candor during deposition testimony on September 28, 2004.

459. Finally, there is no evidence of a pattern of abuse sufficient to warrant the denial of the District's License Renewal Application. The weight of the evidence establishes that there was no intentional misrepresentation or lack of candor. The good faith error made by then-GM Ramirez in the License Renewal Application was promptly disclosed to the Commission. Moreover, even if the Commission found that misconduct had occurred, the balance of factors strongly mitigates against denial of license renewal. KALW has instituted remedial procedures. During the one-year period prior to submission of the renewal application and prior to the issuance of the *HDO*, KALW provided meritorious service to the community through both locally generated and nationally-distributed programming. And finally, this eight-year proceeding, culminating in a five-day hearing has, in and of itself, serves as adequate deterrent against future infractions by the licensee.

Respectfully submitted,



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October 14, 2005

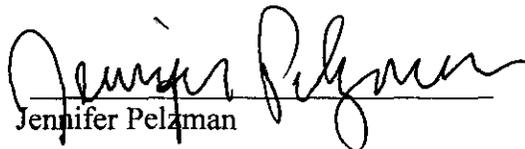
## Certificate of Service

I, Jennifer Pelzman, hereby certify that on this 14<sup>th</sup> day of October, 2005, a copy of the foregoing **San Francisco Unified School District's Proposed Findings of Fact and Conclusions of Law** was sent by hand-delivery to:

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