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

In The Matter of	)	MB Docket No. 04-191
	)	
San Francisco Unified School District	)	
	)	
For Renewal of License for Station	)	Facility ID No. 58830
KALW(FM), San Francisco, California	)	File No. BRED-19970801YA
	)	

Appearances

Marissa G. Repp, Esquire and *Martin A. Price, Esquire*, on behalf of San Francisco Unified School District; *James W. Shook, Esquire* and *Dana E. Leavitt, Esquire,* on behalf of the Enforcement Bureau

INITIAL DECISION
OF
CHIEF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL

Issued: April 6, 2006 **Released:** April 7, 2006

PRELIMINARY STATEMENT

1. This proceeding was set to determine whether the application of San Francisco Unified School District ("SFUSD") for renewal of license for noncommercial educational Station KALW(FM) should be granted. *San Francisco Unified School District, Hearing Designation Order and Notice of Apparent Liability for Forfeiture*, 19 FCC Rcd 13326 (2004) ("*HDO*").[1]

Issues

2. The Commission specified issues:

(1) To determine whether San Francisco Unified School District falsely certified its application with respect to the completeness of the KALW(FM) public inspection file and the effect thereof on its qualifications to be a Commission licensee.

[1] The *HDO* was issued incident to allegations of a petition to deny renewal filed on November 3, 1997. *HDO* at Paras. 1-5.

(2) To determine whether San Francisco Unified School District made misrepresentations of fact or was lacking in candor and/or violated Section 73.1015 of the Commission's Rules with regard to its certification in the subject license renewal application that it had placed in the KALW(FM) public inspection file at the appropriate times the documentation required by Section 73.3527, and the effect thereof on its qualifications to be a Commission licensee.

(3) To determine, in light of the evidence adduced pursuant to the specified issues, if the captioned application for renewal of license for station KALW(FM) should be granted.

HDO at Para. 24.

3. Whether or not the hearing record warrants denial of SFUSD's renewal, the Presiding Judge shall determine whether an Order of Forfeiture in an amount not to exceed $300,000 should be issued against SFUSD for willful and/or repeated violations of the Communications Act and the Commission's rules. *HDO* at Para. 25. *See* § 503(b) (1) of the *Communications Act of 1934*, as amended [47 U.S.C § 503(b) (1)]; 47 C.F.R. §§ 73.3527 and 73.3613.

4. SFUSD was permitted to introduce evidence on meritorious service, limited to one year of programming that aired prior to the filing of a Petition to Deny – November 3, 1996 to November 3, 1997 – and to the one year of programming that aired prior to release of the *HDO* – July 16, 2003 to July 16, 2004. Meritorious programming is considered "only to argue ascertainment of community interests, and/or for considering reduction of forfeiture amounts." *See Memorandum Opinion and Order*, FCC 04M-31, released October 8, 2004, and *Memorandum Opinion and Order*, FCC 04M-37, released November 12, 2004.

5. The Presiding Judge added an issue:

> To determine whether station KALW(FM) has provided meritorious service relevant to a renewal of SFUSD's license, and/or relevant to mitigating the amount of any forfeiture.

Order, FCC 05M-42, released September 16, 2005.

6. The Presiding Judge also added an issue:

> To determine whether San Francisco Unified School District through its agents made misrepresentations of fact and/or lacked candor before the Commission during, or in connection with, discovery testimony taken by the Enforcement Bureau on September 28, 2004.

Memorandum Opinion and Order, FCC 05M-17, released April 1, 2005, *modified by Addendum*, FCC 05M-20, released April 5, 2005.

Burdens of Proof

7. SFUSD must establish by a preponderance of the evidence that its renewal application certification was not intentionally false in representing that the public inspection file ("PIF") for Station KALW(FM) contained all documentation required by the Commission's rules, and that such documentation was placed in the file at the times specified by the rules. SFUSD also must prove by a preponderance of evidence that its subsequent representations about the completeness of its PIF made in responses to a petition to deny and to a letter of inquiry, were not intentionally false.

8. On the added issue about the truthfulness of SFUSD deposition testimony, the Enforcement Bureau has the burdens of proceeding and proof.

9. An evidentiary hearing on the issues was conducted from June 6 to June 10, 2005. The parties proffered witness testimony, conducted cross-examination, and introduced documentary exhibits.[2] Following the hearing, there were received into evidence additional exhibits sponsored by SFUSD. *Order* FCC 05M-31, released June 23, 2005. On October 7, 2005, the parties filed Proposed Findings of Fact and Conclusions of Law. On November 15, 2005, Reply Proposed Findings of Fact and Conclusions of Law were filed.

FINDINGS OF FACT

Background

10. SFUSD has held the license for station KALW(FM) ("Station") since its inception in 1941. (Official Notice; SFUSD Exh. 22, p. 19.) Its most recent license renewal was on December 31, 1990. (Official Notice.) KALW(FM) provides non-commercial educational service to the residents of San Francisco and nearby communities. This service includes locally-produced programs and programming obtained from National Public Radio and Public Radio International.[3] SFUSD and the Bureau stipulate that the Station provided meritorious service during the relevant time periods and furnished broadcast programming to San Francisco responsive to community needs, interests and concerns. (SFUSD Exh. T-6 at 2; Stipulation filed August 31, 2005.)

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[2] Hereafter, each of SFUSD's exhibits will be referred to as (SFUSD Exh. __) and each of the Bureau's exhibits will be referred to as (EB Exh. __). Hearing transcript pages will be referred to as (Tr. __).

[3] SFUSD Exh. T-6 at 2.

Governance

11. SFUSD is governed and controlled by an elected Board of Education ("BOE"), comprised of seven members serving four-year terms. A Superintendent of Schools ("Superintendent") hired by the BOE has overall responsibility for SFUSD's operations, including the operation of the Station. The Superintendent has delegated administrative authority to oversee Station operations to one or more special assistants or consultants. (SFUSD Exh. T-4 at 2.) By letter dated February 17, 2006, counsel for SFUSD reported that Superintendent Arlene Ackerman is retiring and she is being replaced by new Superintendent Gwen Chan.

12. SFUSD and the Superintendent do not participate in the Station's day-to-day management. The Station's General Manager handles the day-to-day responsibilities, including the preparation of an annual report. There are assistants to the Superintendent designated to keep her informed of issues affecting the Station. In September 2004, in response to the matters addressed in this proceeding, the superintendent issued a directive that all applications and filings with the Commission must be cleared by communications counsel, and Station management must report in writing to the Superintendent annually on regulatory compliance. (SFUSD Exh. T-4 at 2-3.)

13. SFUSD's support of the Station is limited to in-kind services such as the sites of the station's offices and studios, and administrative assistance. (SFUSD Exh. 22 at 19.) The Station does not receive direct financial support from SFUSD. All operating funds come from donations of listeners, grants from the Corporation for Public Broadcasting, and grants from underwriters. (SFUSD Exh. 15 (dep. at 205-13); SFUSD Exh. 18 (dep. at 403-07)). During fiscal year ending June 30, 2004, KALW(FM) received $1.3 million for its operations, more than $1 million of which came from listener donations. (SFUSD Exh. 78-C at 6.)

14. On July 30, 1997, Mr. Ramirez forwarded a completed renewal application to SFUSD for review and signature. Under the Superintendent's name, SFUSD certified to the Commission that "the statements in this Report [renewal application] are true, complete and correct to the best of my knowledge and belief, and are made in good faith." On July 30, 1997, counsel for SFUSD reviewed the final renewal application to be certified. (EB Exh. 7 at 2.) On July 30, 1997, former SFUSD Superintendent Waldemar Rojas signed the renewal application, thereby certifying that all representations were accurate. Mr. Ramirez mailed the renewal application to the Commission on July 30, 1977, and it was stamped as filed at the Commission on August 1, 1997. (SFUSD Exh. 5 at 1-5.) It appears from this record that the affixing of a signature at the Superintendent's level was an act taken in the course of SFUSD's business. The Superintendent's signature was the act of certification for SFUSD.

15. There is no evidence that indicates that supervisors at SFUSD had sufficient information on July 30, 1997, to believe that the renewal application and a related PIF were deficient. However, SFUSD's management must have known that a petition to deny renewal had been filed on November 3, 1997, and was aware of the Bureau's letter of inquiry of February 5, 2001 ("LOI"). On May 24, 2001, shortly after counsel responded to the LOI on behalf of SFUSD, they submitted to Superintendent Ackerman a "Report on License Renewal". (SFUSD

Exh. 22.) SFUSD was reminded by counsel that on November 3, 1997, a petition to deny renewal had been filed that was based on an alleged "failure to maintain the station's public file in accordance with FCC rules." (*Id.* at 3.) Counsel expressed their opinion that the charges lacked any merit. (*Id.*)

General Managers

16. The Station is a non-profit, non-commercial enterprise. Station Managers are salaried employees having no monetary stake, and there is no profit motive at any level of management, including General Manager. SFUSD employs a General Manager who is responsible for the Station's day-to-day management. Recent General Managers include: Margaret Ann (Nicole) Sawaya (March 1, 2001 – March 24, 2006),[4] William Helgeson (acting October 2000 – February 28, 2001 and January 1998 – mid-1998),[5] Michael Johnson (mid-1998 – September 2000), and Jeffrey Ramirez (August 5, 1996 – January 31, 1998).

17. The General Manager has responsibility for updating and maintaining the Station's PIF. (EB Exh. 5 at 117.) One requisite is maintaining updated and current ownership information in the PIF. 47 C.F.R. §§ 73.3527(c), 73.3615(e), (f), (g) (1996) (EB Exh. 59). In 1997, supplemental ownership reports were to be placed in the PIF after election changes of BOE membership.[6] Issues/programs lists were to be placed in the PIF on a quarterly basis, ten days following the end of each calendar quarter. 47 C.F.R. § 73.3527(a) (7)(1996) (EB Exh. 59 at 2-3). When a renewal application was filed on August 1, 1997, the Station's PIF was deficient in its ownership reports, and in its issues/programs lists.

18. Jeffrey Ramirez became General Manager on August 5, 1996, and left the Station on January 31, 1998. (SFUSD Exh. T-1 at 1.) His initial concerns were logistics for a Station move that was completed in December 1996. (Tr. 669.) At the same time, he was responsible for programming, funding, program changes, weather and traffic reports, and a new underwriting program. (SFUSD Exh. T-1 at 4-7.) The Station had been required to operate from a series of temporary locations following a 1989 earthquake that had destroyed the high school housing the Station's studios and offices. (SFUSD Exh. T-2 at 5.) PIF deficiencies existed and occurred during his tenure. He resigned in early 1998. He was temporarily replaced in July 1999, by Mr. Michael Johnson. Mr. Helgeson served as interim manager in between Ramirez – Johnson – Sawaya appointments. Ms. Sawaya arrived at the Station on March 1, 2001. (SFUSD Exh. T-3 at 1.)

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[4] SFUSD has advised that Ms. Sawaya was resigning effective March 24, 2006.

[5] Since 1992, Mr. Helgeson has at various times served in the dual capacity of Operations Manager and acting General Manager.

[6] Current responsibilities differ. *See* 47 C.F.R. §§ 73.3527(e) (4), 73.3615(d), (f), (g) (2004). There are no longer requirements for supplemental ownership reports.

19. In August 1996, Mr. Ramirez was hired as General Manager of the Station. (SFUSD Exh. T-1 at 1, 2.) Mr. Ramirez believes that he successfully sold himself at SFUSD interviews with his "programming experience, creativity and positive energy." (*Id.* at 3.) He had no prior general manager experience, his exposure to regulatory aspects of station management was "very limited," and he had never before been involved with a license renewal application or the maintenance of a public information file. (*Id.* at 3-4.)

New Oversight Policy

20. In September 2004, Superintendent Ackerman issued a directive to the Station and to her immediate staff that "all applications, reports and filings made by [SFUSD] must be cleared in advance with outside communications counsel." (SFUSD Exh. 48.) There was no similar "directive" in effect in 1997, and Mr. Ramirez, a regulatory novice, was virtually left to his own devices. However, he did have access to and did utilize services of communications counsel provided by SFUSD to the Station and its General Manager.

Public Inspection File

21. Proper maintenance of a PIF is important. *See N. Benfield, et al,* 13 FCC Rcd 4102, 4105 (Mass Media Bur. 1997). Contents of a PIF are not optional, and a PIF must contain copies of every ownership report filed, and issues/programs lists for each quarter describing the treatment of significant community issues. 47 C.F.R. § 73.3527. The Station's PIF was contained in one file cabinet drawer. It was located in an open space that was readily available to staff, volunteers, and the public. (SFUSD Exh. 22 at 4.) Shortly after becoming General Manager, Mr. Ramirez was counseled by a staff member to inspect the PIF. (SFUSD Exh. T-1 at 11; Tr. 283.) He was cautioned by the Station's Chief Engineer:

> [I]n August 1996, - - - I told Mr. Ramirez that Ownership Reports and quarterly issues reports hadn't been filed, - - -.

(EB Exh. 5 at 42-43.) That exchange occurred "at some time in August 1996 with respect to the public inspection file," but Mr. Ramirez took no action. (SFUSD Exh. 4 at 49; Tr. 352; SFUSD Exh. 1 at 64-5.) He did not begin to focus on the PIF until after receiving a renewal application form and instructions in May 1997, nearly nine months after his conversation with Mr. Evans. (SFUSD Exh. T-1 at 12; Tr. 280-83, 354, 357, 368.)

22. In June 1997, Mr. Ramirez perused the PIF and he found it to be disorganized. (SFUSD Exh. T-1 at 12.) He asked Ms. Susen Hecht, a Station volunteer, to put the file in order, without giving her specific instructions. (Tr. 372-73.) She did not put the file in any particular order. But without being asked, she provided Mr. Ramirez with a written inventory of what she had found in the PIF. She entitled her report "License Renewals Materials – In Files At Present" (referred to as "Hecht report"). (SFUSD Exh. T-1 at 12-13; Tr. 376-77.)

23. Ms. Hecht volunteered at the Station for four years. (EB Exh. 5 at 44) She performed part-time general office work. (EB Exh. 44 at 195.) She averred in an affidavit:

> In June 1997, Station Manager Jeff Ramirez asked me to review the public inspection files for license renewal purposes, which I did. I found the files disorganized and incomplete. I itemized the contents of the files and gave Mr. Ramirez written confirmation titled *License Renewal Materials – In Files at Present* in June 1997. (Italics in original.)

(EB Exh. 5 at 44-49.) Her affidavit "testimony" confirms the position she held as Station volunteer, and establishes the genuineness of her written report in the form of an inventory that she provided to Mr. Ramirez. (EB Exh. 5.) The reliability of her report was attested to by the testimony of a knowledgeable witness, Mr. Jason Lopez. (EB Exh. 4 at 5-6.) Ms. Hecht was unavailable for deposition or cross-examination as her whereabouts are unknown. (Tr. 722; EB Exh. 4 at 5.)

Hecht Report

24. The Hecht report was an exhibit to a petition to deny SFUSD's renewal that was filed in November, 1997. (EB Exh. 5 at 44-49.) Ms. Hecht itemized in writing what she found and what she did not find in the PIF. Mr. Ramirez elected to ignore Ms. Hecht's report, and there was no evidence of Mr. Ramirez questioning her on the contents of her report. He testified:

> .... I never read Susen Hecht's document closely, nor gave it much consideration at all.... Instead, I conducted and relied upon my own review of the PIF.

(SFUSD Exh. T-1 at 12-13.) SFUSD has acknowledged that Mr. Ramirez did read the Hecht report. (EB Exh. 38 at 5.)

25. The Hecht report reflected the following:

> Ownership reports --- for the following dates:
> 1/13/91; 11/90; 3/3/89; 9/16/88; 7/28/88; 7/5/83
> Minority ownership – 2/28/88 and 2/20/89
> Employee Reports –All years included EXCEPT 1994, 1990, 1989
> Reports Missing: 1992, 1990, 1989, 1988 and 1983
> - - -

CONTENTS - - -

Programs – Incomplete 1992 (Winter and Spring ONLY)
Complete 1991; partials for 97-98.

[PRO]Gram List – Empty

(EB Exh. 5 at 46 – 49.) Ms. Hecht needed no expertise merely to observe the contents of a file, write down what she found, and note what she did not find. SFUSD offered no evidence to rebut the contents of her report. Therefore, the Hecht report can be considered as reliable evidence of deficiencies existing in the Station's PIF in 1997, containing ownership reports and issues/programs lists.

26. Mr. Ramirez may have reviewed the PIF in May or June of 1997, but without benefit of deficiencies noted in the Hecht report. She notes in her affidavit that she "found the files disorganized and incomplete." (EB Exh. 5 at 44.) There were enough "red flags" in the Hecht report which, in conjunction with Mr. Evan's earlier warning, put Mr. Ramirez on notice that the PIF was deficient. He should have given the Hecht report a "hard look," and he should have debriefed Ms. Hecht in order to learn the true state of the PIF. He did neither. Mr. Ramirez was grossly negligent and irresponsible in failing to follow up or otherwise utilize the informative Hecht report.

Renewal Application

27. Renewal of SFUSD's license is in abeyance pending a final decision in this proceeding. The renewal term ran from January 1, 1991, to December 1, 1997. On May 15, 1997, the Commission sent SFUSD a renewal application packet. The documents consisted of a renewal application and related instructions, an ownership report form (FCC Form 323-E for noncommercial educational stations), and a broadcast EEO program report (FCC Form 396), and related instructions. (EB Exh. 1.) Mr. Ramirez read the renewal application question and instruction relating to the PIF (SFUSD Exh. 1 at 32-33; SFUSD Exh. T-1 at 12; Tr. 385). Yet he denied familiarity with renewal instructions shown to him at hearing, and he could not recall whether he had reviewed the instructions when he filled out the renewal application. (Tr. 350-51.)

Renewal Form 303-S

28. Question 1(b), asks:

Have the following reports been filed with the Commission:

(b) The applicant's Ownership Report (FCC Form 323 or 323-E), as required by 47 C.F.R. Section 73.3615?

(c) If No, give the following information:

Date last ownership report was filed:

Call letters of station for which it was filed:

(SFUSD Exh. 5 at 4.) Mr. Ramirez checked "**Yes**."

SFUSD's erroneous certification as to its ownership reports filed with the Commission is generally relevant to candor and will receive attention in this decision.[7] But the gravamen of ownership reporting alleged in the *HDO* is in relation to copies being timely deposited in the PIF, Question 2 below.

29. Question 2 asks:

> Has the applicant placed in its public inspection file at the appropriate times the documentation required by 47 C.F.R. Section 73.3226[8] and 73.3527 (local inspection file of noncommercial educational stations)?
>
> If No, attach as an Exhibit a complete statement of explanation.
>
> (SFUSD Exh. 5 at 5.) Mr. Ramirez checked "**Yes**."

Public Inspection File

30. The *HDO* cites the relevant regulation:

> *Public File.* Section 73.3527 of the Commission's rules require all licensees of noncommercial educational broadcast stations to maintain a public inspection file containing designated information. Among the materials required to be in the public inspection file are copies of every ownership report and related materials filed by the station, and issues/programs lists for each

[7] Official notice is taken of the fact that the Station's licensing file maintained in the Commission public reference room contains no "filed" ownership reports subsequent to January 31, 1991. 47 C.F.R. § 1.361 (other proof of official record). The rule requiring educational stations to keep ownership reports was formerly at Section 73.3615(g), and is not at Section 73.3527(e)(8). *See Review of Public Inspection Files*, 13 FCC Rcd 15691 (1998), *recon granted*, 14 FCC Rcd 10922 (1999).

[8] Section 73.3526 pertains to public inspection files of commercial stations and has no application to KALW(FM), an educational station.

> quarter describing the programs that represent "the station's most significant treatment of community issues during the preceding three month period." Both the ownership reports and the issues/programs lists are required to be placed in the public inspection file in a timely manner and retained until the Commission acts on the station's renewal application [footnotes omitted].

HDO at 4.

31. The *HDO* alleges, SFUSD admits, and substantial evidence proves:

> (1) The KALW(FM) public inspection file did not contain all of the supplemental ownership reports required - - - on August 1, 1997, when the subject license renewal application was filed.[9] Missing items include the 1995 ownership supplement, which was not signed and dated until December of 1997. Additionally, it appears that the 1993 ownership supplement was not executed and submitted until July 30, 1997, four years after it should have been placed in the public file.
>
> (2) The KALW(FM) public inspection file did not contain the quarterly issues/programs list required by then Section 73.3527(a)(7). That rule requires: (1) a brief narrative describing what community issues were given the station's most significant treatment; (2) the programming that provided this treatment; (3) the time, date, duration, and title of each program in which the issue was treated.

HDO at 5.

32. Mr. Ramirez received the form and instructions for completing the renewal application which he read. (SFUSD Exh. T-1 at 13.) Mr. Ramirez became aware of the applicable regulation (47 C.F.R. § 73.3527(e)) which prescribes that a public information file will contain "ownership reports" and "issues programs lists." (*Id.*) He also consulted a National Association of Broadcasters ("NAB") memorandum and a National Public Radio ("NPR") Station Manager's Handbook. (EB Exh. 11-A; SFUSD Exh. 6 at 7-8.) These sources instruct licensees to exercise care in maintaining a complete, current PIF that includes supplemental ownership reports for seven years, and lists of programs providing significant treatment of local

[9] It is officially noted that the Commission has abolished the supplemental ownership report requirement. *See Biennial Regulatory Review et seq.*, 13 FCC Rcd 11349, 11380 (1998).

issues. After consulting these sources, it was inexcusable and irresponsible for Mr. Ramirez to certify "Yes" to ownership and issues/answers, particularly in view of the "red flag" Hecht report that he rejected.

33. *Question 2* asks the applicant to certify to the completeness of the Station's PIF. Mr. Ramirez understood, or could readily understand, the plain language of the question and instructions, and he had access to communications counsel for advice on how to answer questions. By the time he received Ms. Hecht's inventory report, he had, in some manner, seen the contents of the PIF. (Tr. 376-77.) The Hecht report, if read with a modicum of care, should have sent a responsible General Manager back for a second look at the PIF, particularly in view of Mr. Evans' earlier "heads-up" warning. Resources readily available were wholly sufficient to enable him to follow the Commission's application reporting rules, but he failed.

Ownership Reports

34. Question 1(b) of the renewal application asks whether the applicant's complete Ownership Reports required by Section 73.3615 have been filed with the Commission. Mr. Ramirez answered "Yes," based on his misunderstanding that Question 1(b) referred only to the current ownership report accompanying the renewal application. (SFUSD Exh. T-1 at 15.) Mr. Ramirez rationalized his erroneous "Yes" answer by assuming that the purpose of the Ownership Reports was to identify the current composition of the BOE where staggered elections are held every two years for four-year terms. (SFUSD Exh T-1 at 15; Tr. 442-44.)

35. Former Section 73.3615 also required licensees to retain in their PIF "[a] copy of all ownership and supplemental ownership reports ...." 47 C.F.R. § 73.3615(g) (1996); (EB Exh. 59 at 6.) Supplemental ownership reports were required within 30 days of changes to the BOE. 47 C.F.R. § 73.3527(f). Newly elected BOE members took office in January 1993, 1995 and 1997. (EB Exh. 40 at 6, 10; EB Exh. 38 at 22-24, 29-31.) SFUSD's renewal application filed with the Commission provided no supplemental reports for 1993 and 1995 to reflect the newly elected BOE members. *Cf. HDO* at 5.

36. Mr. Ramirez claimed ignorance of requirements for supplemental ownership reports for years 1993 and 1995. (Tr. 442-43.) These reports would have disclosed newly elected BOE members in those years. (EB Exh. 34 at 3; EB Exh. 37 at 22-24, 29-31.) He believed that the rules only required placement in the PIF of the 1997 full ownership report (more complete than a supplemental report) which would be the literal "current" report. Mr. Ramirez admitted this misunderstanding in a January 1998 declaration in responding to a petition to deny renewal. (EB Exh. 6 at 17.)

Issues/Programs Lists

37. Section 73.3527(a)(7) provides that a non-commercial licensee must retain in a PIF:

> every three months a list of programs that have provided the station's most significant treatment of community issues during the preceding three-month period. The list for each calendar quarter is to be filed by the tenth day of the succeeding calendar quarter....

47 C.F.R. § 73.3527(a)(7) (1996); (EB Exh. 59 at 2.) Mr. Ramirez did recognize that programming responsive to issues "important to the community" was to be identified on a list that is placed in the PIF, and he sought such a list when he first reviewed the PIF. (Tr. 387-88.) Mr. Ramirez was searching for a "piece of paper" that reflected programming that addressed community concerns. (Tr. 387.) He could not find such a "piece of paper" and so he asked station program producers to prepare program lists. (Tr. 388, 393.) Mr. Ramirez's "paper chase" is consistent with Mr. Evans' observation that the PIF was a "mess" (EB Exh. 5 at 42), and also with the findings of Ms. Hecht (EB Exh. 5 at 46-49) which were corroborated by Mr. Lopez (EB Exh. 4 at 5-6).

38. A Stipulation shows that a large number of programs were aired during Mr. Ramirez's tenure at KALW that were responsive to needs, interests and concerns of the local community. (SFUSD Exh. 79.) However, the Bureau argues, and it appears from the record, that from 1992 to July 1997, SFUSD was seriously remiss in preparing quarterly lists of programming for inclusion in the Station's PIF. (EB Exh. 5 at 46 [Hecht]; EB Exh. 4 at 13 [Lopez].) Station programming was made available to the public through quarterly program guides distributed at local schools, public buildings, and other locations. (SFUSD Exh. T-6 at 1; SFUSD Exh. T-2 at 13; Tr. 681.) Quarterly program guides are published quarterly and describe weekly programming and special features to be broadcast during specified three month periods. *HDO* at 5 n. 26. SFUSD suggests that its program guides, which were readily available to the listening public, serve as a legitimate proxy for program issues lists. There is no provision in the rules for proxy compliance.

39. Mr. Ramirez consulted NAB guidelines. (EB Exh. 11-A at 1-6 "Your Public File," copyright 1997, NAB, Washington, D.C.) (SFUSD Exh. T-1 at 13.) The NAB guidelines warn that maintaining the PIF is "an important task," that FCC enforcement is "alive and well," and that there is a forfeiture policy for a $10,000 fine on violations. The NAB's guidelines instruct that issues/ programs lists should be retained for eight years, that they should be placed in the PIF file by January 10, April 10, July 10 and October 10 of each year, and that each list should include the issues examined, the time, date and length of the program, the program title, the type of program, and the guests appearing on the program. (EB Exh. 11A at 2, 4.) Mr. Ramirez should have realized before filing the renewal application that SFUSD had not followed NAB guidelines relating to issues/programs lists to be maintained in its PIF at the time SFUSD filed its renewal application in August 1997.

40. Mr. John Covell was producer of a popular program entitled "City Visions" covering local news, elections, and the city's economy. (Tr. 302-03.) Mr. Ramirez asked Mr. Covell to prepare written materials for inclusion in the PIF prior to the submission of the renewal application. (Tr. 305.) Mr. Covell prepared a document providing a list of "City Visions" programs for the period 1992-1997. This "issues/ programs" list was placed in the PIF. (SFUSD Exh. T-1 at 14.) At the time the Station's renewal application was filed, Mr. Ramirez believed that Mr. Covell's list alone was sufficient to satisfy the PIF requirement. (SFUSD Exh. T-1 at 14.)

41. Mr. Ramirez learned after August 1, 1997, that the "City Visions" list was defective in that it did not specify the community issues addressed by each program, that it did not date back to the start of the license term in 1991, and that it was prepared just prior to the completion and filing of the renewal application and did not meet the quarterly filing requirement. (SFUSD Exh. T-1 at 14.) But there is no evidence linking Mr. Ramirez's certification on renewal with other program guides. The "City Visions" list is the sole program documentation that Mr. Ramirez relied upon for certification, and was his only basis for answering "Yes" to Question 2. (EB Exh. 6 at 17-18; SFUSD Exh. T-1 at 14.) Reliance on the "City Visions" list as the basis for PIF certification is unacceptable, and Mr. Ramirez had no basis to rely on the incomplete "City Vision's" list. (EB Exh. 5 at 70-72; Exh. "O" to petition to deny at 1-3.)

Legal Advice on Renewal

42. Mr. Ramirez had no experience in preparing a renewal application. (SFUSD Exh. T-1 at 9; Tr. 586.) In exercising good judgment, on May 8, 1997, he contacted the Sanchez Law Firm which had served as communications counsel for SFUSD for 15 years. The firm consisted of Ernest T. Sanchez, Esquire and Susan M. Jenkins, Esquire, both experienced communications counsel ("Sanchez counsel or attorneys"). The firm served as counsel for SFUSD from the 1980s continuing until withdrawal as counsel in September 2004. (SFUSD Exh. 22 at 2, 43.)

43. Mr. Ramirez claims to have relied on counsel for advice in completing the renewal application. (SFUSD Exh. T-1 at 13; EB Exh. 7 at 12.) Mr. Sanchez had conversations with Mr. Ramirez at times between receipt of the renewal application materials on May 15, 1997, and his filing of the renewal application on August 1, 1997. Mr. Ramirez spoke to Mr. Sanchez regarding renewal on at least four separate occasions prior to the submission of the application to SFUSD headquarters for the Superintendent's signature. (EB Exh. 7 at 1-2, billing entries 2309, 1943, 2310 & 1956; Tr. 533-37.) Billing records introduced by the Bureau reflect four separate occasions before filing the renewal application that Mr. Ramirez spoke with Mr. Sanchez. (EB Exh. 7 entries 1943, 1956, 2309-10; Tr. 533.) When Mr. Ramirez completed the application, including his erroneous "Yes" certifications, he forwarded his draft to Mr. Sanchez for review one day before filing. (EB Exh. 7 at 2.)

44. But Mr. Ramirez cannot recall what he asked Mr. Sanchez. (SFUSD Exh.T-1 at 13; Tr. 362-64.) Mr. Ramirez also did not recall whether he told Mr. Sanchez what was in the station's PIF, what he planned to put in the PIF, or whether issues/programs lists had or had not previously been placed in the PIF. (Tr. 403-04.) Notwithstanding this inability to recall, billing records reflect that Mr. Sanchez had conversations with Mr. Ramirez between receipt of the renewal application and the filing of the renewal application. (EB Exh. 7.)[10] But the legal advice given is subject to privilege, and SFUSD has not offered to waive its privilege. In the final analysis, his inability to recall specific advice sought, requires rejecting Mr. Ramirez's claim that he relied on advice of counsel in answering "Yes" to Questions 1 and 2.

Petition to Deny

45. Golden Gate Public Radio ("GGPR") is a non-profit corporation. (SFUSD Exh. 22 at 35; EB Exh. 4 at 2.) GGPR's members were employees of Station KALW(FM), either full-time, or part-time, or volunteers. (SFUSD Exh. 4 at 48; SFUSD Exh. 22.) Mr. Dave Evans was Chief Engineer, Mr. Jason Lopez and Ms. Deirdre Kennedy were part-time announcers, and Mr. Mel Baker began working at the Station in early 1996. (EB Exh. 4 at 1; EB Exh. 44 at 123, 139.) Other announcers included Ms. Joann Mar, Mr. Joseph Hughes and Ms. Hedy Jacobitz. All these individuals are described by Mr. Ramirez as "disgruntled." (EB Exh. 6 at 14.)

46. Mr. Ramirez made unpopular programming changes and cut programs that had been popular with the Station's staff. (SFUSD Exh. T1 at 6-7.) He also implemented a new underwriting program for the Station to raise more grant money. (SFUSD Exh. T1 at 7.) Those changes were not favored by certain long-serving staff, and some became upset. (SFUSD Exh. T-1 at 8.) The goal of GGPR was to take over governance and management of the Station. Essentially, GGPR demanded that the School Board turn over operation of the Station. (SFUSD Exh. T1 at 8; SFUSD Exh. 22 at 6; SFUSD Exh. 4 at 79-80.)

47. On October 1, 1977, counsel for GGPR sent to Mr. Sanchez a threatening list of justifications for a petition to deny, making clear that the petition could be avoided by agreeing to allow GGPR to operate the Station. (SFUSD Exh. 4 at 79-80.) There was much at stake for SFUSD, and so Mr. Ramirez relied heavily on experienced counsel to make appropriate corrections and to provide acceptable explanations to the Commission. (SFUSD Exh. T-1 at 18.)

[10] Mr. Sanchez's billing records reflect time spent during this period selecting documents for Mr. Ramirez. (EB Exh. 7 at 1, entry 1819.) Billing records reflect a 45 minute conference call on the renewal application occurring on June 30, 1997. (EB Exh. 7 at 1.) SFUSD was billed for conferences with Mr. Ramirez on May 8, June 30, July 7 and July 10, 1997. (EB Exh. 7 at 1-2.) Telephone calls on July 7 and 10, 1997 exceeded 75 minutes. (EB Exh. 7 at 2.) Mr. Sanchez submitted bills for services rendered on May 7, May 14, May 31, July 2 and July 30, 1997. (EB Exh. 7 at 1-2.) Mr. Ramirez's preparation of the renewal application and the answers certified therein were related to billed legal advice. (Tr. 533)

Billing records reflect that in October 1997, Mr. Ramirez prepared and sent an "inventory of public file" to Mr. Sanchez, (EB Exh. 7 at 3; EB Exh. 3 at 3), and also reflect contemporaneous discussions between Mr. Ramirez and Sanchez attorneys. (EB Exh. 7 at 3.) On advice of counsel, supplemental ownership reports were to be prepared that had been due to be filed in 1993 and 1995, and as of December 1997, Mr. Ramirez "made sure" that supplemental ownership reports were added to the PIF. (SFUSD Exh. T-1 at 18.) But SFUSD failed to file corresponding supplemental reports with the Commission (SFUSD Exh. 7), and the compliance quality of the PIF remained in question.

48. On November 3, 1997, GGPR made good on its threat and filed its petition to deny renewal, alleging that supplemental ownership reports had not been timely prepared, filed, or included in the PIF, and that issues/programs lists had not been timely prepared since 1992. (EB Exh. 5.)[11] GGPR further alleged that the Station's management knew that such documentation had not been timely prepared, filed, or placed in the PIF, and that the licensee had falsely certified in its renewal application that all ownership reports and issues/ programs lists had been placed in the PIF in a timely manner. (EB Exh. 5 at 1-5.) These allegations were supported by affidavits from Dave Evans, Susen Hecht and Jason Lopez. (EB Exh. 5 at 42-43.)

Opposition to Petition to Deny

49. SFUSD filed its opposition to GGPR's petition on January 20, 1998. (EB Exh. 6.) The truth and correctness of factual allegations in the opposition were certified to by Mr. Ramirez as General Manager, and by Mr. Enrique Palacios, Special Assistant to the Superintendent who was an off-premises supervisor of Mr. Ramirez. (SFUSD Exh. 4 at 31, 45-46, 49-51.) (EB Exh. 6 at 13-14 *et seq.*) The petition also contained allegations of violations of EEO rules that were not included in the *HDO*. Mr. Palacios was the primary source for rebutting those EEO allegations. Mr. Ramirez was primarily responsible for erroneous certifications concerning supplemental ownership reports and programming lists and the PIF.

50. SFUSD's opposition was a pleading prepared by counsel. The pleading argues that affidavits of Mr. Evans and Ms. Hecht are insufficient because they did not allege specific fact that "told" Mr. Ramirez "about what was in the files at the time he prepared the renewal application." (SFUSD Exh. 4 at 37.) That argument lacks conviction because it fails to mention the reasonable conclusion that Ms. Hecht's report showed that there were specific omissions of ownership reports and programming lists that should have been in the PIF. If Ms. Hecht had been wrong, the opposition would have alleged that Mr. Ramirez had searched the PIF and had found all or some of those missing items which would reduce or destroy Ms. Hecht's credibility. But counsel could not so allege because, as Ms. Hecht had reported and as corroborated by Mr. Lopez, missing documents which she inventoried as missing actually were missing.

[11] GGPR's petition to deny was treated as an "informal objection" under Section 73.2587. *See HDO* at 3. Since GGPR does not have party status, there was no appearance of GGPR in this proceeding, and GGPR did not participate in the hearing.

51. Mr. Ramirez rejected Ms. Hecht's work product and relied on his own judgment. (SFUSD Exh. T-1 at 12-13.) But he never pointed out any factual errors. Mr. Ramirez declared that when he certified to ownership and programming, he found the Hecht report to be "inaccurate and confused" without specifying any example, and that he did not "recall any prior conversation" with Mr. Evans. (EB Exh. 6 at 17.) *Compare* the following evidence: The Hecht report was a spontaneous delineation of what was found in and missing from the PIF (EB Exh. 5 at 46-49). It was corroborated by Mr. Lopez's personal review of the PIF. (EB Exh. 4.) Both Ms. Hecht and Mr. Lopez specified documents found and the years of reports that were missing, thereby making their evidence reliable and credible.

52. On January 17, 1998, Mr. Ramirez signed a declaration in support of SFUSD's opposition, representing that he "believed" that he had "fully accounted for all public issues/programs during [his] tenure as "General Manager," and that he was mistaken but his was a "good faith" belief. (SFUSD Exh. 4 at 38, 50; Tr. 447.) He testified that he had meant to admit that he had certified "incorrectly," but that he was relying on legal advice. (Tr. 447, 450-51.) The declaration also represented that after talking with Mr. Evans in 1996, Mr. Ramirez sought "to determine what was in the files" and "what was needed to make them complete," and that "review and update of the file has been and is an ongoing process." (SFUSD Exh. 4 at 49-50.) On cross-examination, Mr. Ramirez at first hesitated but then answered:

> I did look at the file and I did pretty much see the same thing that I think Dave was trying to call to my attention and followed up on it in the way that I did.

(Tr. 452-53.) He admitted that he "might have wrote this differently." But he testified that the declaration was a "good faith effort" to show that "ultimately – I looked at the file." (Tr. 454.) Mr. Ramirez avoided answering whether there was an "ongoing process" for reviewing the PIF, and he testified that he meant to say that he started reviewing the PIF to bring it into compliance by the time the renewal application was filed. (Tr. 455.) That testimony provides no additional explanation and it does not alter his untrue declaration that there was an "ongoing process" of file review and update.

53. On January 16, 1998, Mr. Sanchez filed a declaration which he prepared for Mr. Helgeson in support of the opposition. (SFUSD Exh. 4 at 74-75.) Mr. Helgeson represented in paragraph 4 of his declaration:

> I am aware of and have assisted with, an ongoing affirmative effort since the arrival of Jeffrey Ramirez --- to update and maintain the station's public information file ---.

Mr. Ramirez did not know whether that statement was accurate." (Tr. 476-77.) When asked about any assistance Mr. Helgeson provided, Mr. Ramirez testified: "I'm not aware of any assistance that Bill [Helgeson] provided me ---." (Tr. 476-77.) Mr. Ramirez was not aware of Mr. Helgeson ever working independently on the PIF. (Tr. 483.)

54. On January 30, 1998, Mr. Helgeson sent a fax transmittal to Mr. Sanchez:

> Attached is list that Jeff, Ana and I used yesterday to "clean up" KALW's Public File. ---.

(EB Exh. 10.) Mr. Ramirez was asked whether he understood the reference to "clean up" the PIF, and he testified: "No, I don't." (Tr. 484.) He was asked whether new documents were being added to the PIF in January 1998, and he answered, "I don't remember." (Tr. 484.) This one page document was fact-specific about a "cleanup-list" that if it existed would have significance in corroborating Mr. Ramirez's account that he had reviewed the PIF in connection with his completion of the renewal application. His inability to recall a "list" that was sent to Mr. Sanchez leads to the conclusion that there never was such a "list."

55. Mr. Lopez rebutted both declarations, including with respect to the 1993 and 1995 ownership reports that Mr. Sanchez had attached to the opposition. According to Mr. Lopez, the 1993 report "was inaccurate" in representing that three of those listed were BOE members in 1993. The 1995 report bore a date of December 10, 1997, and it was not in the PFI when Mr. Lopez had inspected it in July 1997. (EB Exh. 4 at 3, 7.) Earlier Mr. Lopez affirmed that when he reviewed the PIF in July 1997, he did not find any "Program Guides" or any "NPR programming." He did find a list consisting of pages 5, 6 and 7 for a program believed to be "City Visions," which he photocopied and returned to the PIF. (EB Exh. 4 at 3.) Mr. Lopez was never contradicted by a subsequent declaration or on his cross-examination. (Tr. 1199-1235.) In July 1997, he found that there were incomplete lists of issues/programming, and that there were no supplemental ownership reports showing changes in the BOE's membership following 1992 and 1994 elections. Mr. Lopez also found that the PIF did not contain program guides or lists that were based on NPR programming. (EB Exh. 4 at 3.)

New General Manager

56. In January 1998, Mr. Ramirez resigned and left the Station "to find alternative employment in a more positive environment." (SFUSD Exh. T-1 at 19; EB Exh. 40 at 4.) He regretted his "mistake" but he believes that he did his best to understand the PIF obligations, to answer renewal questions in "good faith," and to provide counsel with information needed to respond to GGPR's complaints. (SFUSD Exh. T-1 at 19.) Mr. Helgeson immediately became interim General Manager. (SFUSD Exh. T-2 at 10.)

57. In February 2001, SFUSD offered the position to Ms. Margaret Ann (Nicole) Sawaya. (Tr. 869-72.) She was hired and started as General Manager on March 1, 2001. On March 6, 2001, Mr. Sanchez obtained an extension to respond to the LOI to enable Ms. Sawaya to become involved in responding. (SFUSD Exh. T-3; EB Exh. 16.) Ms. Sawaya had held a former position as a general manager. (SFUSD Exh. T-3 at 2-4.) She was an intern at KQED(FM), a public radio station in San Francisco where she worked for "several years" as producer and journalist. She was a "public affairs host" at KQED-TV, San Francisco. She was hired as Program Director at KZYX(FM) in Phito, CA and there she was promoted to Station

Manager for her last six months. She became employed by NPR in Washington, D.C. where she worked for two years. She was hired by Pacifica Foundation Station KPFA(FM), Berkeley, CA, where she became General Manager. She supervised 28 employees and 25 volunteers. But all regulatory work was done at Pacifica headquarters. She worked at KPFA(FM) for eighteen months, and lost her position in a labor dispute. She was working as a media consultant for Pacifica News Service when she was contacted by Mr. Helgeson who knew her through NPR. Mr. Ramirez recommended her as a replacement General Manager at Station KALW(FM). She was hired without being told of the pending petition to deny renewal. (SFUSD Exh. T-3 at 2-4.)[12]

Letter of Inquiry

58. On February 5, 2001, the Bureau issued a Letter of Inquiry ("LOI") requiring SFUSD to provide information concerning allegations of GGPR's petition to deny (EB Exh. 13). The Bureau also delayed action on the renewal application to allow time for SFUSD to reply. (*Id.*) The LOI posed questions on whether at the time the renewal application was filed, the PIF contained supplemental ownership reports and quarterly issues/programs lists. (EB Exh. 13 at 1-3.)

59. On March 8, 2001, Ms. Sawaya sent her first memo to Mr. Sanchez: "I really hope we can put this license challenge to bed very soon...." (EB Exh. 20.) In a second memo on March 8, 2001, Ms. Sawaya recommended "No's" in responding to the LOI questions. (Tr. 1338; SFUSD Exh. 21.)

> **LOI question 1 asked:**
>
> On August 1, 1997, when the subject license renewal application was filed, did the KALW(FM) public inspection file contain all of the ownership and supplemental ownership reports required to be kept in the file by Section 73.3527?
>
> a) If the answer is "no," detail any omission or deficiency. If the answer is "yes," please include a copy of each such report with the response to this inquiry letter.
>
> (EB Exh. 13 at 2.)

[12] SFUSD reported to the Commission Secretary and the Presiding Judge by letter dated February 17, 2006, that Ms. Sawaya has resigned her position as General Manager, and SFUSD began soliciting applicants for a qualified replacement.

Sawaya response:

1) **No**. Missing was: ownership report January 31, 1993 – was put in file December 10, 1997. Missing was ownership report January 31, 1995 – was put in file December 10, 1997. (see enclosed copies) ....

(EB Exh. 21; Tr. 1339-41.)

LOI question 2 asked:

On August 1, 1997, did the KALW(FM) public inspection file contain all of the issues/programs lists required by Section 73.3527? Did any lists that were in the file contain the information required by Section 73.3527?

a) If the answer is "no" to either inquiry, detail any omission or deficiency. If the answer is "yes," include a copy of each issues/programs list with the response to this letter.

(EB Exh. 13, p. 2.)

Sawaya response:

1) **No**. The premises of KALW, [FM] were almost entirely destroyed during the Loma Prieta earthquake in the Fall of 1989 in San Francisco. Until the beginning of 1997, when KALW moved to its current location (Philip & Sala Burton High School), the station was moved several times to temporary facilities. During this period, KALW was operating out of a variety of abandoned school gyms. Many day-to-day operations did not happen during this period, and the record-keeping ability of the station was severely hampered by the constant changing of locations. Most files and paperwork were kept in boxes, some of which were lost as moves kept occurring. Unfortunately, the public file of issues/ programs was susceptible to the physical chaos at the station.

(EB Exh. 21.)

LOI question 4 asked:

If the answer to any of the above questions is "no," detail when and precisely what steps were instituted to correct any problems and ensure that the public inspection file contained all requisite materials?

(EB Exh. 13 at 2.)

Sawaya response:

KALW did ownership reports for 1993 & 1995, and we have brought all ownership reports up to date, with the most recent being January 31, 2001. KALW's reports were spottily corrected during the late 1990's. However, all reports were corrected in the Fall of 1997 when matters came to the attention of then general manager, Jeff Ramirez.[13]

(EB Exh. 21.)

LOI question 5 asked:

As of the date of this letter [February 5, 2001], is the KALW(FM) public inspection file now complete?

> a) If the answer to any of the questions 1-3 above is "no" and presuming that the public inspection file is now complete and current, give the date on which the KALW(FM) public inspection file contained all required materials.
>
> (EB Exh. 21.)

[13] Ms. Sawaya could not remember how she knew what Mr. Ramirez had done with respect to ownership reports, but she presumes that she was told by Mr. Helgeson. (SFUSD Exh. T-3 at 11.) In view of the short time that she was at the Station before sending her March 8 memos, Mr. Helgeson probably was a source of information.

Sawaya response:

> Ownership reports are now completed and current. Donor support for specific programs is non-applicable. Issues and program listings are current, and back listings are in the process of being completed to the best of our ability.

(EB Exh. 21.) (SFUSD Exh. T-3 at 8.) This is an admission that there still were incomplete issues/programs lists, and that the lists were being updated.

60. Ms. Sawaya transmitted her March 8 memos to Mr. Sanchez. (EB Exhs. 13, 21; Tr. 1367.) On April 5, 2001, counsel represented to the Commission that "present General Manager and Operations Manager of KALW(FM) [Ms. Sawaya and Mr. Helgeson] have completely reviewed KALW's public inspection file and made sure that it contains all required documents, reports and information through to the present." (EB Exh. 34 at 8.) There is not sufficient evidence in the record proving that there was such a complete review of the PIF, or that on April 5, 2001, it contained "all required documents." SFUSD's response to the LOI is inconclusive in these respects.

61. Ms. Sawaya "determined rather quickly" that the PIF was not properly maintained, "a fact that she reported to the Sanchez Law Firm." The Bureau concludes that she "accurately reported" to Mr. Sanchez that Mr. Ramirez prepared supplemental ownership reports after the August 1997 filing and that he placed reports in the PIF in December 1997. She also "accurately reported" to Mr. Sanchez that issues/ programs lists were in the process of being completed. By March 26, Ms. Sawaya believed the "public file is now in excellent order including past years in question" and communicated that to Mr. Sanchez. (SFUSD Exh. 19.) By April 3, Ms. Sawaya sent Mr. Sanchez documents related to the license challenge. (SFUSD Exh. 20.) On April 3, Mr. Helgeson sent an 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 specifying "what documents were (or should be) in KALW's public file ... ownership reports, quarterly issue reports and donor lists." (EB Exh. 27.) These events show that Ms. Sawaya acted reasonably and responsibly in attempting to provide Mr. Sanchez with the current status of the PIF.

62. Mr. Helgeson declared that Mr. Sanchez had provided him with a copy of the final response, that he had reviewed it, and that he had personal knowledge of the facts therein. (EB Exh. 34.) Mr. Helgeson was relying on counsel who prepared the response and drafted his declaration. Both the letter and the declaration bore a date of April 5, 2001. Mr. Helgeson could not have meaningfully reviewed the final LOI response that was still being edited on April 5. Mr. Helgeson could not have personal knowledge of all facts asserted in the response, and he did not have personal knowledge of the PIF's contents as of August 1, 1997. Therefore, he did not have a factual basis for affirming or ratifying Mr. Ramirez's input on SFUSD's erroneous certification. He merely assumed that Mr. Ramirez was accurate and truthful. And he was not in control of counsel's strategy in replying to the LOI.

SFUSD's Financial Condition

63. The Station receives no direct financial support from the District. The District provides in-kind contributions of office, production and broadcasting space, and administrative support. (SFUSD Exh. 78-C at 11.) The Bureau concedes that the District would be the "source for paying forfeitures." (Tr. 644.)

64. The operating budget of the Station is funded almost entirely by contributions from more than 13,000 members along with grants received from groups such as the Corporation for Public Broadcasting. Mr. Helgeson indicated in testimony that the Station had a "pretty good year" with its contributions. (Tr. 645.) The Station's budget for fiscal year 2003-2004 was approximately $1.5 million dollars, slightly more than in fiscal year 1996-1997. (SFUSD Exh. 78-C at 6; SFUSD Exh. 2 at 14.) It is concluded that SFUSD, as licensee, would be responsible for paying any forfeiture. (Tr. 644.)

65. The District's Annual Financial Report dated June 30, 2004 ("Financial Report") noted patterns of deficit spending during the 2003-04 fiscal year that resulted in a deficit in available reserves in an amount of $6.9 million. (SFUSD Exh. 78-A at 64.) The Financial Report identifies causes of the deficit as reduced State revenues, costs of fringe benefits, declining school enrollment which caused a reduction in funding, and an increase in the number of charter schools which cost more to run than the school revenues that the District receives. (*Id.* at 64-65.) The Financial Report urges the District to reverse its deficit spending, and warns that without new sources of revenue, significant spending cuts will be necessary. (*Id.*) The Report concludes that District management concurs with the recommendation to achieve expenditure reductions, and that the District 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.[14]

66. SFUSD's "Budget Outlook" reports that the District's deficit for Fiscal Year 2004-2005 is expected to be $4.9 million and that the District's deficit for Fiscal Year 2005-2006 is expected to be $22.3 million, unless cost saving measures are implemented. (SFUSD Exh. 78-B.) Mr. Lopez observed in his testimony that the District had closed several schools in the city in an effort to narrow the budget shortfall. (Tr.1232.) Mr. Ramirez testified that the Station was never "living from paycheck to paycheck," and "there was never a budget crisis that I can remember ever having." (Tr. 317.) The evidence on financial condition that was provided by SFUSD, does not establish that SFUSD cannot pay a forfeiture of a reasonable amount.

[14] The Annual Financial Report for the Fiscal Year July 1, 2004 to June 30, 2005 had not yet been completed when SFUSD submitted its Proposed Findings.

CREDIBILITY ANALYSIS

67. The controlling issue of intent to deceive, or gross indifference for the truth that is tantamount to intent, is grounded in an admittedly erroneous "Yes" certification to completeness of the Station's PIF. That admittedly untruthful certification, recklessly solicited of SFUSD's top manager by Mr. Ramirez, will be considered in the context of declarations in support of SFUSD's opposition to a petition to deny, declarations in support of its counsel's response to the LOI, and related depositions, hearing testimony, and cross-examination.

Ownership

68. Question 1(b) asked if the applicant's ownership report was filed with the Commission. The word "Ownership Report" is in the singular. The regulation then in affect required noncommercial stations to file an "Ownership Report" at the time the application for renewal is filed. A literal reading of the question could have caused Mr. Ramirez to believe there was good faith compliance by filing a current ownership report. The question and answer are of lesser significance because the same question of ownership is also addressed in the question on completeness of the PIF. Finally, the policy requiring supplemental ownership reports became moot, which renders the lack of supplemental ownership reporting a *de minimis* shortfall. SFUSD has met its burden of proof with respect to mistakenly answering "Yes" as to ownership reporting, and there are no adverse credibility findings to be made with respect to Question 1.

Public Information File

69. SFUSD relies on advise of counsel in defense of its certification that the licensee had the required documentation in the PIF at appropriate times. But there is no evidence as to what advice, if any, counsel provided to Mr. Ramirez, and SFUSD never proffered any evidence that shows when or whether Mr. Sanchez had actual knowledge of the contents of the PIF. It was when counsel relied on Mr. Ramirez to answer the petition to deny through his 1998 declaration that Mr. Ramirez reportedly sent counsel an inventory of the PIF, as shown by billing records. (EB Exh. 7 at 3.) Yet there was no written "inventory" offered in evidence, and the only "inventory" was the Hecht report.

70. Mr. Ramirez answered Question 2 about the Station's PIF with an erroneous "Yes." Before answering he asked Ms. Hecht for help in reviewing the PIF, but he has no recollection of instructions. (SFUSD Exh. T-1 at 12.) What follows is baffling. Mr. Helgeson recalls that "she [Ms. Hecht] was assisting Jeff [Ramirez] in regards to the renewal documentation that needed to be done and the forms that needed to be filled." (Tr. 675.) Mr. Ramirez testified that Ms. Hecht reviewed the PIF and then prepared what would be useful for certification in the form of an inventory of the file's deficiencies. Mr. Ramirez looked at the information with editorial criticism, testifying that he had found Ms. Hecht's document to not "look like professional, reliable work," but failing to point out any factual inaccuracy. (SFUSD

Exh. T-1 at 12.)[15] *Ms. Hecht* provided a current inventory or accounting of the PIF that revealed the most recent supplemental ownership report to be dated 1991, and the last complete issues/ programs lists to have been prepared in 1992. Ms. Hecht's report clearly had flagged the problem. (EB Exh. 44 at 79-80; 87-89.)

Ignoring Information

71. When he first arrived at the Station, Mr. Ramirez was told by Mr. Evans about deficiencies. He was again warned by the Hecht report about deficiencies. Ms. Hecht did what she was asked to do albeit in a more complete format than requested. Mr. Ramirez had given her a task without instruction, and then forthwith rejected her efforts. Instead, he conducted and relied upon his own review of the PIF. Yet he could not testify to specifics about the PIF he claims to have examined. It cannot be concluded on this record that Mr. Ramirez learned more on his own about the PIF's deficiencies than did Ms. Hecht, a disinterested volunteer who he told to look into the condition of the PIF, who did so, and who had the good sense to write down a list of observed deficiencies. His own review was comparatively less adequate, and he admittedly erred in causing SFUSD to certify to a complete PIF.

72. In one instance of poor recollection, Mr. Ramirez was asked who had told him that reports were needed for BOE election results in '92 and '94 elections. He answered: "I don't remember --- [but] I can think through how I think I came to that decision." (Tr. 442.) A list of delicts regarding renewal prepared by GGPR's attorney was given to Mr. Ramirez, and as he testified:

> --- the list would have drawn my attention to the fact that the certification I made with respect to the ownership report was not accurate. So I think that would have then caused me to undertake --- to create the ownership reports for 1993 and 1995.

(Tr. 443.) Soon after October 4, he drafted '93 and '95 reports and sent them to the Superintendent's office for signature where they apparently languished for two months. (Tr. 444; SFUSD Exh. T-1 at 18.) While he does admit in testimony to preparing these missing reports, his memory of the operative facts was "a very vague memory." (Tr. 445.) As was frequently the case, when shown a billing reference to refresh recollection of a conference with Mr. Sanchez, Mr. Ramirez reminded Bureau counsel: "There's a lot that I don't remember. I don't know why." (Tr. 446.)

[15] Much of Mr. Ramirez's direct testimony was presented in negative terms in criticizing and blaming others rather than presenting positive, affirmative statements of what he was thinking and doing, and who and when he was talking to in reaching critical decisions on completing the renewal application. (SFUSD Exh. T-1, *passim.*)

Issues/Programs Lists

73. Mr. Ramirez was unclear and unconvincing in his contention that he relied in good faith on only an incomplete "City Visions" list.[16] There was additional important programming. "AIDS Update" was a weekly show involving a significant local public health issue. (Tr. 293.) Arts and culture are an important part of the San Francisco community, and "Open Air" features fine arts interviews with local authors and artists. (Tr. 296.) Mr. Ramirez recalls generally asking producers, which would include producers of "AIDS Update" and "Open Air," to provide similar lists of issues and programming for the renewal application. (Tr. 393.) However, his recollection was faulty (Tr. 297), and there is no credible evidence of "AIDS Update" or "Open Air" programming being referenced in the PFI in 1997. (SFUSD Exh. T-1 at 14.)

74. Mr. Ramirez failed to testify to particulars about what he had found present or missing from the PIF, repeatedly claiming that he could not remember specifics. By contrast, credible evidence of Ms. Hecht and credible testimony of Mr. Lopez identified specific reports which were missing and specifically noted the incomplete "Exhibit O." There were no allegations and no proof was offered that Ms. Hecht or Mr. Lopez had fabricated testimony, or that their conclusions were factually wrong. But Mr. Ramirez was grossly and recklessly negligent in misrepresenting to the Superintendent that the PIF was in compliance with Commission regulations, which caused SFUSD to erroneously certify by Superintendent's signature on the renewal application. (EB Exh. 5 at 25-28.)

Repeated Inabilities to Remember

75. Mr. Ramirez repeatedly forgot what he would be expected to remember. He represented in written testimony attested to on May 2, 2005:

> I do generally recall asking various producers to put together lists of programs that demonstrated the Station's treatment of community issues prior to submitting the Renewal Application.

(SFUSD T-1 at 14.) In cross-examination, Mr. Ramirez was asked if he had looked in the PIF to determine "whether or not any such material made it into the file," to which he answered, "I don't remember if I did that." (Tr. 393.) Mr. Ramirez then was asked about specific producers who were responsible for important programming. Mr. Alan Farley produced "Open Air"

[16] The petition to deny included an "Exhibit O" which is an untitled three page excerpted document containing pages numbered 5, 6, 7. The document listed programming that had been broadcast as "City Visions" programming during the period June 5, 1995 to July 7, 1997. There were 95 programs identified by "producer" and by "topic." When Mr. Sanchez responded to the LOI in April 2001, he attached a continuation sheet which showed "City Visions" programming from July 7, 1997 to October 6, 1997. (EB Exh. 34.)

dealing with local fine arts and culture, yet Mr. Ramirez could not recall asking him to prepare material for the PIF. (Tr. 291-93, 297.) Mr. Ramirez recalled a program called "Commonwealth Club of California" but he did not remember the producer's name, Mr. Ricardo Esway. (Tr. 305.) He recalled Mr. Martin Nemko, producer of "Work With Marty Nemko" which dealt with careers and related training. When asked if he recalled asking Mr. Nemko to prepare material for inclusion in the PIF, Mr. Ramirez answered "I don't remember." (Tr. 306-309.) He then was asked about Mr. Chuck Finney, producer of a program called "Your Legal Rights." He was asked whether he recalled asking Mr. Finney to create a document for inclusion in the PIF. He answered, "No, I don't remember that." (Tr. 309-312.)

76. Overall testimony shows – and perhaps dictates – that when it came to certification of PIF completeness in 1997, Mr. Ramirez was prepared to rely on the incomplete list of "City Vision" programming while knowing full well that there were no other lists of issues/programs in the PIF when he certified an unconditional "Yes." When pressed on individual producers' names, he fell back on repetitive responses of "I don't remember." His representation in testimony that "I believed that the "City Visions" list alone was sufficient to satisfy the issues/ programs list requirements for my tenure at the Station" was at best an irresponsible rationalization with no foundation in fact, and Mr. Ramirez knew that to be the case. (SFUSD T-1 at 14.) Here, despite repeated denials of memory, Mr. Ramirez was lacking in candor in his testimony presented in 2005 when he was on notice of relevant facts. In considering the totality of his testimony, it is impossible to credit Mr. Ramirez with credibility as a witness.

1998 Opposition to Petition to Deny

77. SFUSD's attorneys relied on Mr. Ramirez's declaration of January 1998, and on Mr. Helgeson's companion declaration, both of which the attorneys prepared, and both of which claimed that they undertook efforts to maintain the PIF, but both failing to state specifics. Rationalizations as to good faith innocence that are insufficiently tied to facts are speculative, and therefore are not to be believed. But SFUSD's opposition papers, including the Ramirez and Helgeson declarations, were prepared and advocated by counsel, and SFUSD followed its counsel's legal advice. It would be unreasonable for Mr. Ramirez and Mr. Helgeson to reject counsel's advice when that could have delayed the filing of an opposition, or otherwise might have prejudiced SFUSD's pleading cycle.

78. On January 30, 1998, Mr. Helgeson reported to Mr. Sanchez about a "clean up" of the PIF. (Tr. 831-859.) Until then, he had only assisted Mr. Ramirez in "cleaning up" the PIF, having little knowledge of the PIF. Mr. Ramirez testified at hearing that he knew nothing about Mr. Helgeson working on the PIF. Mr. Helgeson's declaration of January 16, 1998, lacks specificity and does not support a conclusion that he had sought to determine "what was in the files," or that there was an "ongoing process" of review and update of the PIF. To the contrary, he never meant to represent in his declaration that he was "responsible for maintaining" the PIF, and he had never been responsible "for keeping the PIF up-to-date." (SFUSD Exh. T-2 at 9.) Because of counsel's involvement in preparing the declaration, Mr. Helgeson's questionable and

misleading declaration does not establish that Mr. Helgeson had intentionally misrepresented to the Commission. Mr. Helgeson's credibility is assessed further below in connection with responding to the LOI.

2001 Reply to Letter of Inquiry

79. Ms. Sawaya became concerned with a timely response to the LOI while maintaining a detachment from substance. (EB Exh. 23.) She never submitted a supporting declaration. On March 26, 2001, she inquired of Mr. Sanchez whether the "reply to the FCC ha[d] been written." (SFUSD Exh. 19.) Her prompting e-mails were copied to Ms. Jackie Wright, Executive Director, Office of Public Engagement, her "immediate boss" at SFUSD, and to Mr. David Campos, a Deputy City Attorney embedded at SFUSD. (EB Exhs. 22, 23, 49.) Most of the work of the Sanchez attorneys on the letter's preparation occurred just before submitting the response when on April 2 and 3, Ms. Jenkins billed 17 hours. (EB Exh. 35.)

80. There was one significant exception to Ms. Sawaya distancing herself from the LOI response. In a candid March 8 memo to counsel, she wrote "No" to the LOI's question about whether the PIF contained all required supplemental ownership reports and issues/programs lists on August 1, 1997. In the same memo, Ms. Sawaya advised Mr. Sanchez that Mr. Ramirez prepared supplemental ownership reports for 1993 and 1995, after the renewal application had been filed, but that these reports had not been placed in the PIF until December 1997. (EB Exh. 21.) Ms. Sawaya concluded that the PIF had not been maintained as required, and reported that to counsel. Then Ms. Sawaya sent Mr. Sanchez copies of these two ownership reports, plus three others that were overdue. Ms. Sawaya was the first manager at SFUSD to try to come to grips with specific facts as they existed in July-August 1997, and to report them to counsel.

81. Counsel's final letter of April 5, 2001, stated that Station management had a "belief" that its PIF as of August 1, 1997, "contained all of the issues/program lists for the entire period in question." (EB Exh. 34 at 3.) After attorney-client dialogue between Mr. Sanchez and Ms. Sawaya and others, the LOI was answered as Sanchez counsel had drafted it. Inexplicably, Mr. Sanchez rejected Ms. Sawaya's candid "No" answer. There is no evidence to show that Ms. Sawaya was factually in error in recommending "No" responses. Mr. Sanchez shifted the response to mitigation, emphasizing sequential location changes of Station premises causing disruption of PIF maintenance. Counsel also tied the reply letter to a good faith "belief" that on August 1, 1997, all required supplemental ownership reports were in the PIF.

82. Mr. Helgeson was asked whether he had seen counsel's letter before it was sent on April 5, and he testified that "I do not have any recollection of having seen this letter before it was sent in, given the date of April 5th." (Tr. 1072.) Counsel had taken control of the LOI response, and it would not be expected that there would be any objection from Ms. Sawaya, or from any other Station employee. The contents of counsel's letter cannot be accepted as a reliable reconstruction of decisional facts, and the "Yes" answers were misleading. But no intention to deceive is apparent in counsel's letter.

Depositions and Testimony

William Helgeson

83. Mr. Helgeson was asked on cross-examination about his intent in his 1998 declaration. (Tr. 804-14.) When the Presiding Judge intervened, Mr. Helgeson conceded that, contrary to the assertion in his declaration, he (Mr. Helgeson) did not have knowledge of what the rules required. (Tr. 824-25; 831-42 [discussing EB Ex. 10].) And even though contemporaneous e-mails reflected that Mr. Helgeson was supposed to have helped answer the LOI's questions, he repeatedly insisted that his role was only to bring the PIF up-to-date, notwithstanding that he was the only SFUSD employee to verify SFUSD's assertions in the final LOI response. (Tr. 921-22, 942, 1096-97.)

84. Bureau Exhibit 10 (EB Exh. 10) is a one sheet hand-written message to Mr. Sanchez which Mr. Helgeson identified as his handwriting. (Tr. 831.) It shows a date of January 30, 1998, and states:

> Attached is list that Jeff, Ana & I used yesterday to "clean up" KALW's Public File.

Mr. Helgeson testified that now he is "not sure what list it refers to particularly." He went on to testify "I'm not sure what I meant at this time [and] I can't remember what or why I put the words 'clean up' in quotes, either." (Tr. 832.) He testified further: [W]e felt that we needed some list because I certainly didn't know what should and shouldn't be in a public file --- I just assumed there was some printed list." (Tr. 833.) He continues: "I'm not sure --- like I say I don't know what clean up was then." (Tr. 834.) When asked if the public file had been reorganized, he answered "I don't know if we reorganized" and did not "recall us taking an inventory." (Tr. 835-36.) Mr. Helgeson showed an inability to recall what he should have known concerning the state of the Station's PIF in January 1998. Disarray in testimony with regard to his declaration and the PIF when he assumed the General Manager's position in 1998, seems mainly attributable to his ignorance of regulations, his loyalty to Mr. Ramirez, and recently to his disability.[17] It could not be determined from his misdemeanor whether he was being untruthful, and he receives the benefit of the doubt.

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[17] Mr. Helgeson testified in writing:

> [As of] early 2004, --- I am now legally blind. --- When I look directly at a piece of paper with writing on it, I cannot read the words printed. --- Moreover, I cannot see the entire document when I look at the enlarged image. --- I generally do not receive the mental impressions of documents that sometimes help people refresh their memories.

(SFUSD Exh. T-2 at 17.)

85. Mr. Helgeson testified at hearing that he had no intent of attesting to the PIF's contents in August 1997, but only intended to state what was in the PIF in April 2001. His declaration of 2001 was to support the LOI response, and he candidly testified that his certification as to the truth of the entire contents of the reply was not "accurate." (Tr. 1112.) He had misguided faith in Mr. Ramirez knowing Commission rules, and in believing that Mr. Ramirez would have acted in accord with the rules. (Tr. 824-825.) None of what Mr. Helgeson believed was based on fact, and none of it proved to be true. However, Mr. Helgeson's reliance on counsel, his naiveté regarding Mr. Ramirez's ability and trustworthiness, and his candid admission, negate any focused intent to deceive the Commission.

Nicole Sawaya

86. On September 28, 2004, the Bureau deposed Ms. Sawaya. Her deposition testimony was convoluted with inabilities to remember and re-directing of questions. (SFUSD Exh. 18 at 371, 391.) To illustrate, when asked whether she had seen the LOI, she responded:

> 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.

(SFUSD Exh. 18 at 368.) Such testimony of unfamiliarity with the LOI is facially inconsistent with her hearing testimony. She acknowledged drafting memos on March 8, 2001, and testified at the hearing that she had used the LOI as a guide in formulating the substantive responses in her memos. (Tr. 1365.) Ms. Sawaya and Mr. Helgeson collaborated in making the 1999, 2000, and 2001 ownership reports current, and these she mailed to Mr. Sanchez. (Tr. 1346.) She was involved in a meaningful way in completing incomplete files of the Station. (Tr. 1361.) (SFUSD Exh. 18, *passim.*) When asked whether she had been asked to respond to the LOI's first question, she answered "No." (*Id.* at 368-69.) She was asked whether she knew if anyone was asked to respond to that question, and she answered "I don't know." (*Id.*) Identical responses were given for remaining questions in the LOI. (*Id.* at 369-70.) She had seen a final reply in draft form, but could not remember providing any information or comments. (*Id.* at 370-71.) Ms. Sawaya "didn't want to come to any quick judgments, especially given the fact that some people were still at the station that was involved in this." She had not even looked at the PIF until "my second week there [at the station], --- . (SFUSD Exh. 18 at 367-76.) She concluded that by mid-March the PIF appeared to her to be in good order. (SFUSD Exh. 18 at 375-76.) Ms. Sawaya lacked candor in denying having any recollection about the LOI. But her denial is not found to be disqualifying for SFUSD because it is obviously not true so that no one would be misled, and she had no discernable motive to lie on the merits.

87. Ms. Sawaya prepared for her deposition by reading GGPR's petition to deny and the *HDO*. (SFUSD Exh. T-3 at 9.) Both documents discuss in detail what was, or what was not, in the PIF at various times. For context *see HDO* Paras. 9-11. But she testified that she only expected to be "asked to discuss what the Station was doing on the programming front and its fiscal situation and [her] role in bringing it to its current status." (SFUSD Exh. T-3 at 9.) Yet in an e-mail sent two months earlier, Ms. Sawaya stated that she understood the *HDO* and 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." (EB Exh. 57.) This e-mail shows that Ms. Sawaya understood the focus of her deposition would be issues of the *HDO*. Certainly, in advance of her deposition with qualified counsel at her side, she must have known that she would be asked serious and penetrating questions about *HDO* allegations. Her testimony that she expected to testify only about programming was misleading. But it should not be attributable to SFUSD for disqualification because it is *de minimis*, and there is no clear motive to deceive.

88. Ms. Sawaya asserted that she had memory loss because she "had not seen [her] March 8 memo in over three and a half years," that she "wasn't asked about the memo at the deposition," and that she "was not told of the document until some time afterwards." (SFUSD Exh. T-3 at 9.) Ms. Sawaya asserted that she did not retain a hard copy of her March 8 memo because "it is not my practice to print paper copies of electronic documents and place them in a file." (SFUSD Exh. T-3 at 10.) Ms. Sawaya then admitted that her March 8 memo was stored in her computer in a directory styled "MyDocs," which she claims she did not access due to a technician's glitch (SFUSD Exh. T-3 at 10.) It is difficult to accept her explanation about forgotten March 8 memos which were important evidence. It also is difficult to accept that she would keep an "Ernie file" that omitted to include her March 8 memos. But as unreliable as is this testimony, it does not prove an intentional lack of candor with respect to her testimony on substantive issues.[18]

89. There is a lack of proof of any intentional and knowing concealment on Ms. Sawaya's part of prior misrepresentations in connection with certification of the PIF. There is insufficient evidence to conclude that Ms. Sawaya attempted through a knowing deception to convince the Commission that in August 1997, the station had maintained its PIF in accordance with Commission rules. Ms. Sawaya was concerned about showing superiors at SFUSD that she was pressing counsel on whether a "reply to the FCC ha[d] been written." (SFUSD Exh. 19.) Her deposition testimony does not support a conclusion that she intended to mislead. She had no motive to deceive the Commission, she never executed a declaration, and her candor in March 2001 offsets failures at deposition to recall details, and any misstatements in deposition are not decisionally significant.

[18] It is important that on September 28, 2004, when the Bureau deposed Ms. Sawaya, SFUSD had not yet authorized the Sanchez attorneys to turn over its files to new counsel. *See* Declaration of Nicole Sawaya, executed March 2, 2005, included in support of Opposition to Enforcement Bureau's Motion to Enlarge Issues, filed March 2, 2005. SFUSD's in-house counsel did not send a written request authorizing the Sanchez law firm to transfer files to Hogan & Hartson until January 2005, in connection with the Bureau's Second and Third Requests for Documents. Once again, SFUSD was "a day late and a dollar short" in giving Station management assistance at a critical time of need.

CONCLUSIONS OF LAW

General Considerations

90. The Commission's policy on ownership responsibility is applicable in assessing responsibility of SFUSD for the actions of the Station's management. The Commission has a policy that "[a] corporation must be responsible for the FCC – related misconduct --- of its employees in the course of their broadcast employment." *Character Policy Statement*, 102 FCC 2d 11179, 1218 (1986). SFUSD has vicarious responsibility for Mr. Ramirez's conduct under this policy. The policy also provides that "mitigating factors must be considered." *Id.*

91. The Commission's policy on renewal where there has been wrongdoing concludes that "a range of sanctions short of revocation or failure to renew a license can be imposed by the Commission." (*Id.*) It is concluded that gross negligence, vicariously attributable to SFUSD under principles of *respondent superior*, does not automatically result in denial of license renewal. The evidence and applicable case law establish that Mr. Ramirez causing "Yes" certification by SFUSD as to condition of the PIF and his lack of candor in testimony, are serious. But it is concluded that these are isolated violations and are not likely to reoccur. Furthermore, the fact that Mr. Ramirez has left the Station, coupled with the adoption of a compliance policy and retention of new counsel, constitutes reliable evidence that the Station may continue to be operated by SFUSD in the public interest.

Legal Considerations

92. Section 309(k) of the Communications Act 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. But if after hearing the licensee fails to meet the standard, the Commission still may grant the application "on terms and conditions that are appropriate, including a renewal for a term less than the maximum otherwise permitted." 47 U.S.C. §§ 309(k)(2), 209(k)(3). The questions for remedial decision are whether the evidence proves "serious violations" and if so, whether the renewal application should be denied, or granted for a term shorter than eight years. 47 C.F.R. § 73.1020.

93. SFUSD had to truthfully and accurately check off "No" to Questions 1 and 2. 47 USC § 312(a). Instead, SFUSD unwittingly boxed itself into a very close call for license renewal, a box built by Mr. Ramirez's unwitting choice to rationalize wrong answers to simple questions that could have been rectified, but were not rectified until issuance of the *HDO*.[19] To

[19] Upon issuance of the *HDO*, SFUSD retained new counsel, and filed an amended renewal application with "No" certifications to Questions 1 and 2. (SFUSD Exhs. 48, 76.)

make matters worse, it was after the erroneous "Yes" certifications were announced by GGPR that Mr. Ramirez dissembled. Thus, there were three scenarios involving disqualifying misrepresentations or lack of candor: first, the "Yes" certifications on August 1, 1997; second, the opposition to the petition to deny on January 20, 1998; and third the response to LOI filed on April 5, 2001. In each scenario, SFUSD represented that the Ramirez certifications of August 1, 1997, were correct. In any one of these three scenarios – or all – SFUSD had the opportunity to reflect, research, answer correctly, and perhaps avoid this hearing. SFUSD and its Station management failed all three times to get it right.

Misrepresentation and Candor

94. In order for there to be a disqualifying certification, it must be shown that there is a misrepresentation or lack of candor in connection with an application. *In re Application LUJ, Inc.*, 17 FCC Rcd 16980, 16982 (2002); *In the Matter of Certification of Financial Qualifications by Applicants for Broadcast Station Construction Permits*, 2 FCC Rcd. 2122 (1987). Misrepresentation and lack of candor differ as legal concepts only in that misrepresentation involves false statements of fact, while an absence of candor involves concealment, evasion, and failures to be fully informative. *Fox River Broadcasting, Inc.*, Order, 93 FCC 2d 127, 129 (1983). Both misrepresentation and lack of candor can be disqualifying.

95. Substantial evidence of an intent to deceive is required to support a finding of misrepresentation. *See LUJ, Inc.*, 17 FCC Rcd 16980, 17982 (2002) (certifications in assignment application were not false where Commission was not deprived of dispositive information, there was no motive that inferred an intent to deceive, and there was no direct evidence of such an intent). *See Liberty Productions Ltd. P'ship*, 16 FCC Rcd 12061, 12083-93 (2001). In *Liberty Productions*, there was an issue of misrepresentation/lack of candor based on a site availability certification, a more narrowly focused inquiry than here, and the Commission did not find substantial evidence of an intent to deceive. The Commission would not rely on conflicting deposition testimony showing that a witness had "no clear memory" of conversations occurring years before hearing testimony. *Id.* at 12092-93. Commission decisions require a showing of substantial evidence of intent to deceive in order to sustain a finding of misrepresentation. *Id.* at 12085. *Compare Ronald Brasher*, 19 FCC Rcd 18462, 18491-92 (2004) (license revocation for undisclosed parties-in-interest, control of licenses without authorization, concealment of scheme to apply for excessive licenses, numerous misrepresentations and lack of candor, false signatures, false testimony). By contrast, Mr. Ramirez, an inexperienced General Manager who was not a member of any control group, was merely a salaried employee without motive to deceive the Commission.

96. False or misleading representations of Mr. Ramirez that were consequences of his inexperience and absence of oversight do not rise to the level of disqualifying misconduct. *In re Application of Pinelands, Inc.*, 7 FCC Rcd 6058, 6065 (1992). Mr. Ramirez's "Yes" determination of a complete PIF is found to be "wanton, gross and callous, and in total disregard of obligations to the Commission to certify honestly in renewal applications as to be equivalent to an affirmative and deliberate intent." *Golden Broadcasting Systems, Inc.*, 68 FCC 2d 1099, 1106 (1978), quoting *Tipton County Broadcasters*, 37 F.C.C. 191 (1964). *See also Liberty Cable*

Co. Inc., 15 FCC Rcd 25050 (2000), reh. den., 16 FCC Rcd 16105 (2001) (unlicensed operations were legion and in disregard of obligation to activate only authorized paths held to be "tantamount to intentional misconduct.") But in that case, management knew of continuing premature activations and encouraged an employer to continue to activate without concern to non-licensure. *Id.* There is no such active complicity of SFUSD in Mr. Ramirez's misleading acts of misjudgment, and SFUSD should not be denied renewal based on Mr. Ramirez's one-time instance of ineptness and gross negligence.

97. Also, the Commission will not impute a disqualifying lack of candor to an applicant where the record shows a good faith reliance on counsel. *WEBR, Inc. v. FCC*, 420 F.2d 158, 167-168 (D.C. Cir. 1969) (good faith reliance on counsel is relevant to determining candor); *Professional Radio, Inc.*, 2 FCC Rcd 6666 (1987) (applicant not penalized for erroneous site designation made on advice of counsel); *Broadcast Association of Colorado*, 104 FCC 2d 16 (1986) (applicant improperly certifying on advice of counsel not disqualified). In the case of *Abacus Broadcasting Corp.*, 8 FCC Rcd 5110 (Rev. Bd. 1993), the Review Board affirmed an *Initial Decision* finding of justified reliance on counsel for applicant's erroneous site certification, noting particularly that the certification was prepared hastily by counsel and neither the applicant nor counsel were focused on "significance of details." 8 FCC Rcd at 5113. This case is similar to *Abacus Broadcasting* in the haste that was required in signing declarations, and in the reliance on counsel to draft appropriate documents, pleadings and correspondence to be submitted to the Commission without meaningful review by Station management.

Discussion

98. Due to inexperience with renewal applications and inattention to details, Mr. Ramirez negligently failed to maintain the PIF. He was grossly negligent in soliciting SFUSD management to certify wrongfully to the PIF's compliance in the face of his inattention, negligence, inexperience, or even disinterest. But the fault was not solely his. He arrived at a Station which had been disrupted by an earthquake and a series of moves. There is no evidence of supervision by the Superintendent's office that would have provided effective managerial direction to Mr. Ramirez. Equally important, there is no evidence that communications counsel on retainer to SFUSD had advised Mr. Ramirez to repair, or how to repair, a deficient PIF, and there was no legal auditing procedure. Supervisory deficiencies coupled with failures on the part of Mr. Ramirez to receive or follow legal advice that could have rectified the PIF's contents, constitute circumstances that in their totality raise serious doubts that there was ever any intent by the licensee to mislead or deceive the Commission. The weight of the evidence establishes that the Station's violations were mainly caused by Mr. Ramirez's gross negligence which was unknown to SFUSD until after the fact.

99. If he had taken seriously the NAB memo, the FCC instructions, and the information in the Hecht report, Mr. Ramirez, who had been sensitized by Mr. Evans when he first came aboard, would have known that the PIF was not current and would be in violation. Mr. Ramirez at least suspected by June 1997, more than a month before filing the renewal application, that the Station's PIF was deficient. Had Mr. Ramirez acted with reasonable diligence, it could have been corrected by the time the renewal application was filed. Making

matters worse, Mr. Ramirez signed a misleading declaration to oppose a petition to deny wherein he represented that the Station had an "ongoing process" of updating the PIF. He later testified falsely at hearing to the truth of that assertion, thereby putting license renewal further at risk. Mr. Ramirez cannot rely on advice of counsel as a defense for his misconduct because he could not recall whether he told Mr. Sanchez anything about the state of the PIF. (Tr. 403-04.) And when he testified to "working too fast," "not paying attention," while there was an "ongoing process" to update the PIF, Mr. Ramirez cannot rely on advice of counsel for his lack of candor. (Tr. 452, 455.)

100. But Mr. Helgeson and Ms. Sawaya justifiably relied on counsel. Mr. Helgeson reasonably relied on Mr. Sanchez in connection with his declaration of January 1998 and April 2001, because Mr. Helgeson was not familiar with the events of the 1997 renewal application and he had to rely on counsel who were advising Mr. Ramirez. Ms. Sawaya had recommended to counsel correct and candid answers to the LOI shortly after she was hired. She only changed her position in order to accommodate counsel who had been advising SFUSD on legal matters for many years. She did not wish to jeopardize SFUSD's legal defense, and there were deadlines that had to be met. The erroneous response to the LOI was prepared and sent by counsel and there was little time for any Helgeson/Sawaya review. The testimony of Mr. Helgeson and Ms. Sawaya at deposition and hearing was persuasive as to their reasonable reliance on counsel.

101. The 1998 Helgeson declaration was misleading in representing "an ongoing effective effort --- to update and maintain the Station's public inspection file." But there are mitigating circumstances. When Mr. Helgeson realized that SFUSD's certification was under serious attack by GGPR, he assumed that Mr. Ramirez had reviewed the PIF and had knowledge of its contents before certifying "Yes." Mr. Helgeson played no part in certification of the PIF. As a latecomer, he had to rely on the only (and best) resources who had been involved in advising Mr. Ramirez, *i.e.* the Sanchez attorneys. With the license under challenge by GGPR, Mr. Helgeson was compelled to rely on informed and experienced counsel to draft the declaration. In addition, the signing and filing of the declaration was rushed, and Mr. Helgeson had great difficulty in reading documents. His testimony at hearing did not demonstrate an abundance of candor, but his near blindness precludes any negative assessment of his demeanor and related candor.[20] The Bureau does not challenge his deposition. In assessing his declarations and his testimony, Mr. Helgeson receives the benefit of the doubt.

102. The Bureau is correct that the evidence establishes that Ms. Sawaya understood the issues in this proceeding prior to her deposition. Ms. Sawaya knew that "the issue at hand is FCC regulations concerning a station's public file, not whether we 'think' our programming is public service or not." (EB Exh. 57 [e-mail from Ms. Sawaya to Mr. Sanchez showing an understanding of *HDO* issues].) Her ability to assess which issues would likely be explored at deposition, is a reliable indicator of her awareness and caution in giving deposition testimony.

[20] The Presiding Judge had opportunity to observe Mr. Helgeson whose testimony was given over three days. (Tr. 593-1198.) Mr. Helgeson had to use a special magnifying instrument to identify and focus on the many documents presented by examining counsel. He gave the appearance of trying to cooperate with cross-examination, and there was nothing untoward in his demeanor appearance on the stand.

Short of speculation, there is no inference to draw that Ms. Sawaya consciously avoided questions at her deposition about her involvement in responding to the LOI by "shading" her testimony in order to distance herself, or by having strategic amnesia. As new General Manager, she presented truthful answers which counsel rejected. She then deferred to counsel, and as would be expected by her SFUSD superiors, she cooperated with counsel in facilitating a timely response to the LOI.

103. Ms. Sawaya attempted at deposition to excuse her failure to recall her March 8 memo, a copy of which was located on her computer. A lack of memory as to such an important document that the witness prepared and sent to counsel is difficult to understand, but a loss of memory as explanation cannot be summarily rejected. *See Liberty Productions Ltd. P'ship, supra* at 12092-93. Her e-mail communications with counsel show that the "license challenge" was a matter of grave concern to her as it had a potentially negative impact on her future employment. That realization motivated her to cooperate with SFUSD's long-time counsel who she trusted. It seems highly unlikely that she could "forget" a memo that she had prepared that raised questions with counsel about the veracity of answers in filings made with the Commission. Her not remembering the memo and that she "doesn't typically print out documents," is hard to accept in view of her ability to print two March 8 memos, one of which served as a cover memo for the original signed supplemental ownership reports that she sent to Mr. Sanchez. (SFUSD Exh. T-3 at 9.) It is also difficult to accept that Ms. Sawaya could have set up and maintained her own "Ernie file," and not place these March 8 memos therein. However, this circumstantial proof does not establish that she intended to mislead the Commission, and it is plausible to conclude on this record that she did temporarily forget in 2004 her March 8 memos of 2001. Here, Ms. Sawaya is entitled to receive the benefit of the doubt.

104. At hearing, Ms. Sawaya insisted that her role in drafting and completing an LOI response was merely that of facilitator. (Tr. 1328-29, 1332, 1437-38.) Such testimony is transparently inconsistent with the detail of her March 8, 2001 memos to Mr. Sanchez, and her correspondence regarding the LOI in March and April 2001. (SFUSD Exh. T-3 at 9.) There is over-statement in her oft-repeated claim that the issues raised by the LOI were complex and beyond her ken. (Tr. 1332, 1364, 1436.) To the contrary, after only one week on the job, Ms. Sawaya had ascertained that SFUSD's renewal application certification about the PIF was wrong and drafted a focused memo recommending correction and explaining the deficiencies in the PIF which she sent to counsel. Ms. Sawaya also directed her staff to achieve compliance, which involved researching the PIF and responding to the LOI in a timely and truthful manner. When questioned at her deposition about her role in responding to the LOI, Ms. Sawaya attempted to create an appearance that she was only a facilitator and had no substantive involvement in responding. But there was no discernable deceit or intent to deceive on her part, best illustrated by how quickly, candidly and thoroughly she responded in early March. From observing her testifying, there was nothing in her demeanor to suggest that she was intentionally lying about not recalling. However, there also is little weight to be accorded her testimony which is based on recollection, since there is very little of substantive value that she could remember.

105. Counsel had crafted a reply to the LOI and erroneously reported that on August 1, 1997, the PIF "contained all of the ownership reports." There was no basis in fact for making such a claim, since the Hecht report showed that ownership reports and program/issues lists were

missing. It also was factually wrong to assert that program guides and NPR issues lists were in the PIF as of August 1, 1997. (EB Exh. 5 at 44-49; EB Exh. 4 at 3.) Mr. Helgeson had placed both sets of documents in the PIF in March 2001, only after he had confirmed that the PIF was a "disorganized mess" and lacked documents. NPR materials were added as attachments to the LOI response, but those documents were not in the PIF. By the time the letter was sent on April 5, neither Mr. Helgeson (Tr. 1012) nor Ms. Sawaya (Tr. 1424) had control over what the letter contained. Preparation and issuance of counsel's letter response to the LOI do not support any conclusion that Mr. Helgeson, Ms. Sawaya, or SFUSD intended to mislead, or were motivated to mislead, in responding to the LOI.

Mitigation

106. What was missing from the PIF in 1997, were supplementary ownership reports for earlier periods. Such reports were discontinued by the Commission. Station program guides were regularly made available in the community which gave information on programming. Thus, SFUSD was making efforts to inform the community about its programming, and there is no question about the responsiveness of its programming to the community's issues. And despite deficiencies in quarterly issues/programming lists, the Station consistently produced programming that was responsive to San Francisco.

107. Mr. Sanchez's preparation of an opposition to GGPR's petition to deny and response to the Bureau's LOI was the primary responsibility of SFUSD's retained counsel. It also was the responsibility of Mr. Ramirez and Mr. Helgeson to cooperate with counsel. Counsel took control over the process of preparing and finalizing supporting declarations of Mr. Ramirez and Mr. Helgeson, and therefore counsel was also responsible for the accuracy of the declarations. SFUSD's response to the LOI also became the responsibility of counsel. The questioned testimony of Mr. Ramirez, Mr. Helgeson and Ms. Sawaya was given with the assistance of counsel, and as sequestered witnesses, their testimony was beyond the supervision of SFUSD. It is concluded that advice of counsel played a substantial role in the preparation of SFUSD's opposition to petition to deny in its response to the LOI, and in preparing the testimony of Messrs. Ramirez and Helgeson and Ms. Sawaya. *See Abacus Broadcasting Corp., supra* at 5112. *See also WADECO, Inc. v. FCC*, 628 F. 2d 122, 127 (D.C. Cir. 1980).

108. There is no evidence of a repetition of compliance violations. Except for isolated violations attributed to former General Manager Ramirez, SFUSD has a record of compliance with the Commission's rules throughout the renewal period. In reacting to this case, SFUSD adopted a responsible policy that requires counsel to monitor compliance with Commission rules. (SFUSD Exh. T-4 at 3.) SFUSD has retained new communications counsel to diligently oversee compliance, and in that way SFUSD will increase its oversight of Station management. The General Manager who prepared the renewal application is no longer employed by the licensee. His successor had prior experience as a General Manager and showed greater concern for compliance. SFUSD is now in the process of selecting another new General Manager, and hopefully will select one who has solid compliance experience. There is good reason to conclude that there should be no reoccurrence of failures to maintain the Station's PIF, and that there will be no misleading application or report filed with the Commission in the future. These

circumstances show that SFUSD should be fully rehabilitated with respect to PIF maintenance and reporting within two years of this ruling. "*Compare Abacus Broadcasting Corp., supra* at 5113 (question of intent to deceive is a "close one" but "on balance" the record as a whole does not support a disqualifying intent to deceive).

109. While considerations of negligence in failing to hire and supervise apply in this case, a licensee's negligence is not disqualifying misconduct that precludes renewal. *In re Application of Pinelands, supra* at 6065. SFUSD acted reasonably by relying on its counsel. There is ample authority for holding that when there is good faith reliance on qualified communications counsel who is retained to prepare pleadings, declarations, and responses to Commission require (LOI), the misconduct of employees, even if potentially disqualifying, should be substantially mitigated. *See WEBR, Inc. v. FCC,* 420 F2d 158, 167-68 (good faith reliance on counsel is relevant to determining who is acting with candor); *WADECO, Inc. v. FCC*, 628 F.2d at 127 (good faith reliance on counsel protects applicant from disqualification).

Forfeiture

110. Section 73.3527 of the Commission's Rules (Rules) requires non-commercial broadcast licensees to maintain a public inspection file containing specific types of information related to station operations. Section 73.3527(e)(8)(i) provides that an issues/programs list is to be placed in a station's public inspection file each calendar quarter. Where lapses occur in maintaining the public file, neither the negligent acts nor omissions of station employees or agents, nor the subsequent remedial actions undertaken by the licensee, excuse or nullify a licensee's rule violation. *See Padre Serra Communications, Inc.*, 14 FCC Rcd 9709 (1999). There is no dispute that serious willful lapses of PIF maintenance occurred at the Station for which SFUSD is responsible.

111. The *HDO*, Para. 25 provides that:

> IT IS FURTHER ORDERED, that, irrespective of whether the hearing record warrants an Order denying the renewal application for KALW(FM), it shall be determined, pursuant to Section 503(b)(1) of the Communications Act of 1934, whether an ORDER OF FORFEITURE in an amount not to exceed $300,000 shall be issued against SFUSD for willful and/or repeated violations of Sections 73.1015, 73.3527, and/or 73.3613 of the Commission's Rules, which occurred or continued within the applicable statute of limitations. [Footnotes omitted.]

The "Yes" certification on August 1, 1997, concerning the PIF was grossly negligent and so wanton as to equate with an act of willful misrepresentation of compliance with Section 73.3527(a)(2)(e)(4)(8) of the Commission's rules [47 C.F.R. § 73.3527]. As a separate and distinct violation, the licensee failed to maintain ownership reports and issues/programs lists in its PIF from 1991 to 2001.

112. The Bureau asks for denial of renewal for alleged violations, but does not ask that any forfeiture be applied in this case. SFUSD admits that under usual circumstances a $10,000 base forfeiture would be imposed for violation of the PIF rule. But SFUSD asserts that its current deficit condition demonstrates an inability to pay even the base amount. SFUSD has not persuaded of its inability to pay a reasonable forfeiture.[21] Section 1.80 of the Commission's rules establishes a base forfeiture amount of $10,000 for public file violations.[22] The evidence presented by SFUSD on its financial condition does not prove an absolute inability to pay any forfeiture.[23] Considering the record as a whole, a $10,000 forfeiture is appropriate for SFUSD's erroneous "Yes" certification in connection with maintaining a deficient PIF.

CONCLUSION

113. The Enforcement Bureau has presented its case in support of license denial. But it is "only in the most egregious case" that "termination of all rights [must] be considered, and this case does not fall among the "most egregious." *Character Policy Statement*, *supra* at 1228. *Compare Contemporary Media, Inc.*, 13 FCC Rcd 14437 (1998), *reh. den.* 14 FCC Rcd 8790 (1999) (disqualification for criminal acts and repeated misrepresentations which were unaccompanied by adequate remedial measures.) Rehabilitation is significant, and SFUSD's changes in Station personnel and its adopted compliance program show a tendency toward rehabilitation. *Id.* Another positive factor is the "ability to operate in the public interest with no likelihood of future misconduct." (*Id.* at 1229.) *Policy Regarding Character Qualifications*, 5 FCC Rcd 3252 (1990) (mitigating factors include frequency, willfulness, currentness and seriousness of misconduct, the nature of participation by managers, efforts to remedy, record of compliance, rehabilitation.) All of these factors considered in their totality, and particularly the probability of full rehabilitation, rule out denial of SFUSD's license renewal. Full rehabilitation usually can best be assured by ordering a short-term renewal and forfeiture. *See Abacus Broadcasting Corp.*, 8FCC Rcd 5110, 5117 (1993) (short-term renewal appropriate to test future compliance; forfeiture also assessed).

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[21] The authorized forfeiture amount is $300,000. *HDO* at Para. 25. The Presiding Judge has favorably considered meritorious programming identified by SFUSD. (SFUSD Exh. 79.) Consideration also has been given to SFUSD's presentation on forfeiture. *See* Paras. 70-72, *supra.* Under all circumstances, the forfeiture ordered in the amount of $10,000.00 seems reasonable and appropriate.

[22] 47 C.F.R. § 1.80(b) (4), Note to paragraph (b) (4): Section I. Base Amounts for Section 503 Forfeitures; *Forfeiture Policy Statement*, 12 FCC Rcd at 17113, Appendix A, Section I.

[23] The rules provide for requests for installment payments. *See* 47 C.F.R. § 1.1914.

114. The Superintendent's recognition of need for effective future compliance with Commission rules shows persuasive remediation. The fact that Mr. Ramirez was a salaried, at-will employee who left the Station in 1998, makes it unlikely that there would be a reoccurrence of non-compliance in the future. Nor should SFUSD's long-held license be jeopardized by poor judgments of an uninformed General Manager. Ultimately, the misconduct proved by the Bureau pales in comparison to misconduct found to justify the harshest penalty, revocation or denial. *Compare Contemporary Media, supra* (criminal conduct), *Ronald Brasher, supra* (fictitious names in scheme to transfer licenses), *Liberty Cable Co., supra* (management sanctioned unauthorized activations by employee).

115. Under established Commission policies favoring renewal and allowing for mitigation of violations which could be a basis for renewal denial, it is concluded that SFUSD qualifies for a short-term renewal.

ORDER

Based on the record in this proceeding, IT IS ORDERED that pending renewal application (File No. BRED-19970801YA) of San Francisco Unified School District for License for Station KALW(FM), San Francisco, California, IS GRANTED for a period of two years from the release date of this *Initial Decision.*

IT IS FURTHER ORDERED that San Francisco Unified School District IS ASSESSED a forfeiture penalty in an amount of Ten Thousand Dollars ($10,000), to be paid within two years from the release date of this *Initial Decision.*

FEDERAL COMMUNICATIONS COMMISSION[24]

Richard L. Sippel
Chief Administrative Law Judge

[24] This *Initial Decision* shall become effective and this proceeding *shall be terminated* 50 days after its release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. § 1.276(b).