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

In re Applications of	)	MM Docket No. 88-577
	)	
LIBERTY PRODUCTIONS, A LIMITED PARTNERSHIP	)	File No. BPH-870831MI
	)	
WILLSYR COMMUNICATIONS LIMITED PARTNERSHIP	)	File No. BPH-870831MJ
	)	
BILTMORE FOREST BROADCASTING FM, INC.	)	File No. BPH-870831MK
	)	
SKYLAND BROADCASTING COMPANY	)	File No. BPH-870831ML
	)	
ORION COMMUNICATIONS LIMITED	)	File No. BPH-870901ME
	)	
For A Construction Permit For A New FM Broadcast Station on Channel 243A At Biltmore Forest, North Carolina	)	

MEMORANDUM OPINION AND ORDER

Adopted: April 12, 2001; Released: May 25, 2001

By the Commission: Commissioner Tristani dissenting and issuing a statement.

1. In this order, we reverse the Administrative Law Judge's decision, *National Communications Industries*, 5 FCC Rcd 2862, 2879 ¶ 8 (ALJ 1990), insofar as it disqualified Liberty Productions, Limited Partnership (Liberty) on the site certification issue, and we accept the Amendment that Liberty filed on November 10, 1999. We also deny the motions to enlarge issues filed on November 12, 1999 by Orion Communications Limited (Orion) and Biltmore Forest Broadcasting FM, Inc. (BFBFM) and on November 24, and December 13, 1999 by Willsyr Communications, Limited Partnership (Willsyr). We also deny the Joint Request for Approval of Settlement filed November 14, 2000 by BFBFM and Liberty. For the reasons set forth below, we find

that Liberty is ineligible for the 35 percent New Entrant Bidding Credit that it received in the closed broadcast auction that commenced on September.28, 1999. Subject to the payment of the full gross amount of its winning bid in the Closed Broadcast Auction, and compliance with all applicable payment procedures, we therefore grant Liberty's pending long form application, as amended, and dismiss the mutually exclusive applications of the other remaining applicants.

I. BACKGROUND.

2. The above-captioned applicants seek a construction permit for a new FM station on channel 243A at Biltmore Forest, North Carolina. After an evidentiary hearing before an Administrative Law Judge, the ALJ issued an Initial Decision disqualifying Liberty on site availability and site certification issues.[1] The Commission affirmed Liberty's disqualification on the site availability issue without considering the ALJ's findings on the site certification issue. The Commission also affirmed the ALJ's determination that Orion was the comparative winner based on its superior integration proposal.[2]

3. Timely notices of appeal of the Commission's decision in this case were pending before the United States Court of Appeals for the District of Columbia when that court issued its decision in *Bechtel v. FCC*,[3] invalidating the primary comparative criterion on which the Commission had relied in granting Orion's application. Thereafter, the Commission stayed all comparative broadcast proceedings[4] and ultimately determined to resolve frozen hearing proceedings by competitive bidding procedures.[5] The court, on March 15, 1994, remanded this case to the Commission for further consideration in light of *Bechtel* and, in a separate action, subsequently ordered the reinstatement of Orion as the interim operator on Channel 243A pending resolution of the above-captioned proceeding to select the permanent licensee.[6]

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[1] The ALJ also disqualified BFBFM on site issues. The parties filed exceptions with the Commission's former Review Board. The Board affirmed the ALJ's disqualification of both applicants on site availability issues. *National Communications Industries*, 6 FCC Rcd 1978 (Rev. Bd. 1991).

[2] *National Communications Industries*, 7 FCC Rcd 1703 (1992), *recon. denied, Liberty Productions*, 7 FCC Rcd 7581 (1992), *recon. dismissed*, 8 FCC Rcd 4264 (1993).

[3] 10 F.3d 875 (D.C. Cir. 1993).

[4] *FCC Freezes Comparative Proceedings*, 9 FCC Rcd 1055 (1994), *modified*, 9 FCC Rcd 6689, *further modified*, 10 FCC Rcd 12182 (1995).

[5] *Implementation of Section 309(j) of the Communications Act --- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses (First Report and Order)*, 13 FCC Rcd 15920 (1998), *recon. denied*, 14 FCC Rcd 8724 (1999), *aff'd sub nom. Orion Communications, Ltd. v. FCC*, 213 F.3d 761 (D.C. Cir. 2000).

[6] *Orion Communications Ltd. v. FCC*, 131 F.3d 176 (D.C. Cir. 1997).

4. Pursuant to the Commission's competitive bidding procedures for mutually exclusive commercial broadcast applications, the above captioned applicants were identified as the only qualified bidders eligible to compete for a license for Channel 243A in Biltmore Forest.[7] The order referring these applications to the Mass Media Bureau for processing in accordance with our auction procedures also indicated that, if Liberty were the high bidder, the hearing proceeding would resume to consider the ALJ's previously unreviewed findings on the false certification issue.[8]

5. Liberty filed its short-form application on August 19, 1999. The auction commenced on September 28 and closed on October 8, 1999. Liberty was the high bidder, followed by BFBFM, Orion, and Willsyr,[9] and the adjudicatory proceeding was resumed to consider the false certification issue involving Liberty's transmitter site and Liberty was afforded an opportunity to file a supplemental brief on that issue.[10]

6. In accordance with Section 73.5005 of the Commission's Rules, 47 C.F.R. § 73.5005, Liberty submitted an amendment to its long-form application on November 10, 1999. Two of the unsuccessful bidders, Orion and Willsyr, filed oppositions to Liberty's November 10, 1999 amendment of its long-form application.[11] Following the resumption of the adjudicatory proceeding on November 23, 1999, Orion, Willsyr and BFBFM also filed motions to enlarge the issues against Liberty.[12]

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[7] *Liberty Productions, Inc.*, 14 FCC Rcd 7637 (OGC 1999).

[8] *Id.*, at 7640 ¶ 6.

[9] Each of the above-captioned long-form applicants filed a short-form application (FCC Form 175) by August 20, 1999. Skyland, however, did not meet the up-front payment deadline and thus was unable to bid in the auction. *Public Notice*, DA 99-1912, Attachment C (Non-Qualified Bidders) at 3 (Sept. 17, 1999).

[10] *Liberty Productions*, FCC 99I-23 (OGC rel. Nov. 23, 1999). The following pleadings relating to the site certification issue have been filed: (a) Supplemental Brief filed on December 23, 1999 by Liberty Productions; (b) Response to Supplemental Brief filed on January 7, 2000 by Orion Communications Ltd.; (c) Opposition to Supplemental Brief filed on January 7, 2000 by Biltmore Forest Broadcasting FM, Inc.; (d) Response to Supplemental Brief filed on January 7, 2000 by Willsyr Communications; (e) Reply to (Orion's) Response to Supplemental Brief filed on January 24, 2000 by Liberty Productions; (f) Reply to BFBFM's Opposition to Supplemental Brief filed on January 21, 2000 by Liberty Productions; (g) Reply to (Willsyr's) Response to Supplemental Brief filed on January 21, 2000 by Liberty Productions; (h) Motion to Dismiss Liberty's Replies filed on February 7, 2000 by Orion; and (i) Opposition to Motion to Dismiss filed on February 17, 2000 by Liberty Productions.

[11] The following pleadings have been filed: (a) Opposition to Amendment filed on November 22, 1999, by Orion Communications Ltd.; (b) Reply to (Orion's) Opposition to Amendment filed on December 3, 1999, by Liberty Productions; (c) Motion to Strike Reply to Opposition to Amendment filed on December 29, 1999, by Orion Communications Ltd. (d) Opposition to Amendment filed on November 22, 1999, by Willsyr Communications; (e) Reply to (Willsyr's) Opposition to Amendment filed on December 3, 1999, by Liberty Productions; (f) Motion to Strike Reply to Opposition filed on January 3, 2000, by Willsyr Communications; (g) Consolidated Opposition to Motions to Strike filed on January 10, 2000, by Liberty Productions; and (h) Reply to Opposition filed on January 19, 2000 by Willsyr.

[12] The following motions to enlarge issues, and responsive pleadings, are pending before the Commission: (a) Motion to Enlarge Issues filed on November 12, 1999, by Biltmore Forest Broadcasting FM, Inc; (b)

7. Pursuant to Section 0.111(b) of the rules, 47 C.F.R. § 0.111(b), the Enforcement Bureau serves as the Commission's trial staff in this adjudicatory proceeding. The Assistant General Counsel, Administrative Law Division, has afforded the Enforcement Bureau an opportunity to file comments on the above-described pleadings.[13] The Bureau recommends that the issues be decided in Liberty's favor, and that the various motions to enlarge issues should be denied. However, the Bureau believes Liberty is ineligible for the 35 percent New Entrant Bidding Credit. Thus, it recommends that Liberty should be required to pay the full amount of its winning bid at the time of final payment. Separate replies have been filed by Liberty, Orion, BFBFM, and Willsyr.[14]

8. On November 14, 2000, BFBFM and Liberty filed a Joint Request for Approval of Settlement.[15] Pursuant to the attached agreement Liberty would dismiss its application, BFBFM would reimburse Liberty for its legitimate and prudent expenses, [16]

Opposition to Motion to Enlarge Issues filed on November 26, 1999, by Liberty Productions; (c) Reply to Opposition filed on December 7, 1999, by Biltmore Forest Broadcasting FM, Inc.; (d) Motion to Enlarge Issues Against Liberty Productions filed on November 12, 1999, by Orion Communications Ltd.; (e) Opposition to Motion to Enlarge Issues and Motion for Leave to File Out Of Time, filed on November 29, 1999, by Liberty Productions; (f) Supplement to Opposition filed on December 3, 1999, by Liberty Productions; (g) Motion to Enlarge The Issues filed on November 24, 1999, by Willsyr Communications; (h) Opposition to Motion to Enlarge Issues filed on December 3, 1999, by Liberty Productions; (i) Reply to Opposition of Liberty filed on December 13, 1999, by Willsyr Communications; (j) Second Motion to Enlarge The Issues filed on December 13, 1999, by Willsyr Communications; (k) Opposition to Second Motion to Enlarge The Issues filed on December 23, 1999, by Liberty Productions; and (l) Reply to Opposition of Liberty filed on January 3, 2000, by Willsyr Communications.

[13] *Liberty Productions*, FCC 00I-01 (Jan. 14, 2000).

[14] The following pleadings have been filed: (a) Comments on Basic Qualifications Issues Concerning Liberty Productions, A Limited Partnership, filed on February 14, 2000 by the Enforcement Bureau; (b) Reply, filed on February 29, 2000 by Liberty Productions; (c) Reply to Enforcement Bureau's Comments, filed on February 29, 2000 by Biltmore Forest Broadcasting FM, Inc.; (d) Response to Comments of the Enforcement Bureau, filed on February 29, 2000 by Willsyr Communications; and (e) Reply Comments, filed on February 29, 2000 by Orion Communications Ltd.

[15] The following pleadings have also been filed: (a) Memorandum In Support of Joint Request for Approval of Settlement, filed November 14, 2000 by Biltmore Forest Broadcasting FM, Inc.; (b) Memorandum In Support of Joint Request for Approval of Settlement, filed November 17, 2000 by Liberty Productions; (c) Supplement to Joint Request for Approval of Settlement, filed November 20, 2000 by Liberty Productions; (d) Opposition to Joint Request for Approval of Settlement, filed November 29, 2000 by Willsyr Communications; (e) Partial Opposition to Joint Request for Approval of Settlement, filed November 29, 2000 by Orion Communications Ltd.; (f) Opposition to Joint Request for Approval of Settlement, filed December 5, 2000 by the Enforcement Bureau; (g) Consolidated Reply to Oppositions, filed December 11, 2000 by Biltmore Forest Broadcasting FM, Inc.; (h) Consolidated Reply to Oppositions, filed December 11, 2000 by Liberty Productions; (i) Reply to Opposition, filed December 15, 2000 by Liberty Productions; and (j) Motion to Strike, filed January 8, 2001 by Orion Communications Ltd.

[16] Under the proposed settlement Liberty would receive: (a) up to $170,000 in reasonable and prudent expenses in prosecuting its application; (b) up to $27,000 for its potential obligation for expenses related to the interim operation; and (c) $50,000 or such lesser amount as the Commission may approve representing interest owed on a loan made by Cumulus Broadcasting to Liberty and origination costs paid by Cumulus.

and BFBFM and Liberty's general partner would enter into a consulting agreement. The agreement, however, is contingent on BFBFM being designated the winning bidder based on its bid of $643,500 in Round 12 and on Liberty receiving a full refund of its down payment and not incurring any penalty under 47 C.F.R. § 1.2109(c) for not paying its high bid of $2,336,000. The settlement agreement is opposed by the Enforcement Bureau and by unsuccessful bidders Orion and Willsyr, who ranked third and fourth, respectively, in the auction. Consolidated replies have been filed by Liberty and by BFBFM, and Liberty has filed a separate reply to the Enforcement Bureau's opposition.

II. DISCUSSION

9. For the reasons set forth below we find no basis to approve a settlement agreement that is contingent on Liberty and BFBFM being relieved of obligations incurred during the September 1999 auction. We also find no basis to dismiss Liberty's short-form application. We conclude further that its November 10, 1999 amendment specifying a new transmitter site may be accepted without regard to the Commission's earlier adverse resolution of the site availability issue, and that the amendment does not reflect a change of control of the applicant. As to Liberty's basic qualifications, we find no basis to specify either false certification or misrepresentation/lack of candor issues against Liberty and we reverse the ALJ's determinations on the site certification issue relating to Liberty's original proposal. Finally, we conclude that, because of the numerous attributable media interests of Cumulus Broadcasting, Liberty is not eligible for the 35 percent new entrant bidding credit.

1. Settlement Agreement

10. We reject the proposed settlement agreement insofar as it is expressly conditioned on BFBFM being designated the winning bidder for less than its final net bid of $1,518,400[17] and the dismissal of Liberty's application without a penalty and for a full refund of its down payment. The parties assert that Liberty participated in the auction in good faith and remains willing to honor the bids it made in the auction, but that, in the interest of expediting the resolution of this proceeding, is now willing to dismiss its application and relinquish its claim to the construction permit. BFBFM, alleging that Liberty's short-form application was defective, urges that it should receive the license for its Round 12 bid of $643,500 (the final net bid placed against an applicant other than Liberty), and that Liberty should not be liable for any default penalty. Liberty, on the other hand, maintains that its short-form application was not defective, that it has not defaulted, and that there is, in light of the proposed settlement, thus no basis for the Commission to impose a penalty or retain its down payment. The Enforcement Bureau

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The agreement also contemplates a three-year consulting agreement between BFBFM and Liberty's general partner, Valerie Klemmer, whereby she will sign a covenant not to compete and will be paid $75,000 in exchange for providing a maximum of 50 hours of consulting services to the station each month.

[17] On its short-form application BFBFM claimed a 35 percent new entrant bidding credit, as did each of the other applicants filing short-form applications in this proceeding.

asserts that the possible benefits of the settlement agreement are too insubstantial to offset the direct and tangible loss to the treasury as well as the likely damage to the auction process and the likelihood of additional litigation concerning BFBFM's basic qualifications. It notes that Liberty's offer to relinquish its bid for the permit comes after the filing of numerous pleadings challenging Liberty's eligibility for a claimed bidding credit, its basic qualifications, and the acceptability of its short-form application. Waiving the default penalty and offering BFBFM the license for less than its final bid in these circumstances, the Bureau predicts, would have broad implications in future auction cases. Willsyr and Orion urge that, as a matter of fairness, the withdrawal of Liberty's application would require a second auction. Orion also objects to various aspects of the settlement agreement.

11. Section 1.2109(c) provides that, if a winning bidder defaults, "the Commission may either re-auction the license to existing or new applicants or offer it to the other highest bidders (in descending order) at their final bids."[18] It provides further that "[a] winning bidder who is found unqualified to be a licensee, fails to remit the balance of its winning bid in a timely manner, or defaults or is disqualified for any reason after having made the required down payment will be deemed to have defaulted and will be liable for the payment set forth in Section 1.2104(g)(2)." The settling parties urge that the voluntary withdrawal of Liberty's application pursuant to a post-auction settlement agreement does not constitute a default under Section 1.2109(c), and that no other provision of the Commission's rules precludes BFBFM from being designated the winning bidder based on its bid in Round 12 or requires that Liberty be assessed a penalty. But Section 1.2109(b) provides that "[i]f a winning bidder withdraws its bid after the Commission has declared competitive bidding closed . . . the bidder will be deemed to have defaulted, its application will be dismissed, and it will be liable for the default payment specified in Section 1.2104(g)(2)." Furthermore, default, as defined by Section 1.2104(g) of the rules, includes "bidders … who default on payments due after an auction closes or is disqualified." Notwithstanding Liberty's asserted good faith during the auction and its continued willingness to make payments due after the auction, Liberty, by virtue of the settlement, will "withdraw[] a bid after the Commission has declared the competitive bidding closed" and it will not remit "payments due after an auction closes." Approval of an agreement expressly conditioned on BFBFM being offered the license for less than its final bid and Liberty not incurring a default penalty therefore would require a waiver of Sections 1.2104 and 1.2109.

12. The settling parties cite the unusual circumstances of this case, as well as the public interest benefit of expediting the resolution of a long-pending case, as justifying a waiver of the rules to allow BFBFM to return to its bid in Round 12 and to allow Liberty to withdraw its application with a full refund of its down payment and without incurring any penalty under section 1.2104(g). It is unclear, however, that the settlement would expedite resolution of this case, given that there are unresolved questions as to BFBFM's basic qualifications and that the other applicants would have an

[18] In adopting auction rules to govern the resolution of the frozen comparative cases, the Commission indicated its intent to offer the permit to the next highest bidder, rather than conduct a further auction, because this would be more expeditious. *First Report and Order*,13 FCC Rcd at 15952 ¶ 86, 15953 n.81.

opportunity to raise additional issues against BFBFM following its designation as the winning bidder. [19] That this case was litigated through the Commission and the courts before we decided to use auctions to resolve these cases provides no basis to distinguish this case from other auction proceedings, and is therefore not a basis to waive these auction procedures. Indeed, the Commission specifically advised applicants in the hearing cases to "carefully consider the impact of auction rules prescribing penalties in the event of default or disqualification" in deciding whether to participate in the auction. 14 FCC Rcd at ¶ 16. None of BFBFM's other equitable arguments persuade us to waive section 1.2109(c) and offer the license to BFBFM for any amount less than its final bid in Round 27.

13. It would also not serve the public interest to approve a settlement agreement expressly conditioned on the license being offered for less than final net bids placed during the auction. The efficacy of auction procedures designed to discourage insincere bids would be seriously impaired if bidders could, without penalty, expunge their bids after the close of the auction. To permit such post-auction abandonment of final bids here would clearly be unfair to Orion and Willsyr, who might have pursued quite different bidding strategies, had they been aware that bids could be withdrawn after the auction. Similar considerations would militate against waiving any default penalty owed by Liberty under Section 1.2104(g)(2). Therefore, because we are not prepared to offer the license to BFBFM for less than its final net bid of $1,380,600 in Round 27 or to permit Liberty to dismiss its application without penalty, we deny the request to approve the agreement without considering whether any of its other provisions would provide additional reasons for its rejection.

[19] *See Liberty Productions*, 14 FCC Rcd 7637, 7640 ¶ 6 (OGC 1999), providing that the hearing proceeding would resume to consider, *inter alia*, "the question concerning BFBFM's representations as to the availability of its transmitter site." The settling parties urge that this matter can be expeditiously resolved since no issue was ever designated for hearing. Quick resolution of the concerns raised by the ALJ as to BFBFM's representations is, of course, possible. Another possibility, however, is that the Commission might conclude that there is a basis for specifying an issue. In that event, the case would be remanded for evidentiary hearings before an Administrative Law Judge. This would further delay resolution of this case.

2. Short-Form Application

14. There is no merit to BFBFM's contention that because Liberty's short-form application did not contain all requested information, it should now be summarily dismissed pursuant to Section 1.2105(b) of the Rules, 47 C.F.R. § 1.2105(b). The Public Notice, released July 9, 1999 by the Bureaus, announcing the filing procedures for this auction contains the following instruction that, as BFBFM notes, is addressed to "All applicants."[20] *"[B]idders or attributable interest holders in bidders must certify under penalty of perjury that the bidder complies with the Commission's policies relating to media interests of immediate family members."* (Emphasis in original.)

15. This certification was not included in the short-form application that Liberty filed on August 19, 1999. This omission, however, is not a basis to now dismiss the application or to set aside the results of the auction without opportunity for resubmission after the filing deadline, as BFBFM claims. First, the applicable Commission rules do not expressly provide that a short-form application omitting this particular certification is unacceptable for filing and will be dismissed with prejudice (*i.e.*, with no opportunity to supply the missing certification after the short-form filing deadline). In this regard, Section 73.5002(b) provides that "[t]o participate in broadcast service or ITFS auctions, all applicants must timely submit short-form applications (FCC Form 175), along with all required certifications, information and exhibits, pursuant to the provisions of 47 C.F.R. § 1.2105(a) and any Commission public notices." Also, pursuant to Section 73.5002(c), applicants for a broadcast auction are subject to the provisions of 1.2105(b) regarding the modification and dismissal of their short-form applications. Section 1.2105(a) specifies information that must be included in the short-form application, but Section 1.2105(b) requires the dismissal with prejudice, without the opportunity to correct after the applicable filing deadline, only of any application "that does not contain all of the certifications required pursuant to this section," a narrower category of information. The certification as to media interests held by family members is not one of the certifications specified in Section 1.2105(a), the omission of which renders a short-form application unacceptable for filing and subject to dismissal under Section 1.2105(b), if provided after the short-form filing deadline.[21] Thus, although

[20] *Public Notice: Closed Broadcast Auction: Notice and Filing Requirements for Auction of AM, FM, TV, LPTV, FM and TV Translator Construction Permits Scheduled for September 28, 1999*, 14 FCC Rcd 10632, 10639 (Jul. 9, 1999).

[21] The certifications mandated by Section 1.2105(a) include the following: (1) certification that the applicant is legally, technically, financially and otherwise qualified pursuant to section 308(b) of the Communications Act; (2) certification that the applicant is in compliance with the foreign ownership provisions of section 310 of the Communications Act; (3) certification that the applicant is and will, during the pendency of the application, remain in compliance with any service-specific qualifications applicable to the licenses on which it proposes to bid; (4) an exhibit, certified as truthful under penalty of perjury, identifying all the parties with whom the applicant has an arrangement of any kind relating to the license to be auctioned; and (5) certification that the applicant has not entered into any arrangements with any other party regarding the amount of of their bids or bidding strategy. All of these certifications were included in Liberty's short-form application.

Section 73.5002(b) specifies that the short-form application must contain any certification required by a Public Notice, the rules do not provide notice that the omission of such a certification, as opposed to a certification required by Section 1.2105(a), will result in the dismissal of the short-form application with no opportunity to amend.

16. Second, the Bureaus' July 9, 1999 Public Notice, on which BFBFM relies, does not expressly state that the omission of this particular certification or of any certification not specifically listed in Section 1.2105(a) will render the short-form application defective pursuant to Section 1.2105(b), such that it cannot later be amended. The Public Notice, although generally admonishing the pending long-form applicants to file complete short-form applications, only states generally that "[f]ailure to submit required information by the resubmission date will result in the dismissal of the application and inability to participate in the auction."[22] It does not state that failure to submit all of the requested information will render the application unacceptable for filing, such that the defect could not be cured after the filing deadline. Rather, this general admonishment merely echoes the general requirements applicable to all short-form information. As to that broader class of information, dismissal may be warranted after the filing deadline if the information is not provided, but only where the applicant has been advised by public notice that its application is defective and has failed to timely supply the information. *See* Section 1.2105(b)(3). The staff, however, did not advise Liberty of the omitted certification, nor afford it an opportunity to correct its short-form application by supplying the missing certification.[23] This circumstance, while insufficient to preclude the dismissal of an application subsequently found to have omitted certifications required by Section 1.2105(a) or to otherwise be in patent conflict with the Commission's rules,[24] further militates against BFBFM's suggestion that the earlier omission of the familial certification from Liberty's short-form application now warrants setting aside the results of the auction.

17. As noted, the record now contains the omitted information regarding Liberty's compliance with the Commission's policies relating to media interests held by family members. Liberty has submitted a declaration under penalty of perjury, dated November 24, 1999, from its sole general partner certifying that no member of her family has any interest in any medium of mass communications.[25] Having supplied the

[22] *Public Notice*, Attachment B (Guidelines for Completion of FCC Forms and Exhibits), 14 FCC Rcd at 10697.

[23] *See First Report and Order*, 13 FCC Rcd at 15976-47 ¶ 146 ("After reviewing the short-form applications, the Bureaus will issue a public notice listing all applications containing minor defects, and applicants will be given an opportunity to cure and resubmit defective applications").

[24] *See* 47 C.F.R. § 73.3564, providing that the acceptance for filing of an application does not preclude its subsequent dismissal, if it is later found to be patently in conflict with the Commission's rules.

[25] The declaration is dated November 24, 1999 and is attached to Liberty's November 26, 1999 Opposition to BFBFM's Motion to Enlarge Issues.

requisite certification regarding the insulation of the sole limited partner,[26] Liberty was generally required to submit ownership information only as to its sole general partner, Valerie Klemmer. Her declaration is therefore sufficient to supply the omitted information as to compliance with the Commission's policies regarding media interests held by family members. The accuracy of the certification has not been challenged. The initial omission of information now supplied by her unchallenged post-auction declaration is therefore not an impediment to the grant of Liberty's long-form application.[27]

18. Furthermore, as discussed above, the July 9th Public Notice, containing only a general admonishment as to the obligation to file complete short-form applications without specifying the consequences of omitting the certification in question, does not provide sufficient notice that a short-form application not containing the familial certification must be dismissed at this juncture even though the requested information has now been provided.[28] Fairness demands explicit notice for a severe sanction, such as the dismissal of an application. *See generally Salzer v. FCC*, 778 F.2d 869, 871-72 (D.C. Cir. 1985) ("fundamental fairness . . . requires that an exacting application standard, enforced by the severe sanction of dismissal without consideration on the merits, be accompanied by full and explicit notice of all prerequisites for such consideration"); *Trinity Broadcasting v. FCC*, 211 F.3d 618 (D.C. Cir.2000), vacating the Commission's denial of an application to renew a license for violation of a regulation that was insufficiently clear to warn the licensee of what was expected; *Satellite Broadcasting v. FCC*, 824 F.2d 1 (D.C. Cir. 1987), setting aside the dismissal of an application that had not been timely filed in the correct location because Commission rules had not clearly specified the location at which the applications should be filed.

19. The absence of the certification in Liberty's short-form application is therefore not a basis to dismiss its application. Nor does fairness demand that we set aside the result of the auction and hold a second auction to select the permittee. BFBFM claims that it relied on the omitted certification in Liberty's short-form application in developing its bidding strategy and that it would be unfair not to at least reauction the frequency under these circumstances. BFBFM, however, points to nothing in the Commission's rules, in its orders adopting the auction rules, or in Public Notices issued by the staff in connection with this particular auction affirmatively stating that the omission of the certification in question from a short-form application would warrant

[26] *See* Public Notice, 14 FCC Rcd at 10698 ("[O]wnership information need not be provided for any limited partner that is not materially involved, directly or indirectly, in the management or operation of the media-related activities of the partnership. In such case(s), the general partner shall certify under penalty of perjury, to the limited partner(s)' insulation, in lieu of providing the limited partner information").

[27] *See* Section 1.2105(b)(2), permitting applicants to make minor changes in the short-form application after the resubmission period.

[28] In this regard, the record before us reflects that the short-form application filed by Willsyr also omitted this same certification and that Willsyr was permitted to participate in the auction with impunity. *See Public Notice: CLOSED BROADCAST AUCTION Status of Applications to Participate in the Auction*, 14 FCC Rcd 14113, 14140 (Sept. 3, 1999), including Willsyr Communications, Limited Partner on the Accepted List as eligible to participate in the auction.

such an action. There were not, for example, conflicting provisions specifying different consequences for such an omission. Rather, BFBFM misinterpreted Sections 1.2105 and 73.5002 to require the dismissal now of Liberty's short-form application, based upon an over broad reading of the staff's July 9th Public Notice. That misunderstanding, however, does not warrant dismissing Liberty's application or impair the integrity of the auction so as to require that we set aside Liberty's selection as the permittee.

3. Amendment to Long-Form Application

20. Notwithstanding the contentions of Orion, Willsyr and BFBFM, there is no basis to reject the minor engineering change proposed in the amendment, filed November 10, 1999, by Liberty. The amendment was timely filed following Public Notices announcing the results of the auction and the resumption of the hearing proceeding to consider unresolved issues relating to the winning bidder's basic qualifications.[29] The Enforcement Bureau supports its acceptance, and the competing applicants, although raising various substantive objections to the amendment as discussed below, have not identified any technical deficiency that would bar its acceptance from an engineering standpoint.

21. Transmitter Site: When Liberty filed its application in August 1987, it specified a site located on Busbee Mountain. Upon learning that the site was unavailable, Liberty sought to amend to specify a second site. The ALJ, concluding that Liberty never had reasonable assurance of the original site, rejected the amendment and ultimately disqualified Liberty on site availability and site certification issues.[30] Citing that determination, Orion and Willsyr challenge the post-auction amendment insofar as it specifies a third transmitter site. They urge that Liberty should not be permitted to amend to a new location when it never had reasonable assurance of a transmitter site in the first place. Willsyr relies on earlier cases rejecting for lack of good cause site amendments, where the availability of the original site was not shown. Sections 73.3522(a) and 73.3573, governing post-auction amendments, do not require that an amendment be supported by good cause and the unavailability of the original site would not, in any event, be a basis to reject a site amendment. Now that competing broadcast applications are to be resolved by competitive bidding procedures, rather than by comparative hearing, the Commission has repealed the requirement that broadcast applicants certify the availability of a suitable transmitter site.[31] Winning bidders in the frozen comparative

[29] *Public Notice: Closed Broadcast Auction*, DA 99-2153 (Oct. 12, 1999).(announcing that any amendment to the long-form application would be due by November 10, 1999); *Public Notice: Clarification Regarding the Resumption of Hearing Proceeding In MM Docket No. 88-577*, DA 99-2355 (Oct. 28, 1999). *See also Liberty Productions*, FCC 99I-23 (OGC 99I-23) (ordering the resumption of the hearing proceeding).

[30] *National Communications Industries*, FCC 89M-1080 (ALJ rel. Apr. 5, 1989); *Initial Decision*, 5 FCC Rcd at 2866-67 ¶¶ 39, 49-51.

[31] *First Report and Order*, 13 FCC Rcd at 15987-89 (1998), noting that the site certification requirement, designed to deter the filing of frivolous and speculative applications that frustrated the Commission's processing goals, was no longer vital to the Commission's goal of expediting the initiation of new service to the public. *See also Memorandum Opinion and Order*, 14 FCC Rcd at 8732-33 ¶ 16 (1999), advising

cases face significant monetary penalties if they are disqualified for any reason (including the inability to secure a suitable transmitter site).[32] In these circumstances the Commission decided to adjudicate unresolved site issues, even against an auction winner, only to the extent there is a substantial and material question of false certification.[33]

22. The site availability issue, moreover, was never finally adjudicated. The Review Board affirmed the ALJ's adverse resolution of that issue, and the Commission denied Liberty's application for review, as well as its subsequent petition for reconsideration.[34] Liberty, however, appealed the denial of its application for lack of a transmitter site to the United States Court of Appeals for the District of Columbia Circuit. As noted above, the court remanded this proceeding to the Commission without considering the merits of any issue raised on appeal. To reject Liberty's amendment based on our earlier, non-final determination on the site availability issue would effectively require that Liberty renew its court appeal of that ruling, and that the parties litigate an issue that is no longer relevant now that the permittee will be selected by auction. Such litigation would, as we explained in the *First Report and Order*, serve only to delay service to the public and would, thus, disserve the public interest.

23. Cumulus Broadcasting: Orion urges that the amendment should be rejected on the separate ground that it impermissibly brings in a new investor, Cumulus Broadcasting. It relies in this respect on Liberty's September 10, 1999 loan agreement with Cumulus, reported to the Commission on September 27, 1999, the details of which were provided in the November 10, 1999 amendment. There, Liberty certified that, although the proceeds of the loan will exceed 33 percent of Liberty's total asset value, the agreement does not provide Cumulus an option to acquire the construction permit (or the license) and does not authorize it to broker time on or manage the station. According to Orion, Cumulus is the nation's third largest broadcaster with numerous media holdings and it would have a realistic potential to influence Liberty's conduct as a licensee. Orion further contends that the loan agreement, funded by such a large media group owner, undermines the Commission's premise that the auction price would reflect the applicants' similar prosecution expenses and circumvents the closed nature of the auction. It also cites the Commission's recent amendment of Section 73.5008, 47 C.F.R. § 73.5008, to specify that certain debt interests are attributable for purposes of determining eligibility for the new entrant bidding credit. The loan agreement with Cumulus, according to Orion, represents the type of manipulation of the process by a large broadcast group owner that the rules were intended to prevent. It requests, finally, that the Commission

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pending applicants to carefully consider the impact of auction rules prescribing penalties in case of disqualification in deciding whether to participate in the auction.

[32] Section 73.5004(a) provides generally that broadcast applicants are subject to the provisions of 47 C.F.R. §. 1.2104(g) regarding payments upon disqualification.

[33] *First Report and Order*, 13 FCC Rcd at 15956 ¶ 99.

[34] *National Communications Industries*, 5 FCC Rcd at 2866 ¶ 39 (ALJ), *affirmed*, 6 FCC Rcd at 1979 ¶ 11 (Rev. Bd.), *review denied*, 7 FCC Rcd 1703 (1992), *recon denied, Liberty Productions*, 7 FCC Rcd 7581 (1992), *recon. dismissed*, 8 FCC Rcd 4264 (1993).

order Liberty to submit copies of the September 10, 1999 loan agreement and any amendments to the agreement.

24. Section 309(l)(2) restricts qualified bidders to applicants who filed mutually exclusive applications before July 1, 1997. Neither the statute nor the Commission's implementing rules, however, precludes applicants from borrowing money from a bank or another lender in order to participate in the auction. The Commission has specifically rejected the view that the closed nature of these auctions required the adoption of special disclosure requirements to ensure against the participation of new investors. The uniform Part 1 ownership disclosure standards, the Commission concluded, were sufficient to effectuate the purpose of Section 309(l)(2)'s requirement that the auction be limited to the pending applicants. But it agreed that, consistent with the Part 1 rules providing that a short-form application is considered newly filed and would be dismissed if it is amended by a major amendment, a change in the control of an applicant subject to 309(l), would render it ineligible to participate in the auction.[35] A major amendment to a long-form application subject to Section 309(l)(2) would likewise render the application ineligible to be granted after an auction that is statutorily restricted to applicants who filed their applications before July 1, 1997.

25. In this regard, the applicable auction rule, Section 1.2105(b)(2), 47 C.F.R. § 1.2105(b)(2), provides that "an application will be considered newly filed if it is amended by a major amendment and may not be resubmitted after the applicable filing deadline." A major amendment is defined as including "changes in ownership of the applicant that would constitute an assignment or transfer of control, changes in an applicant's size which would affect eligibility for designated entity provisions, and changes in the license service areas identified on the short-form application on which the applicant intends to bid." That provision, significantly, has not been amended to reflect either the New Entrant Bidding Credit, or eligibility standards requiring the attribution of media interests of investors holding significant debt interests, as well as significant equity interests, in an auction bidder claiming new entrant status.[36] A change affecting eligibility for the New Entrant Bidding Credit, in other words, does not necessarily constitute a major amendment within the meaning of Section 1.2105(b)(2). Thus, absent evidence that Cumulus has a controlling *ownership* interest in the applicant, Liberty's September 17, 1999 amendment reporting the September 10, 1999 loan agreement does not constitute a major amendment within the meaning of Section 1.2105(b)(2).

26. The issue, therefore, is whether the September 10, 1999 loan agreement with Cumulus constitutes a change in the control of the applicant so as to warrant the dismissal of its application, or the rejection of the November 10 amendment, pursuant to

[35] *First Report and Order*, 13 FCC Rcd at 15942 ¶ 57, *citing* 47 C.F.R. § 1.2105(b)(2).

[36] A new entrant bidding credit of 35 percent is available to bidders with no attributable media interests in any medium of mass communications. *See* 47 C.F.R. § 73.5007(a). Media interests held by an individual or entity with equity and/or debt interests in the bidder will be attributed if the equity and debts interest(s), in the aggregate, exceed 33 percent of the total asset value of the winning bidder. *See* 47 C.F.R. § 73.5008(c).

the Part 1 disclosure standards. We conclude that it does not. The Cumulus loan was first reported in Liberty's September 27, 1999 amendment to its short-form application. And, in the November 10, 1999 amendment, Liberty has certified that, in accordance with the Part 1 rules, the loan agreement, as amended, does not provide Cumulus with an option to acquire the license or any right to broker time on or manage the station.[37] It has also stated that the agreement never contained such an option.[38] In these circumstances, there is no basis to direct Liberty to submit a copy of the loan agreement to the Commission, as Orion requests. Such submission would not be required under section 1.2112(a)(4) unless Cumulus had an ownership interest, or an option to acquire an ownership interest, in Liberty. Orion has not raised a substantial and material question as to the reliability of Liberty's certification that would warrant rejecting the November 10 amendment to Liberty's long-form application, or directing Liberty to submit a copy of the agreement.

27. To the extent Orion relies on the amendment of Section 73.5008, the adoption of special attribution rules governing eligibility for the new entrant bidding credit did not modify the applicable Part 1 disclosure rules. In deciding to attribute for this purpose certain debt and equity interests, the Commission "emphasize[d] that this debt/equity standard does not preclude an individual or entity (including any existing broadcaster) from investing any amount in a prospective broadcast auction applicant."[39] The adoption of special eligibility criteria is therefore not a basis to reject Liberty's November 10, 1999 amendment.

28. Orion suggests, nevertheless, that Cumulus may have replaced Liberty's limited partner and 65 percent equity holder, David Murray. Only speculation supports the suggestion that there has been an (unreported) structural change in the applicant, however. Orion relies on certifications that Liberty made regarding Murray that were intended to support the claim that no ownership information needed to be provided for Murray. Specifically, Liberty certified in the November 10, 1999 amendment that Murray has not been involved (and will not be involved) directly or indirectly, in the management or operation of the applicant's media-related activities, that he is not a creditor of the applicant, and that his total equity contribution does not exceed 33 percent of the total asset value of the applicant. These certifications do not raise a substantial and material question that Murray no longer has an ownership interest in Liberty, but are completely consistent with his stated position as limited partner. And, as noted above, Orion has not raised a substantial and material question as to the reliability of Liberty's various certifications regarding the Cumulus loan agreement. In these circumstances, its funding of Liberty's participation in the auction is not inconsistent with Section 309(l)(2), or with the Part 1 disclosure rules generally, and this funding does not raise a substantial or material question that Cumulus has an ownership interest in the applicant. There is

[37] Amendment, Exhibit D.

[38] Reply to Opposition, filed December 3, 1999, by Liberty Productions, at ¶ 10.

[39] *Implementation of Section 309(j) of the Communications Act --- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses*, 14 FCC Rcd 12541, 12545-46 ¶ 10 (1999) (Hereafter *Eligibility Order*).

thus no basis to reject the amendment. We address below the separate question of whether media interests of Cumulus are attributable to Liberty for the purpose of determining Liberty's eligibility for the new entrant bidding credit. We note, however, that the provisions of the loan agreement have no relevance to that question inasmuch as Liberty does not rely on the terms of the agreement to support its claim that Cumulus' media interests are not attributable.

29. In a related context, we deny Willsyr's second motion to enlarge issues that likewise questions whether there has been an unreported change in Liberty's ownership structure. Willsyr relies primarily on representations contained in the November 10 amendment regarding the lack of involvement in partnership affairs and the extent of the equity contributions of Liberty's sole limited partner (David T. Murray). On this basis Willsyr seeks an issue to determine whether Liberty has misrepresented its ownership structure. (These representations relate to Liberty's certification that Murray's media interest is not attributable for purposes of the New Entrant Bidding Credit.[40]) In this respect, the motion, filed December 13, 1999 is untimely. *See* Section 1.229(b)(3), 47 C.F.R. § 1.229(b)(3), specifying that motions to enlarge issues based on newly discovered facts must be filed within fifteen days after the discovery of such facts.[41]

30. Even assuming that the motion had been timely filed, it is without merit. It does not raise a substantial and material question of fact as to whether Liberty has misrepresented Murray as a current 65 percent limited partner. Willsyr focuses on the certification in the November 10 amendment that Murray's total equity contributions are less than 33 percent of the total asset value of the applicant and that there has been no communication with Murray since 1990.[42] It also cites the general partner's November 24, 1999 declaration stating that Murray's total equity contribution was only $36,000, although Willsyr's reliance on this additional information is less than clear. Without mentioning the Cumulus loan explicitly, Willsyr alleges that the "some $2 Million in debt" that Liberty assumed without communicating with Murray evidently diluted his partnership share.[43] But the declaration is clear that the general partner calculated that Murray's total equity contribution was less than 33 percent of total asset value before she

[40] As discussed in greater detail below, a media interest held by Murray would be attributable, pursuant to Section 73.5008(c), if Murray were materially involved in the partnership's media-related activities, or if his total equity contribution exceeded 33 percent of the total asset value (i.e., total debt plus total equity) of the applicant.

[41] *See also Liberty Productions*, FCC 99I-23, ¶ 4 (OGC Nov. 23, 1999) ("Motions to enlarge filed in response to Liberty's November 10, 1999 amendment must be filed by November 26, 1999"). Willsyr timely filed a motion to enlarge issues on November 24, 1999.

[42] Amendment, filed on November 10, 1999 by Liberty, at Exhibit C. The Exhibit also states that its limited partner is not a creditor of the applicant.

[43] Motion at 2. Elsewhere there is a reference to Liberty having "assumed in 1999 some $2 Million in debt from a broadcast group owner." Motion at 1. This makes it evident that Willsyr is referring to the Cumulus loan.

certified on the short-form application that Liberty was eligible for the New Entrant Bidding Credit and before the September 10 loan agreement with Cumulus.

31. To the extent that Willsyr questions the continued status of Murray based on the substantial costs Liberty presumably incurred since 1990, the general partner has exclusive authority to borrow money on behalf of the partnership. Thus, the assertion that the partnership allegedly incurred significant expenses without asking for a further capital call from (or even communicating with) Murray does not raise a substantial and material question as to Murray's continued status as limited partner. And, in any event, Liberty disputes the costs alleged by Willsyr, and states that, thus far, it has only borrowed $303,680 from Cumulus. Finally, there would be no motive for Liberty to conceal the ouster or resignation of Murray as limited partner under the circumstances before us.

4. Eligibility for New Entrant Bidding Credit

32. Background: To fulfill its statutory responsibilities regarding designated entities, the Commission adopted a new entrant bidding credit for bidders with no, or very few, other media interests.[44] Section 73.5007(a) provides that "[a] thirty-five (35) percent bidding credit will be given to a winning bidder if it, and/or any individual or entity with an attributable interest in the winning bidder, have no attributable interest in any other medium of mass communications, as defined in Section 73.5008." Section 73.5008(c) of the rules specifies that attributable interests in a winning bidder or in a medium of mass communications shall be determined in accordance with the broadcast multiple ownership rules (that is, 47 C.F.R. § 73.3555 and note 2). Additionally, on August 5, 1999, the Commission amended that provision to provide for the attribution of media interests held by individuals and entities whose interest in the bidder would not otherwise be attributable under the Commission's multiple ownership rules (*e.g.*, a lender or a limited partner not materially involved in the partnership's media activities).[45] Specifically, section 73.5008(c), as amended, specifies that: "[i]n addition, the attributable mass media interests, if any, held by an individual or entity with an equity and/or debt interest(s) in a winning bidder shall be attributed to that winning bidder for purposes of determining its eligibility for the new entrant bidding credit, if the equity (including all stockholdings, whether voting or nonvoting, common or preferred) and debt interest or interests, in the aggregate, exceed thirty-three (33) percent of the total asset value (defined as the aggregate of all equity plus all debt) of the winning bidder." The Commission advised that participants in the September 28, 1999 auction would be subject to the revised attribution standards. [46]

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[44] *First Report and Order*, 13 FCC Rcd at 15994-96 ¶¶ 189-90; *Memorandum Opinion and Order*, 14 FCC Rcd at 8761-67 ¶¶ 71-82.

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[45] *Eligibility Order*, 14 FCC Rcd at 12543-45 ¶¶ 7-8.

[46] *Memorandum Opinion and Order*, 14 FCC Rcd at 8762 ¶ 71 ("For purposes of applying the general broadcast eligibility for the new entrant bidding credit in any future auction, we will apply those attribution rules as they exist at the time of the short-form filing deadline for that auction. "); *Eligibility Order*, 14

33. To support its claimed eligibility for a 35 percent New Entrant Bidding Credit, Liberty certified on its August 19, 1999 short-form application that "neither it nor any of its attributable interest holders have any attributable interest in any other media of mass communications as defined in 47 C.F.R. § 73.5008." On September 27, 1999, as noted above, Liberty amended the short-form application to reflect the September 10 loan agreement with Cumulus. Additionally, Liberty's November 10, 1999 amendment to the long-form application reflects that its 65 percent limited partner, David Murray, has a 50 percent interest in the permittee of a station in Colonial Heights, Tennessee. Liberty asserts that, for purposes of the new entrant bidding credit, the media interests of Cumulus are not attributable, because the loan agreement was executed after the August 20, 1999 deadline for filing short-form applications. The interest of David Murray is not attributable, according to Liberty, because his limited partnership interest does not exceed 33 per cent of Liberty's combined debt and equity.

34. Cumulus Broadcasting: Turning first to the September 10, 1999 loan agreement with Cumulus, we reject Liberty's assertion that, because the loan agreement was executed after the short-form filing deadline, the lender's numerous media interests are not attributable for purposes of the New Entrant Bidding Credit. Liberty relies on language in the July 9, 1999 Public Notice,[47] advising that "[t]he bidder's attributable interests shall be determined as of the short form (FCC Form 175) filing deadline – August 20, 1999."[48] That statement, read in context, does not reflect that eligibility for the New Entrant Bidding Credit is unaffected by subsequent ownership changes, however. Indeed, the very next sentence in the Public Notice directs that "[b]idders intending to divest a media interest or make any other ownership changes, such as resignation of positional interests, in order to avoid attribution for purposes of qualifying for the New Entrant Bidding Credit must have consummated such divestment transactions or have completed such ownership changes by no later than the short-form filing deadline – August 20, 1999." Both sentences are in boldface. Read together, they clearly reflect that a bidder could not qualify for, or upgrade a previously claimed bidding credit, based upon ownership or positional changes occurring after the short-form filing deadline. But the impact of subsequent changes that, if recognized, would eliminate or diminish a previously claimed bidding credit is not expressly addressed.

35. That issue, as the Enforcement Bureau notes, was directly addressed in a later Public Notice, issued September 17, 1999, clearly reflecting that changes made after

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FCC Rcd at 12542 ¶ 3. See also *Public Notice: New Rule Now In Effect Concerning Equity/Debt Threshold For Use With Determining Eligibility for New Entrant Bidding Credit*, DA-1663 (Aug. 19, 1999) ("The purpose of this Public Notice is to provide notification that OMB approval has been obtained and Federal Register publication occurred today, August 18, 1999. Therefore, the new equity/debt threshold rule is now in effect . . . Bidders participating in the September 28, 1999 Closed Broadcast Auction and seeking a New Entrant Bidding Credit are reminded that they will be subject to the [new] equity/debt threshold rule").

[47] *Public Notice: Notice and Filing Requirements for Auction of AM, FM, TV, LPTV, and FM and TV Translator Construction Permits Scheduled for September 28, 1999*, 14 FCC Rcd 10632 (Jul. 9, 1999).

[48] *Id.* at 10639.

the August 20, 1999 short-form filing deadline could reduce, or completely eliminate, a previously claimed New Entrant Bidding Credit. In a section advising applicants of their Section 1.65 responsibility to maintain the accuracy and completeness of information contained in their short-form applications, bidders were "reminded that if ownership changes result in the diminishment or loss of a New Entrant Bidding Credit due to the attributable interests of new attributable interest holders, such information must be clearly stated in the bidder's amendment material."[49] "In such cases," the staff advised, "the Commission will make appropriate adjustments in the New Entrant Bidding Credit prior to computation of down and final payment amounts due from any affected winning bidders." Liberty narrowly reads the September 17, 1999 Public Notice as applying only to ownership interests. The language, however, expressly encompasses "attributable interests of new attributable interest holders." Cumulus, by virtue of its debt interest in Liberty, is a "new attributable interest holder." Because Cumulus's ownership interest in more than three broadcast stations is attributable to Liberty, there has been an "ownership change . . . due to the attributable interests of [a] new attributable interest holder[]."

36. Contrary to Liberty's assertion, the July 9, 1999 Public Notice is not a final action that became effective upon its release to the public and that is no longer subject to review or reconsideration. Prospective bidders were expressly advised in the July 9 Public Notice that "[t]he Commission may amend or supplement its public notices at any time, and will issue public notices to convey any new or supplemental information to bidders . . . [and that] it is the[ir] responsibility . . . to remain current with all Commission Rules and with all public notices pertaining to this auction."[50] Nor does the fact that the Commission continued to advise prospective bidders in subsequent broadcast auctions that eligibility for the New Entrant Bidding Credit would be determined as of the short-form filing deadline support Liberty's claims. Clearly, material included in public notices for subsequent auctions has no bearing on the terms governing this particular auction. More importantly, those notices contain the identical language quoted above indicating that, in order to avoid attribution for purposes of the New Entrant Bidding Credit, the divestiture of media interests must have been consummated by the short-form filing deadline. As in the case of the July 9, 1999 Public Notice, the cited language does not provide that eligibility for the New Entrant Bidding Credit is established as of the short-form filing deadline without regard to the subsequent acquisition of debt or equity interests.

37. Furthermore, Section 5008(c), as amended, is clear that the media holdings of a lender are attributable, for purposes of the New Entrant Bidding Credit, if the lender's debt interest exceeds 33 percent of the bidder's total asset value. Liberty has certified in its November 10, 1999 Amendment, Exhibit D, that the proceeds of the Cumulus loan will exceed 33 percent of Liberty's total asset value. By virtue of its loan agreement with Cumulus, the numerous media interests of Cumulus are attributable to Liberty. Liberty is thus ineligible for the New Entrant Bidding Credit without regard to whether the media interest of its sole limited partner, David Murray, is also attributable.

[49] *Public Notice: Closed Broadcast Auction 224 Qualified Bidders*, DA 99-1912, pp. 5-6 (Sept. 17, 1999).

[50] 14 FCC Rcd at 10637.

38. Having concluded that Liberty does not qualify for the 35 percent bidding credit, we next consider the appropriate remedy. As the Enforcement Bureau notes, the Commission, in implementing its statutory obligations regarding the prevention of unjust enrichment, previously determined not to require reimbursement from licensees who utilized a New Entrant Bidding Credit to obtain a broadcast licensee if they subsequently acquired media interests that would have rendered them ineligible for the New Entrant Bidding Credit. The Commission's concern, 13 FCC Rcd at 15998 ¶ 195, was that this would effectively punish the most successful broadcasters. The attribution of Cumulus' extensive media holdings, based on the pre-auction loan agreement and pursuant to the Commission's effort "to insure that only true new entrants qualify for the bidding credit," 14 FCC Rcd at 12543-45 ¶ 7, does not raise similar concerns. The stricter attribution standards were based on a record reflecting "that holders of nonvoting stock and debt interests may be able to influence broadcast licensees in a significant manner" so that disregarding such interests "would be contrary to the new entrant bidding credit's diversification goals." *Id.* at 12545 ¶ 7. In order to effectuate the intent of the revised attribution standards it is appropriate to require that Liberty remit in full its winning bid.

39. It is not appropriate, however, to dismiss Liberty's application or to set aside the results of the auction because it incorrectly claimed the 35 percent bidding credit. For the reasons set forth in paragraph 25 above, there is no merit to BFBFM's contention that the change in Liberty's bidding status is a major amendment warranting the dismissal of Liberty's application pursuant to Section 1.2105(b) of the rules. We are also not persuaded that the change in Liberty's bidding status so alters the circumstances under which the auction was conducted as to require that we set aside its results. BFBFM is correct that we have generally refused to allow a bidder to change its designated status after an auction. We have taken this position in recognition of the facts that bidding credits confer significant advantages on auction participants and that a post-auction increase in such credits alters core circumstances likely to have influenced the bidding strategies of the other auction participants.[51] The same cannot be said for a post-auction change that removes a credit believed to have been in place during the auction. Clearly, Liberty's mistaken belief that it was entitled to a 35 percent bidding credit could have affected the amount it was willing to bid for the license. But we fail to see how that mistake would have deprived the other auction participants of information as to Liberty's valuation of the frequency, or would have otherwise influenced their bidding strategies. Indeed, requiring full payment of Liberty's winning bid preserves the integrity of the auction.

40. Nor is there a basis to add false certification or character issues, as requested by BFBFM and Willsyr, because Liberty erroneously claimed the 35 percent New Entrant Bidding Credit. Motions filed by BFBFM and Willsyr requesting such

[51] *See Two Way Radio of Carolina*, 14 FCC Rcd 12035 (1999), *affirming*, 12 FCC Rcd 958 (WTB 1997), upholding a staff action that had rejected a post-auction amendment purporting to increase the bidder's designated entity status, based on the applicant's mistaken calculation as to its small business size. *Accord Clearcall Inc.*, 12 FCC Rcd 965 (WTB 1997).

issues are therefore denied. Prior to the start of the auction and prior to the filing of any motions to enlarge issues, Liberty disclosed its loan agreement with Cumulus, acknowledged that the proceeds of the loan would exceed 33 percent of Liberty's total asset value, and explained its belief that Cumulus' media interests were not attributable. And, although the attribution of Cumulus' interests is required to effectuate the underlying purpose of the New Entrant Bidding Credit, Liberty's certification of eligibility under the circumstances reflected above does not raise a substantial and material question that the certification was deliberately false, or otherwise raise a question as to the basic qualifications of either Liberty or Cumulus.

41. To raise a substantial and material question of deceit, it is necessary to show that the statement was inaccurate or materially incomplete and that there was an intent to deceive. *See Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983). Intent may, as BFBFM suggests, be inferred from motive. *Joseph Bahr*, 10 FCC Rcd 32, 33 (Rev. Bd. 1994). However, the Commission has generally not found an intent to deceive where the misstatement resulted from a mistaken interpretation of the law. *High Country Communications*, 4 FCC Rcd 6237, 6238 (1989). *See also Baker Creek Communications*, 13 FCC Rcd 18709 (WTB 1998) (finding bidder qualified for LMDS license despite its erroneous assertion of designated entity status, where applicant had fully disclosed its ownership structure and acted under the erroneous assumption that the structure comported with the requirements of the Commission's designated entity provisions).

42. Significantly, Liberty's view that Cumulus' interests are not attributable is based on a literal reading of language in the July 9, 1999 Public Notice. That interpretation, although erroneous, is not so specious or frivolous as to raise a question as to Liberty's truthfulness and reliability in dealing with the Commission. And, as noted above, Liberty divulged sufficient facts prior to the auction to permit a determination as to its eligibility for the New Entrant Bidding Credit. In these circumstances we find no basis for a false certification issue, particularly since this is the first case applying the requirements for entitlement to a bidding credit for new entrants. At the same time, however, we do not find BFBFM's request for a false certification issue so frivolous as to warrant, as Liberty suggests, the imposition of sanctions against BFBFM.

43. Although the date of the execution of the Cumulus agreement is irrelevant in determining eligibility for the New Entrant Bidding Credit, Liberty's truthfulness and reliability is pertinent in assessing its basic qualifications. *See WOKO, Inc. v. FCC*, 329 U.S. 223 (1946) (immaterial misrepresentations can be a basis for disqualification). Here, both BFBFM and Willsyr suggest that, contrary to Liberty's representation, the loan agreement may have been entered into prior to the August 20, 1999 filing. Willsyr, for example, intimates that the agreement may have been "formalized" after the short-form filing deadline. These allegations, however, are based on sheer speculation. As such, they likewise do not raise substantial and material questions of fact that would warrant the specification of misrepresentation or other character issues against Liberty.

44. David T. Murray: We agree with Liberty that, for purposes of determining eligibility for the New Entrant Bidding Credit, the media interests of its limited partner,

David Murray, are not attributable, and that its failure to report these interests on its short-form application is not a basis to specify false certification and lack of candor issues. As required by Sections 73.5002(b) and 1.2105(a), governing such filings, Liberty's short-form application accurately reflected that Murray is a 65 percent limited partner. It also contained the requisite certification that "no limited partner is or will be involved, directly or indirectly, in the management or operation of the media-related activities of the partnership."[52] Relying on the Bureaus' July 9, 1999 Public Notice reflecting that "ownership information need not be provided" with respect to such a limited partner,[53] Liberty did not disclose on its short-form application that Murray has a 50 percent ownership interest in Murray Communications, the permittee of Station WRZK, located in nearby Colonial Heights. That information was fully disclosed on Liberty's November 10, 1999 amendment to the long-form application, however.[54]

45. BFBFM asserts that the attribution standards adopted August 5, 1999 made it clear that the media interests of an ostensible limited partner, such as Murray, are attributable. It surmises further that the media interest held by Murray renders Liberty ineligible for the claimed bidding credit, giving it a motive to conceal this interest. Merely stripping Liberty of its bidding credit, according to BFBFM, is an inappropriate remedy, because its misrepresentation compromised the integrity of the auction to the detriment of the other participants. Orion likewise asserts that the Commission made it expressly clear that it intended to consider not only the individual equity and debt interests of an investor, but also the extent of those combined interests.

46. As the Enforcement Bureau notes, however, Liberty adhered to Section 73.5008, as amended, in determining that Murray's media interests were not attributable for purposes of the New Entrant Bidding Credit. To the extent that Orion and BFBFM rely on statements in the text of the order revising Section 73.5008 explaining the rationale for the revised attribution standards or in notices announcing the revision, they do not allege that the rule is ambiguous. The rule's underlying purpose, however, cannot provide the fair notice required by due process except to the extent it is reflected in the language of the rule. *Trinity Broadcasting*, 211 F.3d at 631. The actual language of revised Section 73.5008(c) without regard to any statements as to the intended impact of the revision, therefore, must govern whether Murray's media interest is attributable. In this regard, the mass media interests of a limited partner are attributable within the meaning of Section 73.5008(c) only in two circumstances. First, such interests are attributable to the winning bidder to the same extent as those of a general partner, absent

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[52] *See* FCC Form 175, filed August 19, 1999, by Liberty Productions, Exhibits A and C.

[53] *Public Notice*, DA-99-1346, Attachment B (Guidelines for Completion of FCC Forms 175 and Exhibits), 14 FCC Rcd at 10698, stating that "[o]wnership information need not be provided for any limited partner that is not materially involved, directly or indirectly, in the management or operation of the media-related activities of the partnership. In such case(s), a general partner shall certify under penalty of perjury, to the limited partner(s)' insulation, in lieu of providing the limited partner information." *See also Public Notice: Closed Broadcast Auction Ownership Disclosure Requirements For Auctions Scheduled For September 28, 1999*, 14 FCC Rcd 13283 (Aug. 10, 1999).

[54] Amendment, submitted November 10, 1999, Exhibit C.

a certification of no material involvement by the limited partner in the management or operation of the partnership's media-related activities.[55] Murray's interest in the Colonial Heights station is not attributable on this basis because Liberty's August 19, 1999 short-form application contained the requisite certification of noninvolvement.

47. Second, despite such a certification, a limited partner's media interests are attributable pursuant to Section 5008(c) insofar as its equity and/or debt interest(s) in the winning bidder "exceed thirty-three (33) percent of the total asset value (defined as the aggregate of all equity plus all debt) of the winning bidder." Murray has a 65 percent equity interest in Liberty. But Liberty has certified that Murray is not a creditor of Liberty and that his total equity contribution to the applicant does not exceed 33 percent of its total asset value.[56] Additionally, Liberty has submitted a declaration, dated November 24, 1999 from its general partner, Valerie Klemmer. The declaration reflects that, before submitting the short-form application, she had determined that Murray's total equity investment of about $36,000 was substantially less than 33 percent of Liberty's total asset value of more than $120,000.[57] BFBFM has raised no substantial or material question as to the accuracy of that calculation or the reliability of Liberty's certification that Murray is not (and will not be) materially involved in the partnership's media-related activities. As such, the media interests of Murray are not attributable for purposes of determining Liberty's eligibility for the bidding credit. It is worth noting that, if Murray were the general partner, his media interest would be attributable without regard to his debt/equity contribution. To the extent that BFBFM suggests otherwise, it has misunderstood that, pursuant Section 73.5008(c) of the rules, the debt/equity calculus is relevant only with respect to interests that are not otherwise attributable under the Commission's multiple ownership rules.

48. We do not find that Liberty was less than forthcoming in failing to disclose on its short-form application that David Murray has an ownership interest in the Colonial Heights station. As Liberty notes, neither Section 1.2105, nor FCC Form 175 (short-form application), was amended to reflect the revised standards providing for the attribution, in certain circumstances, of media interests held by a limited partner. Having properly concluded that Murray does not have an attributable interest for purposes of the New Entrant Bidding Credit, Liberty did not have an affirmative obligation to disclose, on the short-form application, either Murray's media interests or its basis for the conclusion that they were not attributable. Disclosure of his partnership interest, together with the general partner's certification that he has not been, and will not be, materially involved, directly or indirectly, in the management or operation of the media-related

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[55] Section 73.3555, note 2(g)(1), of the multiple ownership rules provides for the attribution of a limited partnership interest unless "th[e] partner is not materially involved, directly or indirectly, in the management or operation of media-related activities of the partnership and the [applicant] so certifies."

[56] Amendment, submitted for filing on November 10, 1999, by Liberty, Exhibit C.

[57] She calculated total asset value as the combined equity investments of the general partner and the limited partner plus all debt. See Declaration, dated November 24 1999, at ¶¶ 3-4. The Declaration is attached to Liberty's November 26, 1999 Opposition to BFBFM's Motion to Enlarge Issues.

activities of the partnership was sufficient. Of course, it would have been helpful if Liberty's short-form application had also disclosed Murray's media interest and had included a certification that his 65 percent equity interest (plus no debt interest) was substantially less than 33 percent of Liberty's total asset value. Such disclosures on the short-form application might have avoided questions being raised concerning the media interests held by Murray. We cannot say, however, that Liberty breached any reporting obligation, or lacked candor, in failing to include this information on the short-form application.

5. False Site Certification Issue

49. Background: When Liberty filed its application on August 31, 1987, it specified a transmitter site on property owned by Vickey Utter. Liberty's general partner, Valerie Klemmer, certified that the applicant had reasonable assurance that the site would be available. In response to a motion to enlarge issues filed by Orion, the ALJ specified issues to determine whether Liberty has reasonable assurance of its site and whether it has made misrepresentations about the availability of the proposed transmitter site.[58]

50. After an evidentiary hearing the ALJ resolved both issues against Liberty. Based upon the statements and deposition testimony of Vickey Utter that she had never agreed to lease or otherwise promised that Liberty could use her property as a transmitter site, the ALJ found that Liberty did not have reasonable assurance of its specified transmitter site and that Klemmer had misrepresented facts about the availability of the transmitter site. This misrepresentation, the ALJ determined, was an independent basis for disqualifying Liberty. The Review Board, although reciting the ALJ's findings on both the site availability and the false site certification issues,[59] affirmed only the ALJ's adverse resolution of the former issue. Specifically, the Board agreed with the ALJ that "vague discussions with the site owner, and Liberty's hopes and expectations, do not support a finding that there was the requisite meeting of the minds required for reasonable assurance." [60] Having affirmed Liberty's disqualification for lack of a transmitter site, the Board did not consider the separate issue of whether Liberty's certification was false.[61] The Commission likewise affirmed Liberty's disqualification for lack of a transmitter site without addressing the merits of the false certification issue. Liberty appealed the denial of its application to the court of appeals. The court

[58] *Memorandum Opinion and Order*, FCC 89M-1025 (ALJ Mar. 10, 1989).

[59] A summary of the Judge's findings, with appropriate citations to the Initial Decision, is set forth in paragraph 8 of the Review Board's Decision. *National Communications Industries*, 6 FCC Rcd at 1979 ¶ 8.

[60] *National Communications Industries*, 6 FCC Rcd at 1979 ¶ 11, noting that the mere possibility that the site will be available is insufficient.

[61] *Id.* at 1979 ¶ 12 ("Since Liberty is not basically qualified because of its disqualification on the site issue, we need not reach the issue of whether it misrepresented to the Commission when it certified that a transmitter site was available, nor do we have to consider whether Liberty is entitled to any comparative credit . . .").

remanded the case to the Commission after *Bechtel*, without considering the merits of any issue raised on appeal.

51. As noted in ¶ 21 above, the Commission, in implementing its auction authority for commercial broadcast services, has repealed the requirement that broadcast applicants must certify the availability of a transmitter site.[62] We must, however, review the ALJ's determination that Liberty's general partner misrepresented the availability of the transmitter site when the application was filed, inasmuch as candor remains important.[63]

52. Discussion: The issue before us concerns the state of Ms. Klemmer's mind when she certified on the August 31, 1987 application that Liberty had a transmitter site. We must determine whether that certification was deliberately false, or whether she believed (even if such belief was incorrect) that the landowner, Ms. Utter, had made a commitment to lease the site in the event Liberty secured the construction permit.

53. As an initial matter, we decline Liberty's invitation to revisit the site availability issue. The Review Board denied Liberty's exceptions on this issue, and the Commission denied Liberty's application for review and petition for reconsideration. The fact that it did so without specifying reasons is not, as Liberty submits, a basis for the Commission to again consider this issue. Although the Commission's resolution of the site availability issue is not final, it would be a waste of private and public resources to reconsider an issue that is no longer relevant to Liberty's basic qualifications, now that the construction permit is to be awarded after an auction. In this respect, Willsyr's reliance on *Damsky v. FCC*, 199 F.3d 527 (D.C. Cir. 2000), involving an analogous issue that would be rendered moot under auction procedures, is misplaced. There, the court affirmed our adjudication of the financial issue against a non-settling applicant in the context of a settlement agreement filed before the implementation of auction procedures. By virtue of the settlement, *Damsky* was decided without resort to an auction or the policies pertinent to our auction procedures. In this case, however, there has been no settlement agreement or other circumstance making it appropriate to adjudicate an issue that would be relevant only if the licensee were selected through a process other than an auction.

54. Despite our determination not to revisit the site availability issue (that is, whether there was a meeting of the minds sufficient to establish reasonable assurance of a transmitter site), we recognize that resolution of the false certification and site availability issues both entail consideration of the disputed events of August 1987 when Liberty principal Valerie Klemmer, accompanied by Tim Warner, allegedly discussed with landowner Vickey Utter the possibility of using her property for a transmitter site.

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[62] *First Report and Order*, 13 FCC Rcd at 15956 ¶ 99; *Memorandum Opinion and Order*, 14 FCC Rcd at 8732-33 ¶ 16.

[63] *First Report and Order*, 13 FCC Rcd at 15956 ¶ 99. *See also Dorothy O. Schulze and Deborah Bingham*, 13 FCC Rcd 3259, 3264 ¶ 14 (1998), aff'd sub nom. *SL Communications v. FCC*, 168 F.3d 1354, 1359 (D.C. Cir. 1999) (affirming the Commission's refusal to approve a settlement agreement that would have effectively granted an authorization to an applicant lacking character qualifications).

There is thus some similarity between Liberty's contentions regarding its disqualification on the false certification issue and arguments previously rejected by the Commission in upholding the ALJ's adverse resolution of the site availability issue. Inasmuch as Liberty's disqualification on the site issue has not become final (and will never be litigated to a final decision), the principles of res judicata do not, as BFBFM suggests, preclude challenges to underlying findings of fact made in connection with the site availability issue, insofar as they also pertain to the false certification issue.[64] Nor are, as Orion suggests, challenges to the reliability of record evidence barred by the Commission's rejection of virtually identical claims in upholding the ALJ's adverse resolution of the site issue. But more important here, as a matter of law the determination that there was not a meeting of the minds between Klemmer and the site owner sufficient to establish reasonable assurance of Liberty's original site does not foreclose a determination that Klemmer mistakenly believed that the landowner had agreed to lease the property and thus made the certification in good faith. Resolution of the misrepresentation issue thus requires us to consider an additional factual question not previously addressed in either the Board's or the Commission's disposition of the site availability issue.

55. Turning to the merits of the false certification issue, it is well established that substantial evidence of an intent to deceive is necessary to support a finding of misrepresentation.[65] For the reasons that follow we conclude that the ALJ's disqualification of Liberty on the false certification issue is not supported by substantial evidence. At the outset, we note that, contrary to the assertions of BFBFM, Orion and Willsyr, the ALJ made no credibility findings against Liberty that are entitled to special deference on review.[66] Indeed, the Initial Decision is devoid of any specific finding addressing the credibility of either Ms. Klemmer or Tim Warner, who also testified about this issue. The ALJ does not acknowledge, let alone assess the credibility of, Mr. Warner's lengthy testimony about the negotiations Klemmer claims to have had with Ms. Utter before certifying on Liberty's application that it had reasonable assurance of a transmitter site located on her property. Nor does the Initial Decision cite any aspect of Ms. Klemmer's demeanor -- including the expression of her countenance, how she sat or

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[64] *See Georgia Public Telecommunications Commission*, 7 FCC Rcd 7996, 7999 n.29 (1992), *citing Pantex Towing Corp. v. Glidewell*, 763 F.2d 1241, 1245 (11th Cir. 1985) (case in which exceptions concerning a particular issue were filed but never considered by the Review Board, the Commission found that it would be inappropriate to give a res judicata or collateral estoppel effect in future proceedings to the ALJ's adverse findings on that issue since they were not actually litigated to a final decision in which they were necessary to the outcome).

[65] *Swan Creek Communications v. FCC*, 39 F.3d 1217 (D.C. Cir. 1994), *citing*, *Weyburn Broadcasting Ltd. Partnership v. FCC*, 984 F.2d 1220, 1232 (D.C. Cir. 1993) ("'intent to deceive [is] an essential element of a misrepresentation or lack of candor showing'").

[66] *See Heidi Damsky*, 13 FCC Rcd 11688, 11693 ¶ 12 (1998), *aff'd on other grounds, Heidi Damsky v. FCC*, 199 F.3d 527 (D.C. Cir. 2000), citing *Walnut Creek Honda Associates v. NLRB*, 89 F.3d 645, 646 (9th Cir. 1996); *Barker v. Shalala*, 40 F.3d 789, 795 (6th Cir. 1994); *WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1141-42 (D.C. Cir. 1985).

stood, whether she was inordinately nervous, her coloration during critical examination, or other non-verbal communication -- which might convince an observing judge that a witness was testifying falsely or truthfully but which would be unavailable to a reader of the written transcript.[67] Ms. Utter, whose recollection concerning the site contradicts that of Liberty's witnesses (Klemmer and Warner), did not testify at the hearing. As such, the ALJ's conclusion, based on the deposition and statements of Utter, that Klemmer intentionally deceived the Commission in certifying reasonable assurance of a transmitter site was not based on any specific credibility findings that are entitled to special deference on review.[68] And, as the Enforcement Bureau notes, the ALJ did credit Klemmer's testimony on other matters.

56. The language cited by the competing applicants does not support their contention that the ALJ made credibility findings against Liberty. The ALJ, in resolving the false certification issue against Liberty, found that "Valerie Klemmer has blatantly dissembled in a manner that doesn't befit a prospective broadcast applicant." *Initial Decision*, 5 FCC Rcd at 2879 ¶ 8. This, however, merely reflects the ALJ's ultimate resolution of the issue. Ms. Klemmer "had blatantly dissembled," the ALJ concluded, because "when [she] represented to the Commission that Liberty had available the site specified in their application, she . . . knew she had no basis for so certifying." He found further that "it strains credibility . . . [t]o argue that her feeble, half-hearted effort to obtain some of Vicki [sic] Utter's land on Busbee Mountain constitutes 'reasonable assurance.'" What "strain[ed] credibility," in the ALJ's view, was not the testimony of Ms. Klemmer or any other witness as to the facts and circumstances surrounding her certification, but that Ms. Klemmer could believe that the landowner had promised to lease the site. These determinations based upon the ALJ's assessment of the evidence presented, however, do not constitute credibility findings. The lack of specific credibility findings, while not undermining the legal sufficiency of the ALJ's ultimate determination of misrepresentation, affects the nature of the review pertaining to that conclusion on appeal. Because that determination is not supported by specific demeanor findings, we accord it no special deference but assess whether the ALJ's determination is supported by substantial evidence in the record. It is the right and the duty of the trier of fact to assess the credibility of any witnesses based on his observations of their demeanor. But where, as in this case, the presiding judge has not made any specific demeanor findings, a reviewing body must proceed to make its own findings of fact without the benefit of a dispassionate ALJ's appraisal of the witnesses. [69]

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[67] *TeleSTAR, Inc.*, 2 FCC Rcd 7352, 7353 ¶ 11 (1987), *citing Penasquitos Village v. NLRB*, 565 F.2d 1074, 1078 (9th Cir. 1977).

[68] *See Heidi Damsky*, 13 FCC Rcd at 11693 ¶ 17 (noting specific findings by the ALJ that "[t]he Presiding Judge has had an opportunity to observe [HPI's] witnesses and finds their testimony forthcoming, candid, and entirely believable"); *Dorothy O. Schulze and Deborah Bingham*, 1 FCC Rcd 120, 124 (ALJ 1986), aff'd sub nom. *SL Communications v. FCC*, 168 F.3d 1354, 1357 (D.C. Cir. 1999) (upholding ALJ's credibility findings rejecting testimony as "sheer fabrication" and a "web of lies") (intervening history omitted).

[69] *See, e.g., Mid-Florida Television Corp.*, 70 FCC 2d 281, 293-94 ¶ 25 (Rev. Bd. 1975), *settlement agreement approved*, 49 RR 2d 1477 (1981), where the ALJ's observations were deemed untrustworthy because he had placed presumptive weight on the witnesses' status as practicing attorneys.

57. Based upon our required *de novo* review of the record, we find that substantial evidence in the record does not support the ALJ's conclusion that the certification was deliberately false. Relying primarily on Utter's statements and on the existence of a written lease for virtually the same transmitter site executed only days before she purportedly made an oral commitment to lease that property to Klemmer for the same purpose, the ALJ found that "what appears to have happened" is that Klemmer, apprised of the need to make an immediate payment to secure the landowner's commitment to lease her property to Liberty, declined to do so and went ahead and made the certification on Liberty's application.[70] Substantial evidence does not support that finding, however.

58. The record reflects that, before certifying reasonable assurance of a transmitter site, Valerie Klemmer investigated only one site, located on property owned by Ms. Utter, and that she believed, based upon her brief August 1987 meeting with Utter, that Utter had agreed to lease her property for $4000 per year if Liberty got the license. Klemmer had contacted Utter at the recommendation of her friend and neighbor, Tim Warner, who worked at local noncommercial station WCQS. (Tr. 651-52, 849, 851, 933) Warner had dealt previously with Utter and already knew that her property was desirable as a transmitter site. (Tr. 841, 835, 849) Klemmer's detailed and lengthy testimony as to what transpired when she met with Utter approximately five days before Liberty's application was filed, is corroborated in all material respects by the testimony of Tim Warner, who also attended that meeting.

59. At the meeting, which Klemmer had arranged, Warner introduced Klemmer and identified her as an applicant for the Biltmore Forest FM station. (Tr. 670, 871) Utter remarked that there had been a lot of recent inquiries about using her property for a site. (Tr. 676-77) According to the testimony of Klemmer and Warner, however, Utter did not specifically name anyone who had contacted her regarding a site or indicate that she had agreed to lease her property for that purpose. (Tr. 676-77, 679, 876-77, 940-42) Warner is certain he would have remembered any mention of Brian Lee having a lease with Utter since the Lee family was well known. (Tr. 940) Both Warner and Klemmer claim that, when Liberty's application was filed, they were unaware of the written lease executed August 21, 1987 between Utter and Orion's Brian Lee. (Tr. 659, 676-79, 915, 941, 987) Under the terms of that lease Utter was entitled to yearly payments of $1500 that increased to $4000 once the tower was constructed. The lease was for three years, and was renewable, at the lessee's option, for two three-year terms. (Orion Ex. 4; Tr. 2462-64)

60. Klemmer and Warner testified that they indicated that Klemmer was interested in leasing a portion of Utter's property for use as a transmitter site, and that their conversation with Utter included a discussion of the annual rent and the location of the tower. (Tr. 872) Klemmer, aware of the need to firm up the cost in order to secure reasonable assurance, asked Utter how much the rent would be. (Tr. 653, 672, 674, 922)

[70] *Initial Decision*, 5 FCC Rcd at 2867 ¶ 50.

When Utter indicated she would need $4000 and Warner indicated that this was a fair price, Klemmer advised Utter that $4,000 was acceptable.[71] (Tr. 655-57, 878-80) Both Warner and Klemmer believed, based on their August 1987 conversation with Utter, that she had agreed to lease her property for $4000.00 annually if Liberty got the license, and that she understood that Klemmer would not need the site for 18 months to two years, since FCC proceedings tend to be lengthy. (Tr. 661, 665-67, 680, 810, 884-86, 889, 961) They understood further that if Liberty received the construction permit, Utter would be willing to sign a lease at that point. (Tr. 893) Klemmer believed that the only thing left to work out was the duration of the lease.[72] (Tr. 810-13)

61. Further contributing to Klemmer's belief that she had reasonable assurance of a site was that the August 1987 meeting with Utter included a discussion, largely between Utter and Warner, as to the general location of the site. Klemmer, having no experience in selecting transmitter sites, relied on Warner, who had a great deal of experience in this area and had dealt previously with Utter. (Tr. 653, 662-63) He recommended that the site be located at the highest possible elevation and as close as possible to the television tower already located on Utter's land, and he pointed to a relatively flat area between the dog pen and the tower. (Tr. 881-83) Both Warner and Klemmer understood from the August 1987 meeting that this area was acceptable to Utter, in part because of its close proximity to the existing television tower. (Tr. 663, 678, 881-83)

62. After meeting with Utter, Warner and Klemmer discussed whether she could make a certification of reasonable assurance on Liberty's application. (Tr. 875) Based on Warner's experience in securing transmitter sites, Warner's previous dealings with Utter, and the television tower already located on Utter's property, Warner and Klemmer believed that Utter's oral commitment to enter into a future lease was sufficient. (Tr. 681, 809, 905) Warner had had considerable experience in securing transmitter sites for Station WCQS, and on at least one occasion he had been the one to certify reasonable assurance on an FCC application. (Tr. 825, 952-55) Additionally, he had an oral agreement with Utter allowing station employees to cross her land in order to work on the station's tower located on adjacent property. (Tr. 845, 846) His experience was that Utter was willing to enter into verbal agreements, that she honored such agreements, and that she had never required either a written agreement or monetary compensation to secure a verbal promise for a current lease of her property. (Tr. 898-99, 964) Warner was comfortable advising Klemmer that she had obtained reasonable assurance, as defined by the Commission, of a future lease of Utter's property for use as

[71] Warner later explained that, although $4000 was higher than he had hoped, it was not unreasonable. (Tr. 878-79, 904) He knew there were other area sites where the rent would be lower. Those sites would be less economical in the long run, he advised, because they would entail costs that Klemmer would not face with the already developed Utter site. He was aware of what was available in the area because he had tried to find an alternate site for WCQS when access to its current site became a problem.

[72] Warner testified that, although the duration of the lease was not discussed specifically, he inferred that Utter was amenable to a multi-year lease comparable to the lease for the existing television tower on her property. (Tr. 963)

site if Liberty were awarded the construction permit. (Tr. 899-900) His understanding from station WCQS's attorney is that, so long as a commitment is obtained from the landowner, there is no need for a written agreement. (Tr. 976) This is what Warner advised Klemmer, but he also told her to check with her own attorney before making the certification. (Tr. 906)

63. Other than Liberty's evident interest in establishing its basic qualifications, there is little reason to reject the detailed testimony of Klemmer and Warner. First, the competing applicants urge us to infer a motive to misrepresent the site's availability from the fact that Klemmer, having contacted Utter only days before the August 31, 1987 filing deadline, did not investigate any alternative sites. The record is clear, however, that Warner advised that Utter's was the best site but that there were other suitable sites. (Tr. 834-35, 957) The desirability of Utter's property is corroborated by Brian Lee, who testified that Orion's engineer had likewise advised that a site on Busbee Mountain would be preferable. (Tr. 2445) The availability of other suitable sites is illustrated by the fact that the original thirteen Biltmore Forest applicants specified eleven different sites and by the ease with which Liberty, upon learning in March 1989 that Utter was no longer willing to lease her property, specified a second site.[73] Significantly, Liberty in its November 10, 1999 amendment has specified a third site, located on property adjacent to Utter, that it proposes to share with noncommercial station WCQS. Neither the timing of the negotiations with Utter, nor the failure to investigate other sites is probative evidence that Klemmer knew the most desirable site was unavailable when she certified its availability.

64. The competing applicants also attack the credibility of Warner's testimony, asserting that he is not a disinterested witness. But we discern no basis to infer a motive to deceive on Warner's part. Despite lengthy cross-examination and repeated questioning by the ALJ, there is no evidence that Warner has any interest in, or managerial position with, Liberty. Warner, a career public broadcaster, is fairly committed to public radio and, although he does not foreclose the possibility of a really good offer tempting him into commercial radio, he repeatedly testified that he had no interest in the Biltmore Forest FM station and no ownership interest in Liberty.[74] (Tr. 856-57, 951) It is unclear that friendship, standing alone, would motivate Warner to perjure himself on Liberty's behalf, particularly given his commitment to public broadcasting and his station's ongoing contractual relationship with Utter at the time of

[73] Liberty's second site was the existing television tower located on Utter's property, already specified by Skyland, a competing applicant. The ALJ rejected Liberty's site amendment, finding that it was not supported by good cause inasmuch as it did not have reasonable assurance of the site (on Utter's property) specified in its August 31, 1987 application.

[74] He did, however, explore the possibility of noncommercial station WCQS applying for the Biltmore Forest allotment and then working out a channel swap with a commercial station, because this would have helped with a third adjacent channel problem at the station's current frequency. (Tr. 951) He had also hoped that the owner of the station 's current transmitter site would apply for the FM allotment and would propose to use that same property for a transmitter site, thereby minimizing the possibility of station WCQS having to find another transmitter site because of the property's owner's growing ambivalence about the use of his property as a transmitter site. (Tr. 932)

the hearing. It is problematic, in our view, that Warner would have been willing to jeopardize a relationship on which Station WCQS depended to access its site, and presumably his position as station manager of that station, by testifying falsely as to the events surrounding Liberty's specification of a site. Our analysis is not changed by the fact that Klemmer has apparently retained Warner to provide engineering services in connection with Liberty's November 10, 1999 filing insofar as it seeks to amend to a new transmitter site that, as reflected above, is to be shared with Station WCQS. [75]

65. We note, moreover, that despite Klemmer's extensive reliance on Warner in selecting the site and in negotiating with Utter, his pre-certification efforts on Liberty's behalf were based primarily upon information already available to Warner and entailed a minimal time commitment. Warner had been contacted by other potential Biltmore Forest applicants for advice in locating a site, because of his experience in selecting sites generally and because of the location of his station's tower on Busbee Mountain. (Tr. 830-31) He knew that Utter's property would be suitable for Klemmer's purposes, given his dealings with Utter and his investigation of other Busbee Mountain sites. (Tr. 833-35, 843, 848-49) He also knew that Utter's property was one of the few without restrictive covenants precluding the construction of a tower because, in exploring alternate sites for WCQS, he had researched the deeds in the spring of 1987. (Tr. 837, 840-41, 843-44) We do not find it incredible that a neighbor and friend would be willing to give advice, based largely on his own expertise and involving little time commitment, without expecting an interest in the application. Neither Warner's friendship with Klemmer, nor the extent of her reliance on his expertise, provide a basis to infer that Warner had a motive to deceive the Commission or to otherwise reject his very extensive testimony as to what occurred when he and Klemmer met with Utter in August 1987.

66. There is a direct conflict, we recognize, between the testimony of Warner and Klemmer and the denials of Vickey Utter that she ever gave Valerie Klemmer or anyone connected with Liberty any assurance that her property would be available for a transmitter site. But as noted by the Enforcement Bureau, based on its independent analysis of this matter, Utter's deposition testimony and various statements are inconsistent and, viewed in the best light, reflect only a very sketchy recollection of the events of August 1987 concerning the possible lease of her property for construction of a tower.

67. In this regard, the record shows that Orion's Brian Lee asked Vickey Utter to explain Liberty's specification of virtually the same piece of property that was the subject of their August 21, 1987 written lease. In response, she signed a statement under penalty of perjury on February 22, 1989, declaring that she did not know Valerie Klemmer, had never heard of Liberty Productions or given any representative of Liberty

[75] At the time of the hearing, Warner was the general manager of station WCQS. We take official notice of the fact that Warner has signed the Engineering Exhibit to Liberty's November 10, 1999 amendment, identifying himself as a technical consultant. The record does not reflect whether Mr. Warner is still general manager of station WCQS.

any assurance that her property would be available for use as a transmitter site.[76] The substance of that statement was largely withdrawn, however, after a visit from Warner and Klemmer on March 10, 1989, refreshed Utter's recollection of the August 1987 encounter. During that visit Utter refused to sign a statement Klemmer had prepared indicating her willingness to lease the site if Liberty received the construction permit. But she drafted and signed a second statement on March 13, 1989, reflecting that she then remembered meeting with Valerie Klemmer and Tim Warner about one and a half years before and discussing the possibility of leasing a portion of her land to Klemmer for a tower.[77] In that second statement, Utter indicated that "[a]t that time I told them that I had leased a portion of my land to Brian Lee for a tower to be constructed should he be awarded the new FM station. It was also discussed the posibility [sic] of leasing Valerie a piece of land for the same purpose but since she never contacted me again I assumed she found someplace more suitable for her project." At the request of Brian Lee and Orion's attorney, Utter signed a third statement on March 29, 1989.[78] In addition to repeating information to explain the inaccuracies in the February 22, 1989 declaration, Utter stated in the March 29, 1989 statement that: "We talked, in my yard, for a brief period concerning my property lease to Brian Lee. At that time or any other time I never gave Valerie the promise or assurance that she could use my land or my name when she filed the application with the FCC."

68. Ms. Utter was deposed on April 27, 1989. Her deposition testimony reflects only a vague memory of the meeting with Klemmer and Warner. She did not recall being introduced to Klemmer or being told of her intention to apply for the FM station. She had no idea why Klemmer had accompanied Warner, and assumed that she was connected with Warner's station, whose tower was located on property adjacent to Utter's. (Liberty Ex. 13, p. 24-28). And, despite her March 13, 1989 statement, she had no recollection of ever discussing the possibility of leasing Valerie Klemmer a portion of her land for a tower. (Liberty Ex. 13, p. 27). She claims to have included that statement in the March 13, 1989 document because Warner insisted that there had been such a discussion. (Liberty Ex. 13, p. 41). Yet, according to Brian Lee's testimony, she remembered this discussion and she had no qualms about entering into a lease with someone else for another portion of her property. (Tr. 2501-04) Her deposition testimony confirms that, as reflected in her March 13 and 29, 1989 Statements and as recounted by Brian Lee (Tr. 2499-500), she remembered discussing their written lease with Klemmer and Warner when they stopped by her house in August 1987. Utter's recollection is that Warner was aware of the lease, and even knew the annual rent. Her vivid recollection of a snippet of an otherwise forgotten conversation is a bit curious. Also troublesome is her admission in her deposition that she had included information in the March 13, 1989 statement, of which she had no independent recollection, based entirely on the recollection of others.

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[76] The February 22, 1989 statement is attached to Liberty Exhibit 13 and is identified as Exhibit 1. (Liberty Exhibit 13 is a transcript of Vickey Utter's deposition.)

[77] The March 13, 1989 statement is attached to Liberty Exhibit 13 (transcript of deposition) as Exhibit 2.

[78] The March 29, 1989 statement is attached to Liberty Exhibit 13 (deposition transcript) as Exhibit 3.

69. Thus, even crediting only the deposition testimony and various statements of Ms. Utter (and disregarding entirely the contrary testimony of Klemmer and Warner), there is not substantial evidence of an intent to deceive. Utter's statements, rather than providing a comprehensive and coherent account of the disputed events, reflect only that she has no clear memory of the August 1987 conversation with Klemmer and Warner. In her statements and in her deposition she has variously denied that any meeting occurred at all, or recalled meeting Klemmer but not being aware that Klemmer intended to apply for the FM station, or meeting with Klemmer and specifically discussing a lease for the FM station. In the circumstances, and given Utter's inconsistent statements, we do not give substantial weight to Utter's assertions that purport to provide detailed descriptions of what was said or might have been said, including, for example, her certainty that in any discussion of leasing her property, she would have insisted on a commitment (presumably a monetary payment) from Liberty, and would have expected Klemmer to contact her again. (Deposition at 41-42, 45 (Liberty Exhibit 13); March 13, 1989 Statement; March 29, 1989 Statement) She is likewise sure that, in August 1987, Warner and Klemmer were aware of her written lease with Brian Lee. (Deposition at 26-27, 41; March 13, 1989 Statement; March 29, 1989 Statement)

70. The record reflects, moreover, that Utter understood that only one applicant would ultimately need a transmitter site and that Brian Lee would not likely renew the lease unless Orion received the license. (Tr. 2502; Liberty Exhibit 13, p. 14) In these circumstances, there may have been a casual discussion of a future lease with Klemmer, long forgotten by Utter, that Klemmer and Warner, not fully understanding that reasonable assurance requires something more than a possibility of a future lease, misconstrued as providing reasonable assurance. Consistent with her only vague recollection of these events, moreover, she might have felt compelled to reassure Brian Lee that, while she did not feel constrained from leasing other portions of her property, she had advised Klemmer and Warner of the written lease agreement for Orion's site, whereas Klemmer and Warner testified that she had not done so. None of this provides substantial evidence that, when Klemmer certified reasonable assurance, she knew that the certification was false.

71. One final matter warrants comment. The existence of the written lease with Brian Lee is admittedly troublesome. It is somewhat problematic that Utter, having just signed a lease providing for up-front payments before the license was awarded, would have been willing to consider leasing Valerie Klemmer a portion of her property for the same purpose without requesting a similar monetary commitment.[79] For purposes of the false certification issue, however, the pertinent question is not whether Utter had agreed to lease the site to Liberty if it received the construction permit. The critical question instead is Klemmer's understanding at the time of certification. Particularly in the absence of any reliable evidence that Klemmer was, or should have been, aware of

[79] But the record contains no evidence as to Utter's precise understanding of the lease in 1987; it is not inconceivable that she believed that she could agree to (or at least discuss) a future lease to be signed only if Orion, having failed to win the license, did not renew the lease for a second term.

Brian Lee's lease at that time, its existence is not probative of false certification. Apart from Utter's otherwise faulty recollection of her August 1987 conversation with Klemmer and Warner, however, there is nothing to indicate that anyone connected with Liberty was aware of the lease at the time of certification**,** or that, during that conversation, Utter had demanded a similar written commitment from Liberty. Awareness of Brian Lee's lease, moreover, cannot be inferred from its recordation on August 21, 1987. Warner's research of the Busbee Mountain properties ended in March or April 1987, and there is no evidence that Klemmer's former husband, a real estate attorney, was involved in any transactions concerning Busbee Mountain during the pertinent time period. (Tr. 944) Nor can awareness of the lease be inferred, as Willsyr suggests, from the location of Liberty's originally specified transmitter site. It contends that the area described in the August 21, 1987 lease is the best possible site, and that Liberty's specification of a different (less desirable) site can only be explained by its awareness that Utter had already agreed to lease the more desirable portion of her property to Orion's Brian Lee. But the terms of the lease do not include an exact specification of the site. The location of Orion's site, therefore, could not have been determined from the August 21, 1987 lease. The coordinates of the sites specified by Orion and by Liberty, moreover, vary by only one degree. Furthermore, Warner's detailed testimony reflects that the site's location was influenced by the terrain of the land and by Utter's desire that it be as close as possible to the existing television tower, and that its location on higher ground made Liberty's original site preferable to Orion's site. (Tr.881-83)

72. There is, in sum, no basis to reject the consistent testimony of Klemmer and Warner, contradicted only by Utter's faulty recollection, that they first learned of the written lease in March 1989 after the filing of Orion's petition to add the site availability and site certification issues against Liberty, and that they believed, based upon their August 1987 conversation, that Utter had expressed a willingness to lease the land to Klemmer in the event Liberty was the successful applicant. Only the hearsay testimony of Brian Lee as to what Utter told him in early 1989 about what had occurred in August 1987, and the existence of the Utter-Lee lease lend credence to Utter's version of what occurred. Particularly in light of Utter's admitted lack of recollection and her clear interest in reassuring Orion's Brian Lee that her dealings with Liberty were consistent with their written lease arrangement, neither the existence of the lease nor Utter's various statements and deposition testimony provides substantial evidence that Klemmer deliberately misrepresented the availability of the site when she certified reasonable assurance.[80] Indeed, if Utter had told Liberty about her lease agreement with Orion and had then specifically relied on it to demand a similar commitment from Liberty, it is

[80] We do not draw any adverse inferences from the fact that Ms. Utter, in contrast to Tim Warner and Valerie Klemmer, did not testify at the hearing. There is merit to the suggestion that Liberty, having subpoenaed Utter and having elected not to enforce that subpoena, cannot take advantage of her failure to appear. Liberty's failure to enforce the subpoena, however, cannot obscure the inconsistencies in Utter's various statements and deposition testimony and that, by her own admission, she has little recollection of the events in question. Indeed, Liberty was "happy" to rely on her deposition and statements precisely because it believed that, given her evident lack of recollection, it would get nothing further from her by forcing her to testify. We cannot fault Liberty for not enforcing the subpoena under these circumstances.

difficult to believe that Liberty would have falsely certified about a matter relating to a site location so well known to a competing applicant. Because we find no probative evidence of intentional deceit by Klemmer, let alone substantial evidence of such deceit, we reject the ALJ's findings on the false certification issue and reverse his disqualification of Liberty on this issue. We conclude, therefore, that Liberty is basically qualified to be awarded the construction permit for a new FM station on channel 243A in Biltmore Forest.

IV. ORDERING CLAUSES

73. ACCORDINGLY, IT IS ORDERED, That the Joint Request For Approval of Settlement, filed November 14, 2000 by Biltmore Forest Broadcasting FM, Inc. and Liberty Productions IS DENIED, and the Motion to Strike, filed January 8, 2001 by Orion Communications, Ltd. IS DISMISSED as moot.[81]

74. IT IS FURTHER ORDERED, That the Motions to Strike Reply to Opposition, filed on December 29, 1999 by Orion Communications Limited and on January 3, 2000 by Willsyr Communication Limited Partnership, ARE DENIED;[82] and the Amendment, tendered for filing on November 10, 1999 by Liberty Productions, A Limited partnership IS ACCEPTED.

75. IT IS FURTHER ORDERED, That the Motions to Enlarge Issues, filed on November 12, 1999 by Orion Communications Limited and by Biltmore Forest Broadcasting FM, Inc. ARE DENIED; and that the Motion to Enlarge Issues and the Second Motion to Enlarge Issues, filed on November 24, and December 13, 1999 by Willsyr Communications Limited Partnership ARE DENIED.

[81] Our action herein denying the proposed settlement agreement is without regard to the allegedly improper statements contained in the responsive pleadings filed by Liberty and by BFBFM.

[82] The issue concerns replies that Liberty filed in response to oppositions to its November 10, 1999 amendment. These replies, according to Willsyr and Orion, are unauthorized under Section 1.294 of the rules. As the Enforcement Bureau notes, however, Section 73.3522(b), 47 C.F.R. § 73.3522(b), governing the filing of amendments to long-form applications, does not specifically authorize the filing of oppositions to such amendments. Furthermore, the Order, FCC 99I-23 ¶ 4 (OGC 1999), resuming the hearing proceeding in MM Docket No. 88-577contemplated only that motions to enlarge issues could be filed in response to Liberty's November 10, 1999 amendment to its long-form application. Insofar as oppositions to that amendment raise questions as to Liberty's basic qualifications, or otherwise request the denial of its long-form application, they are, in effect, motions to enlarge issues to which Liberty, clearly, is entitled to respond. *See First Report and Order*, 13 FCC Rcd at 15956 ¶ 98, providing that the auction winner will have 15 days to respond to any new petitions to enlarge. Instead of dismissing the oppositions as unauthorized, as the Enforcement Bureau has suggested, we have considered the arguments raised in both the oppositions to the amendment and in the related replies. By doing so, we have given the unsuccessful bidders multiple opportunities to challenge Liberty's qualifications beyond what the rules specifically authorize but have, as a matter of fairness, also afforded Liberty ample chance to respond.

76. IT IS FURTHER ORDERED, That the Motion to Dismiss Replies, filed on February 7, 2000 by Orion Communications Limited IS DENIED;[83] that *National Communications Industries*, 5 FCC Rcd 2862 (ALJ 1990), is set aside to the extent reflected herein; and that the hearing proceeding in MM Docket No. 88-577 IS TERMINATED.

77. IT IS FURTHER ORDERED, That, subject to full payment of the gross amount of Liberty's high bid of $2,336,000 for the permit and full compliance with all of Commission's payment procedures, the application filed by Liberty Productions, A Limited Partnership (File No. BPH-870831MI), as amended, IS GRANTED; and that the following applications ARE DISMISSED: (a) Willsyr Communications Limited Partnership (File No. BPH-870831MJ); (b) Biltmore Forest Broadcasting FM, Inc. (File No. BPH-870831MK); (c) Skyland Broadcasting, Inc. (File No. BPH-870831ML); and (d) Orion Communications Limited (File No. BPH-870831ME).

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

[83] Orion requests that we dismiss on procedural grounds the separate replies that Liberty filed in response to the Oppositions filed by Willsyr, BFBFM and Orion. According to Orion, the delegated authority order, FCC 99I-23, rel. Nov. 23, 1999, according Liberty an opportunity to file a supplemental brief on the site issue contemplated that Liberty would file a single, rather than multiple, replies in response to any oppositions to its brief. However, the Order, ¶ 7, specifies a deadline by which "replies MAY BE FILED," thus reflecting that multiple replies are authorized.

Dissenting Statement of Commissioner Gloria Tristani

In Re Applications of Liberty Productions, a limited partnership, Willsyr Communications limited partnership, Biltmore Forest Broadcasting company, Orion Communications Limited, *for a construction permit for a new FM broadcast station on channel 243A at Biltmore Forest, North Carolina*

Because I do not believe the record justifies reversing both the F.C.C. Review Board ("Review Board") and the F.C.C. Administrative Law Judge ("ALJ") who held the hearing and heard the witnesses in this matter, I respectfully dissent. I write separately because the majority's decision renders our rule against misrepresentation by a licensee almost unenforceable by requiring direct proof of intent to deceive.[1]

I. Procedural History

The ALJ held a trial-type hearing lasting 8 days.[2] The ALJ framed the issue:

> To determine whether Liberty has made misrepresentations to the Commission about the proposed transmitter site's availability, and, if so, what impact that has on Liberty's basic qualification to be a Commission licensee.[3]

The factual dispute arose from a conversation between the landowner of the tower site, and two witnesses for Liberty. At the hearing, Liberty's two witnesses Valerie Klemmer and Tim Warner testified about the meeting with the site owner.[4] Liberty subpoenaed the site owner, Ms. Vickey Utter, but declined to enforce the subpoena, instead relying on her deposition and sworn statements.[5] Following the proceeding the parties submitted findings of fact and conclusions of law.[6] After hearing from Liberty's witnesses, the ALJ rejected their testimony stating:

> When Valerie Klemmer certified to the Commission that Liberty had a transmitter site, she had absolutely no basis

[1] *See e.g. American Communications Ass'n v. Douds*, 339 U.S. 382, 411 (1950) (noting that "courts and juries every day pass upon knowledge, belief and intent ... having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred").
[2] *In re Applications,* 5 FCC Rcd. 2862, 2863 (1990)
[3] *Id.*
[4] *Id.* at 2866-67; 2879; *see also Memorandum Opinion and Order,* at para. 55.
[5] *See Memorandum Opinion and Order,* at n75.
[6] *See In re Applications,* 5 FCC Rcd. at 2863.

> for doing so. Moreover, she knew she had no basis for so certifying.[7]

After the ALJ's adverse disposition, Liberty sought relief from the Review Board.[8] The Review Board affirmed the ALJ stating:

> The ALJ found that Liberty never had reasonable assurance that the site which it specified in its application was available, and that its *principal falsely certified that the transmitter site was available because, "she had absolutely no basis for doing so.* Moreover she knew she had no basis for so certifying." His findings and conclusions were based on the verified statements and deposition testimony of the site owner. Her testimony was in turn corroborated by the fact that other applicants who has sought permission to use her land were required to enter into a written lease.[9] (emphasis added)

The Review Board went on to conclude that Liberty's two witnesses supported, rather than controverted the ALJ's findings, stating:

> Like the ALJ, we find no reason in the record to reject the firm denial of the site owner that she had ever given assurance to Liberty that the property would be available, especially where twice before she had insisted on written agreements.[10]

Following a remand from the D.C. Circuit for reasons unrelated to the merits of this dispute, the matter ultimately came before the Commission. The majority reverses because, "we find that substantial evidence in the record does not support the ALJ's conclusion that the certification was deliberately false."[11] The majority supports this conclusion saying, "no probative evidence of intentional deceit," exists and by relying on the failure of the ALJ to make a "specific finding addressing the credibility" of Klemmer and Warner, Liberty's witnesses.[12] The majority thus reaches a different conclusion than the ALJ who heard the testimony, and the Review Board that examined the entire record.

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[7] *See In re Applications,* 5 FCC Rcd. at 2867; *see also Id.* at 2879 (ultimate conclusion of law).
[8] *See In re Applications II,* 6 FCC Rcd.1978 (1991).
[9] *Id*. at 1979.
[10] *Id.*
[11] *Memorandum Opinion and Order,* at para. 57.
[12] *Memorandum Opinion and Order,* at para. 72.

II. Substantial Evidence Exists that Liberty Falsely Certified the Availability of the Tower Site and is Unqualified to be an F.C.C. Licensee.

De novo review is not trial *de novo.* Thus, while *de novo* review authorizes a review of the whole record without deference to facts found by the ALJ, there can be no doubt that our law universally favors disposition of questions of credibility or motive by the person or body that hears the testimony. *De novo* review in the instant case means we must consider whether the challenged outcome was based on a consideration of the relevant factors, whether there is record evidence to support the disposition and whether there has been a clear error of judgment. While this inquiry must be searching and careful, a hearing on the merits before an ALJ should be, "the 'main event,' and not simply a 'tryout on the road' to appellate review."[13]

Here, the property owner swore she did not give any assurance whatsoever to Ms. Klemmer that the property would be leased to Liberty. If credited by the factfinder, this fact alone is substantial evidence sufficient to sustain the adverse determination against Liberty. Moreover, as the Review Board noted, the rejection of Ms. Klemmer and Mr. Warner's testimony is supported, rather than controverted by the record. The sworn testimony of Ms. Utter was not undermined by extrinsic evidence and was actually supported by the submission of an existing written lease with Liberty's competitor, Orion. The lease was probative of the fact that Liberty did not receive the type of site availability assurance Ms. Utter knew how to give, and in fact had given to Orion. As found by the ALJ and the Review Board, there is substantial evidence that Liberty's witness, Ms. Klemmer, knew the representations she made to the Commission regarding the availability of Ms. Utter's land were simply false.

A. The Majority Errs When it Holds No Probative Evidence of Licensee Deceit Exists in this Record.

Despite the existence of "admittedly troublesome" documentary evidence, and a "direct conflict" between the testimony of the site owner and Liberty's witnesses, the majority makes the surprising claim that the record contains no "probative evidence" of deceit by Liberty.[14] "Probative evidence" has an evidentiary meaning quite distinct from that which the majority attributes to it.[15] Careful examination of paragraphs 58-72 of the majority's opinion discloses not a lack of probative evidence but instead a complete reweighing of the evidence and testimony presented. While perhaps permissible, such reweighing is not advisable. The majority's review of the record proves too much. It is

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[13] *Freytag v. Commissioner*, 501 U.S. 868, 895 (1991) (citing *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977)).

[14] *See Memorandum Opinion and Order* at para. 71 ("admittedly troublesome"); para. 66 ("direct conflict").

[15] "'Probative value' addresses the tendency of the evidence to establish a 'material' proposition." *U.S. v. Bagley*, 473 U.S. 667, n.5 (1985) (Marshall, J. dissenting)(citing E. Cleary, McCormick on Evidence § 185 (3d ed.1984)); *See also* 1 J. Wigmore, Evidence § 2 (P. Tillers rev.1982).

precisely material inconsistencies and contradictions in and between the evidence and testimony that is sufficient to support adverse credibility determinations.[16]

B. The Majority Errs When it Requires Direct Evidence of Intent to Deceive.

The most troubling aspect of the majority's approach is its conflict with our cases on the quantum of evidence necessary to find misrepresentation by licensees. It is well settled that, "intent to deceive" is a necessary element of proving misrepresentation or lack of candor in FCC proceedings.[17] The evidence reviewed by the ALJ and the Review Board is more than sufficient to support the finding that Liberty did misrepresent the site's availability *and* intended to deceive the Commission. The D.C. Circuit has said,

> [T]he fact of misrepresentation coupled with proof that the party making it had knowledge of its falsity [is] enough to justify a conclusion that there was fraudulent intent.[18]

Applying the D.C. Circuit's logic, the majority's preference for an explicit finding that Liberty's witnesses lied, instead of the existing finding that Liberty's witnesses had no basis for their representations to the Commission, is a distinction without a difference. But, it has the unfortunate effect of suggesting the Commission will not find intent to deceive unless there is a smoking gun. Questions of credibility, motive and state of mind are almost universally resolved by reasonable inferences from direct and circumstantial evidence. The D.C. Circuit has said, "[I]n almost any claim involving motive, a [civil] defendant's state of mind is typically established by circumstantial evidence because of the difficulty in obtaining direct evidence of motive."[19] This general understanding also

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[16] *See e.g. S&L Communications v. FCC,* 168 F.3d 1354, 1355 (1999)(affirming FCC decision without explicit credibility findings on each witness, "The ALJ rejected as "sheer fabrication"--a "web of lies," as he also put it--the contrary testimony of three S&B witnesses, including Schulze."); *Saballo-Cortez v. INS*, 761 F.2d 1259, 1264 (9th Cir.1984); *de Leon-Barrios v. INS*, 116 F.3d 391, 393 (9th Cir.1997).

[17] *See Swan Creek Communications*, 39 F.3d 1217, 1222 (D.C.Cir. 1994); *Fox River Broadcasting, Inc*., 93 F.C.C.2d 127, 129 (1983).

[18] *Leflore Broadcasting. Co., v. FCC,* 636 F.2d 454, 462 (1980).

[19] *Kimberlin v. Quinlan,* 6 F.3d 789, 808 (1993); *see also United States v. Jackson*, 513 F.2d 456, 461 (D.C.Cir.1975) (footnotes omitted); *see also United States v. Bank of New England, N.A.*, 821 F.2d 844, 854 (1st Cir.) ("Willfulness can rarely be proven by direct evidence, since it is a state of mind; it is usually established by drawing reasonable inferences from the available facts."), *cert. denied*, 484 U.S. 943 (1987); *Mallette v. Scully*, 752 F.2d 26, 32 (2d Cir.1984) ("Because intent is formed in the mind in secrecy and silence ..., a determination of whether a deliberate intent was formed must be drawn from all the circumstances of the case. Circumstantial evidence of this subjective fact is therefore indispensable."); *United States v. Pope*, 739 F.2d 289, 291-92 (7th Cir.1984) ("Proof of the requisite state of mind need not be by direct evidence; it may be inferred from the surrounding facts and circumstances."); *United States v. Hudson*, 717 F.2d 1211, 1213 (8th Cir.1983) ("Willfulness, intent and guilty knowledge may also be proven by

applies in criminal cases, where the burden of proof is considerably higher than in a civil action.[20]

If circumstantial evidence and inferences therefrom suffice to prove intent beyond a reasonable doubt in criminal trials, it should certainly satisfy this Agency's standard in a civil licensing matter. Construing the record before us as lacking "probative evidence" on the question of deceit amounts to calling for a record that contains a confession of intent to deceive or requiring the Commission find direct evidence of deceit. This is a nearly impossible burden to put on the F.C.C.'s bureaus and judges and renders the bar on misrepresentation unenforceable except in the most extreme cases. It would also have the effect of requiring more evidence of deceit at the pleading stage at the F.C.C. than is required to win a Title VII case or convict a defendant at trial in Federal court.

C. The Majority Errs when it Requires the ALJ to Enter Findings Stating Witnesses Lack Credibility Prior to Making Adverse Rulings if the Credibility Determinations are Implicit in the Adverse Ruling.

The ALJ found Liberty's arguments, "strained credulity."[21] The majority concluded this finding, together with the ALJ's finding that Liberty lacked "any basis" for certifying the site's availability did, "not constitute credibility findings."[22] The majority's conclusion, that the absence of an express finding regarding the credibility of Liberty's witnesses weakens the ALJ's ultimate disposition, is unsupported by any citation to a rule or case that requires that an ALJ enter an express finding regarding witness credibility.[23] While such findings may be preferred, the majority should not create such a duty out of thin air.

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circumstantial evidence and frequently cannot be proven in any other way."); *United States v. Childs*, 463 F.2d 390, 392 (4th Cir.) ("Intent is not susceptible of direct proof; it must be proved by circumstances.") (footnote omitted), *cert. denied*, 409 U.S. 966, 93 S.Ct. 271, 34 L.Ed.2d 232 (1972); 2 Charles A. Wright, FEDERAL PRACTICE AND PROCEDURE § 411 (2d ed. 1982) ("Though circumstantial evidence is used in virtually every criminal case, there are certain kinds of cases and issues on which it is almost indispensable, because it is so unlikely that direct evidence will be available. These include such matters as the existence of a conspiracy, criminal intent, or other issues involving state of mind.") (footnotes omitted); 2 John H. Wigmore, EVIDENCE IN TRIALS AT COMMON LAW §§ 242, 244, 245 (Chadbourn rev. 1979) (intent, knowledge, belief, and state of mind may be evidenced by external circumstances and the defendant's conduct).

[20] *See generally, Kimberlin v. Quinlan; see also United States v. Maggitt*, 784 F.2d 590, 593 (5th Cir.1986) (same*); United States v. Harris*, 558 F.2d 366, 369 (7th Cir.1977) (same); *United States v. White*, 557 F.2d 233, 236 (10th Cir.1977) (per curiam) (same).

[21] *In re Applications*, 5 F.C.C.Rcd. at 2879.

[22] *Memorandum Opinion and Order,* at para. 56.

[23] The majority seems to be calling for a rule like that used in the immigration asylum context, where factfinders must explicitly enter findings on witness credibility prior to making an adverse determination on a petition. *See e.g. Garcia- Ramos v. INS*, 775 F.2d 1370, 1374-75 (9th Cir.1985); *Argueta v. INS*, 759 F.2d 1395, 1397-98 (9th Cir.1985).

Only the ALJ can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it. Where such factors are present, the Commission may well find error even in a finding purportedly based on a credibility determination.[24] But when an ALJ's finding is based on a decision to credit testimony that tells a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can almost never be error.

I am at a loss to explain how the ALJ's rejection of Liberty's testimony and explicit finding that its position on the evidence, "strained credulity," can be held to be an inadequate credibility finding.[25] The strongly worded findings and conclusions entered by the ALJ, and affirmed by the Review Board, leave no doubt that Liberty's witnesses were not only lacking in credibility, but were disbelieved and thought to have testified falsely. It is an inescapable inference from the ALJ's findings and conclusions entered that any credibility issues were resolved against Liberty.

Conclusion

The majority opinion constitutes an unwise use of our *de novo* review power. *De novo* review is not for the purpose of retrying the matter. While the site owner may not have testified at the hearing, the ALJ did hear from two of three key witnesses. The majority has thus exchanged a result that turned on credibility assessments made by a judge, who heard the testimony from two of three witnesses, for a result made by four Commissioners who did not hear from a single witness. Surely the ALJ is better positioned than this Commission to decide the issue in question.[26] The majority's disposition does not reduce the likelihood of erroneous deprivation of rights in the future nor does it prescribe improved due process in the future. Thus it does not comport with the usual purpose of *de novo* review, which is to clarify the application of legal standards to facts.

Direct conflicts in sworn testimony, and documentary evidence surely constitutes "probative evidence." A finding that Liberty had, "no basis," for its certification to the

[24] *See, e.g., United States v. United States Gypsum Co.*, 333 U.S. 364, 396 (1948)(reversing trial court because documentary evidence outweighed credibility determinations).

[25] *See e.g. Anderson v. Sullivan*, 914 F.2d 1121 (9th Cir. 1990)(rejecting claim that administrative factfinder must make explicit findings in absence of rule compelling such findings); *United States v. Mastropierro*, 931 F.2d 905, 906 (D.C.Cir.1991)(holding agency must apply and consider relevant factors rather than list findings on each factor to be in compliance).

[26] *See e.g. Miller v. Fenton*, 474 U.S. 104, 114 (1985)(noting deference is owed to the judicial actor best positioned to decide the issue in question.).

Commission and that its argument, "strained credulity," is sufficiently clear to constitute any necessary credibility determination. The Commission, after expending its ALJ resources in a week long hearing, should be reluctant to substitute its own view of the facts in the absence of a wildly implausible result. Here, the majority sends the wrong enforcement message to licensees and wrong procedural message to its judges. The ALJ's findings and conclusions, as affirmed by the Review Board, are not implausible and should be affirmed.