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	)	

ORDER

Adopted: September 25, 2001 ; Released: October 26, 2001

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

1. By this order, we deny the requests filed June 13, 2001 by Biltmore Forest Broadcasting FM, Inc. (BFBFM) and by Orion Communications Limited (Orion) to stay, pending judicial review, our decision in *Liberty Productions,* FCC 01-129 (released May 25, 2001).[1] The Commission determined that Liberty Productions (Liberty), the winning

[1] Pending before the Commission are: (a) Motion To Stay Effect Of Order Pending Judicial Review, filed June 13, 2001, by Biltmore Forest Broadcasting FM, Inc.; (b) Motion For Stay Pendente Lite, filed June 13, 2001, by Orion Communications, Ltd.; (c) Consolidated Opposition To Motions For Stay, filed June 19, 2001, by the Enforcement Bureau; (d) Opposition To Motion To Stay Effect Of Order Pending Judicial Review,

bidder in an auction that closed October 1999, is basically qualified and, subject to full payment of its winning bid, conditionally granted its application for a construction permit for a new FM station in Biltmore Forest, North Carolina. For the reasons set forth below we find that neither BFBFM nor Orion has demonstrated that irreparable harm will result unless the effect of the Commission's May 25, 2001 decision is stayed or that they have otherwise satisfied the requirements for a stay under *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921 (D.C. Cir. 1958) (*Virginia Jobbers*), as revised by *Washington Metropolitan Area Transit System v. Holiday Tours*, 559 F.2d 841 (D.C. Cir. 1977) (*WMATA*). We also deny the Motion to Recuse filed July 9, 2001 by Willsyr Communications, Limited Partnership, an unsuccessful bidder for the Biltmore Forest construction permit.

BACKGROUND

2. The Commission, affirming the decisions of the ALJ and of the Commission's former Review Board,[2] initially granted Orion's application based on its superior integration proposal and disqualified BFBFM and Liberty on site availability issues.[3] Timely notices of appeal filed by four unsuccessful applicants were pending before the United States Court of Appeals for the District of Columbia Circuit when that court issued its decision in *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993), holding that continued reliance on the integration criterion is arbitrary and capricious and therefore unlawful. The court subsequently remanded this proceeding to the Commission for further consideration in light of *Bechtel*. By virtue of the court's separate decision in *Orion Communications Ltd. v. FCC*, 131 F.3d 176, 181 (D.C. Cir.1997), Orion has served as the interim operator on Channel 243A "pending such further proceedings as the Commission may conduct to choose either an interim or a final licensee."

3. Following *Bechtel* the Commission stayed the adjudication of all comparative broadcast cases pending resolution of the questions raised by *Bechtel*[4] and ultimately adopted competitive bidding procedures to govern the resolution of all frozen commercial broadcast comparative cases.[5] In accordance with those procedures, the

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filed June 19, 2001, by Liberty Productions; (e) Opposition To Motion For Stay Pendente Lite, filed June 19, 2001, by Liberty Productions; and (f) Consolidated Opposition To Motions For Stay, filed June 28, 2001, by Willsyr Communications Limited Partnership.

[2] *National Communications Industries*, 6 FCC Rcd 1978 (Rev. Bd. 1991), *affirming*, 5 FCC Rcd 2862 (ALJ 1990).

[3] *National Communications Industries*, 7 FCC Rcd 1703 (1992), *recon. denied, Liberty Productions, Inc.*, 7 FCC Rcd 7581 (1992), *recon. dismissed*, 8 FCC Rcd 4264 (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*, 13 FCC

above-captioned applications were scheduled for an auction that commenced on September 28 and closed October 8, 1999. Liberty was the high bidder, followed by BFBFM, Orion, and Willsyr.[6] The adjudicatory proceeding resumed to consider an unresolved basic qualifications issue involving Liberty and to allow the filing and consideration of any amendment to Liberty's long-form application and of any further motions to enlarge issues against Liberty in accordance with the Commission's routine adjudicatory procedures.

4. By its Memorandum and Opinion, FCC 01-129 (rel. May 25, 2001), the Commission determined that Liberty is fully qualified, accepted an amendment specifying a new transmitter site and, subject to full payment of Liberty's final bid of $2,336,000 and timely compliance with all payment procedures, granted Liberty's application for channel 243A and dismissed the competing applications. The Mass Media Bureau announced that the balance of Liberty's winning bid payment was due by June 19, 2001 and that, upon timely payment of the final bid, the authorization would be granted.[7] A wire transfer in the amount of $2,032,032 was received from Liberty on June 19, 2001.

THE STAY REQUESTS

5. Stay requests have been filed by BFBFM and Orion, unsuccessful bidders for the Biltmore Forest construction permit who placed the second and third highest bids, respectively, in the auction. Both have filed notices of appeal with the D.C. Circuit, as has Willsyr Communications, Limited (Willsyr), the third unsuccessful bidder for the Biltmore Forest construction permit. The stay requests are opposed by Liberty, the Enforcement Bureau and Willsyr.

6. Orion and BFBFM submit that a stay is warranted under *Virginia Petroleum* and *WMAT*. A stay, they urge, will not materially harm Liberty, who has not commenced broadcast operations and whose only possible loss is the revenue it would earn during the pendency of the court appeal. After eleven years Orion sees no reason for haste until judicial review is complete. BFBFM intends to ask the court to expedite the

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Rcd 15920 (1998), *recon. denied*, 14 FCC Rcd 8724 (1999), *aff'd sub nom. Orion Communications Ltd. v. FCC*, 213 F.3d 761, *mem.*, 221 F.3d 196 (D.C. Cir. 2000).

[6] Skyland, also eligible to be included in the auction, filed the short-form application necessary to participate in the auction, but it failed to make the up-front payment entitling it to place bids in the auction. Nor did Skyland participate in the post-auction proceedings relating to Liberty's qualifications. The denial of Skyland's application is therefore final and hereafter it may be deleted from the caption.

[7] *Correction to Public Notice DA 01-1347, Released June 5, 2001: FCC Announces It Is Prepared To Grant FM Broadcast Construction Permit For Biltmore Forest, North Carolina After Final Payment Is Made*, DA 01-1347 (released June 14, 2001) (indicating that balance of the winning bid was due by June 19, 2001).

appeal, and is confident the length of the stay will be brief. But it is nevertheless sensitive to the injustice of requiring Liberty to make its final payment while not permitting it to commence operating.

7. Orion, relying on a declaration from Orion owner Betty Lee, claims that it will be irreparably harmed in the absence of a stay pending judicial review. In a declaration attached to Orion's motion, Mrs. Lee details the loss of business and goodwill Orion experienced when its interim operation was temporarily terminated in June 1997. According to Mrs. Lee, the station lost incalculable advertising revenue and market share, as well as valuable employees, not fully recouped by the station since its court-ordered reinstatement as the interim operator in January 1998. She believes these losses are certain to recur and will destroy Orion's business if it is again removed from the air. BFBFM, on the other hand, submits that the community of Biltmore Forest will be irreparably harmed by the further disruption in service that will occur if yet another operator is installed before the court has had an opportunity to review the Commission's decision.

8. BFBFM claims that it has a reasonable likelihood of prevailing on the merits in its court appeal of the Commission's decision. It cites the detailed and lengthy dissent of Commissioner Tristani as the best evidence that this is a close case on which reasonable decision-makers, including a reviewing court, might well disagree. The Commission, according to BFBFM, also ignored its own auction rules by failing to dismiss Liberty's short-form application for omission of the family media certification and by permitting Liberty to change its bidding status after the close of the auction. Citing Commission precedent[8] that a post-auction change in a bidder's status may in some circumstances impair the integrity of an auction, as well as the binding nature of auction terms generally, *see Erie Coke and Coal v. U.S.*, 266 U.S. 518 (1925), BFBFM believes there is a solid likelihood that the court will reverse the Commission.

9. Orion also focuses on the false certification issue involving the transmitter site specified in Liberty's August 1987 application. Orion maintains that the Commission's resolution of that issue, allegedly based on serious distortions of what it characterizes as the ALJ's credibility findings and of the record as a whole, cannot withstand judicial scrutiny because it is not supported by substantial evidence. Orion urges that there is no reason to reject the landowner's consistent, repeated declarations that she never gave Liberty any reason to think it could use her property for a tower site. The Commission, according to Orion, distorted the landowner's account of her brief discussion with Liberty's two witnesses, overlooked Liberty's efforts to get the landowner to sign an untrue statement regarding that discussion, and ignored the material

[8] BFBFM cites *Two Way Radio of Carolina, Inc.*, 12 FCC Rcd 958 (WTB 1997) *aff'd*, 14 FCC Rcd 12035 (1999), refusing to grant the post-auction change in bidding status, because a post-auction increase in a participant's bidding credit could have impacted the bidding strategies of competing bidders. What is at issue here, by contrast, is the loss of a bidding credit, a circumstance potentially affecting only Liberty's bidding strategy. On this basis, MO&O, FCC 01-129 ¶ 39 & n.51, the Commission distinguished precedent that post-auction changes in bidding credit may affect the integrity of the auction.

consistency of the landowner's written statements. Having allegedly demonstrated the faulty reasoning in the Commission's decision, as well as irreparable harm, Orion maintains that a stay is warranted.

10. The stay requests are opposed by the Enforcement Bureau, by Liberty and by Willsyr. Each contends that the compelling showing necessary for a stay has not been made. Neither the Bureau nor Liberty believes the Commission's decision is likely to be overturned by a reviewing court. They also dispute the movants' allegations of irreparable harm in the absence of a stay, as does Willsyr. Liberty claims that it will be unconscionably and seriously harmed if it is precluded from utilizing the authorization for which it has paid while the unsuccessful bidders pursue various court appeals. And, given today's regulatory environment in which radio stations frequently change hands, it asserts that avoiding further disruption in service is not a public interest reason to grant the stay. A stay, in Liberty's view, would disserve the public interest by having a chilling effect on future auctions and by delaying technically improved broadcast service to Biltmore Forest. Willsyr agrees that Orion, having no legal right to operate on a permanent basis, will not be irreparably harmed absent a stay and that a stay will harm Liberty as well as the public interest.

DISCUSSION

11. We will deny both stay requests. To warrant a stay of an administrative action, the parties must make a convincing showing that: (1) they are likely to prevail on the merits of their court appeal; (2) they will suffer irreparable harm if a stay is not granted; (3) a stay would not harm other interested parties; and (4) a stay would serve the public interest.[9] The stay requests are not supported by a convincing showing on any of the four prongs, and they must therefore be denied.

12. Neither BFBFM nor Orion has demonstrated sufficient likelihood of prevailing on the merits of their planned court appeals to warrant a stay. Insofar as BFBFM claims a reasonable likelihood of prevailing on the merits, it has misstated the pertinent standard. At the very least a substantial showing is required.[10] Moreover, the claims relating to the sufficiency of Liberty's short-form application, the significance of its post-auction loan agreement with Cumulus, and the impact of its inappropriately claimed new entrant bidding credit challenge the Commission's interpretation of its own rules. It is well established, however, that a reviewing court would "review the Commission's reading of its regulation[s] under highly deferential standards, and would

[9] *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 673-74 (D.C. Cir. 1985), *citing Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

[10] *WMATA*, 559 F.2d at 843 ("[W]e hold that under *Virginia Petroleum Jobbers* a court, when confronted with a case in which the other three factors strongly favor interim relief may exercise its discretion to grant a stay if the petitioner has made a substantial case on the merits"). As noted below, however, a strong showing has not been made on any of the other three factors.

reverse only a clear misinterpretation." [11] And, in any event, the Bureau is correct that the parties' allegations on these issues, as well as Liberty's contentions regarding the false site certification issue, repeat arguments thoroughly considered in the Commission's decision. In particular, the parties' citation of *Erie Coke and Coal v. U.S.* regarding the generally binding nature of auction terms, adds nothing substantive to the various arguments – addressed in great detail in the decision -- that the Commission departed from its announced auction procedures.

13. With respect to the false site certification issue, the Commission explained its determinations that the ALJ did not make any specific demeanor findings and that, even crediting only the landowner's deposition testimony and written statements, substantial record evidence does not establish that Liberty intentionally deceived the Commission in certifying it had a transmitter site. The parties have thus fallen far short of showing sufficient likelihood of persuading the court that the Commission's decision granting Liberty's application is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), to warrant the requested stay.

14. The parties' allegations of irreparable harm are also deficient. To justify a stay, the alleged harm must be great, imminent, and certain to occur *unless* the stay is granted.[12] BFBFM, however, does not explain how it would be at all harmed – let alone harmed irreparably – in the absence of a stay. If BFBFM prevails in court and in further proceedings before the Commission, the operator providing FM service to Biltmore Forest when BFBFM is ready to construct – whether it is Orion as the interim operator or Liberty as the permanent licensee based on its auction win – must vacate the channel. The identity of the vacating operator, however, will not affect BFBFM at all.

15. Orion, on the other hand, relies on an anticipated loss of its ongoing business as the interim operator on the FM channel. By its express terms, however, Orion's interim operating authority "expire[s] upon notification to the Commission that the successful applicant for permanent authority for that frequency is ready to commence operations."[13] Thus, in seeking to stay the permanent licensing proceeding, as we have indicated previously, "Orion is not entitled to claim irreparable harm, absent a stay,

[11] *Qwest Corporation v. FCC*, No. 00-1376 slip op. 9 (D.C. Cir. June 15, 2001).

[12] *Wisconsin Gas Co. v. FERC*, 756 F.2d at 674 (internal citations omitted) ("[T]he injury must be both certain and great; it must be actual and not theoretical . . . the party seeking injunctive relief must show that '[t]he injury complained of [is] of such *imminence* that there is a 'clear and present' need for equitable relief to prevent irreparable harm'") (emphasis in the original).

[13] *Orion Communications Ltd.*, 13 FCC Rcd 5642 ¶ 4 (1988). *See also Orion Communications Ltd v. FCC*, 131 F.3d 176, 181 (D.C. Cir. 1997), directing the Commission to reinstate Orion as the interim operator "pending such further proceedings as the Commission may conduct in order to choose either an interim or a final licensee."

because it faces the loss of its ongoing business as the interim operator for Biltmore Forest." [14] Furthermore, Orion, having been outbid by both Liberty and BFBFM, will be the ultimate permittee only if both Liberty and BFBFM are disqualified and if it successfully dispels all outstanding questions regarding its own qualifications. Yet, Orion has not addressed the likelihood of BFBFM being disqualified or otherwise explained why, given the attenuated nature of its ultimately receiving the permit, it will be irreparably harmed unless a stay is granted.

16. The third prong involves an assessment of the likely question of harm to other interested parties if a stay is granted. The movants predict that a stay will only minimally impact Liberty. But Liberty, having in the meantime paid the balance of its winning bid, claims that it will be significantly harmed if utilization of the authorization for which it has paid fully is further delayed. It is undisputed that Liberty stands to incur substantial interest charges, in addition to the those already incurred on its $300,000 down payment, if the effect of the decision is stayed so as to delay the initiation of revenue-producing FM broadcast service to Biltmore Forest. As such, the parties have not made the affirmative demonstration of no harm to other interested parties necessary to justify a stay.

17. Finally, we find that staying the post-auction grant of Liberty's application pending judicial review would disserve the public interest. At the outset, even assuming the court expedites judicial review, we do not share the parties' confidence that the duration of any stay is likely to be brief. The selection of the licensee for Biltmore Forest has already been delayed more than fourteen years and we previously pledged to expedite the resolution of the permanent licensing proceeding so as to avoid prejudice to the other applicants and to promote the public interest generally.[15] In these circumstances, strong public interest factors favor installing as soon as possible an ultimate permittee on the channel currently occupied by an interim operator.

18. We also deny Willsyr's unsubstantiated Motion To Recuse. Willsyr requests that each commissioner state whether he or she has received any direct or indirect communication from any member of congress, including Congressman Charles N. Taylor of North Carolina, or from any *ex parte* source, regarding the above-captioned adjudicatory proceeding, and, if so, decide whether he or she should recuse himself or herself from consideration of the stay requests. Willsyr relies on a letter, dated April 13, 2001, from Congressman Taylor to Chairman Powell allegedly demanding that the Commission favor the interests of Orion over that of Willsyr and that of the other competing applicants. It also cites the asserted efforts of a United States Senator to extract promises from previous commission nominees to favor Orion over the other

[14] *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Fixed Service Licensees,* FCC 99-157 ¶ 14 (Jul 2, 1999).

[15] *Orion Communications Ltd. v. FCC,* 131 F.3d at 181.

applicants in this adjudicatory licensing proceeding.[16] It also submits a declaration under penalty of perjury from its general partner alleging that Congressman Taylor and U.S. Senator Jesse Helms, by introducing legislation and pressuring commission nominees, have repeatedly sought to have the Biltmore Forest license awarded to Orion. Citing the recent confirmation of three new commissioners, Willsyr maintains that each commissioner should affirmatively state whether he or she has received similar communications and whether such communications have influenced or would influence his or her consideration of the stay requests.[17]

19. The test for recusal in an adjudicatory proceeding on the ground of bias or the appearance of bias is whether "a disinterested observer may conclude that [the decisionmaker] has in some measure adjudged the facts as well as the law of a case in advance of hearing it."[18] Willsyr, however, has made no such showing here. Attached to its Motion is a letter from the Office of General Counsel reflecting that Congressman Taylor's letter to Chairman Powell was handled in accordance with the Commission's *ex parte* rules and would not be considered by decision-making personnel.[19] Apart from that letter, moreover, Willsyr merely repeats allegations concerning events that allegedly transpired during confirmation hearings held in 1997, without establishing any nexus with commissioners confirmed after the Commission's April 12, 2001 grant of Liberty's application. Those allegations, moreover, were deemed insufficient to warrant the recusal from this adjudicatory proceeding of then-Commissioner Powell, Commissioner Tristani, or former Commissioner Furtchgott-Roth.[20] Nor does Willsyr explain how

[16] Wilsyr cites *Congressional Record*, Oct. 29, 1997, S1108-11310.

[17] Willsyr cites *Jenkins v. Sterlacci*, 849 F.2d 627 (D.C. Cir. 1988), for the proposition that the decision-maker must in the first instance decide whether to recuse himself if his impartiality is reasonably questioned. No such obligation arises, however, where there has been no contact, or even the suggestion of any contact, that might conceivably lead a disinterested observer to question the decision-maker's impartiality.

[18] *Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1164-65 (D.C. Cir. 1998), *citing Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970).

[19] As required by the *ex parte* rules, 47 C.F.R. §§ 1.1200 –12, copies of Congressman Taylor's letter were served on all parties to this proceeding and were placed in a public file associated with, but not made part of, the record. The congressman was advised that, unless resubmitted in accordance with the *ex parte* rules, the letter would not be considered by Commission decision-making personnel. Letter, dated May 11, 2001, from John I. Riffer, Assistant General Counsel, Administrative Law Division, Federal Communications Commission, to the Honorable Charles H. Taylor, U.S. House of Representatives.

[20] *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses,* 13 FCC Rcd 15920, 16007 (1998) (Based on the applicable law of recusal, the three

previously introduced legislation purportedly awarding the permit to Orion could possibly influence current consideration of the stay requests or of any other matter affecting this proceeding. That Congress again had occasion to consider the nomination of FCC commissioners and of a new chairman is not evidence of impermissible influence being placed on any agency decision-maker.[21] Hence, there is no basis to infer that there has been any contact – let alone any impermissible *ex parte* contact -- with any present commissioner concerning any aspect of this proceeding and thus there is no reason to require any of the commissioners to state on the record whether he or she has any such impermissible contact. Having failed to show even the appearance of bias, the request for recusal based on undue congressional influence must be denied.

ORDERING CLAUSES

20. ACCORDINGLY, IT IS ORDERED, That the Motion To Stay Effect Of Order Pending Judicial Review, filed June 13, 2001 by Biltmore Forest Broadcasting FM,

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commissioners decline to recuse themselves from the adjudicatory proceeding involving Biltmore Forest). To avoid the appearance of any bias, however, then-Chairman Kennard recused himself from participating in this adjudicatory proceeding "as soon as it became clear that the proceeding might become an issue in [his] confirmation," but he declined Willsyr's request that these circumstances also warranted his recusal from all aspects of the related rulemaking proceeding. *Statement of Chairman William E. Kennard Regarding Request For Recusal*, 13 FCC Rcd 16052, 16052-54 (affirmatively stating that he had given no assurance regarding the outcome of the adjudicatory proceeding involving Biltmore Forest or the adoption of rules governing its resolution).

[21] *Compare American Public Gas Association v. FPC*, 567 F.2d 1016, 1070 (D.C. Cir. 1977) (finding intervention by congressional committee concerning ongoing investigation raised only mere possibility of undue influence where it was undisputed that committee members had questioned commissioners about the proceeding and had even criticized earlier decision).

Inc. and the Motion For Stay Pendente Lite filed June 13, 2001 by Orion Communications Ltd. ARE DENIED.

21. IT IS FURTHER ORDERED, That the Motion To Recuse, filed July 9, 2001 by Willsyr Communications, Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

DISSENTING STATEMENT OF COMMISSIONER KEVIN J. MARTIN
Request for Stay of Order in *Liberty Productions, A Limited Partnership*, FCC 01-129

I respectfully dissent from the denial of a stay of *Liberty Productions*, FCC 01-129. In this instance, I believe a stay is justified given the petitioner's substantial likelihood of success upon the merits, as well as a balancing of the relevant harms. I am concerned that the Commission has failed to give enough deference to the findings of the Administrative Law Judge who took the testimony in this case. I also believe the Commission has given insufficient attention to the potential inequity to the current broadcaster, Orion Communications, Ltd., if it fails to issue a stay in this 11-year proceeding.

I. PROCEDURAL HISTORY

On May 4, 1990, an Administrative Law Judge granted, under comparative criteria, the application of Orion, an entity controlled by Zebulon Lee, for a new FM station at Biltmore Forest, North Carolina. In that decision, the ALJ disqualified Liberty Productions, a mutually exclusive applicant, finding that Liberty principals had intentionally misrepresented the availability of the tower site. The ALJ concluded that

> [t]he record clearly justifies the conclusion that when Valerie Klemmer (a Liberty principal) represented to the Commission that Liberty had available the transmitter site specified in their application, she had absolutely no basis for doing so. Moreover, she knew she had no basis for doing so.

National Communications Industries, 5 FCC Rcd 2862, 2879 (1990). The ALJ conditioned grant of the application on divestiture of the Lee Family's only other broadcast radio interest, which was located in the same market as the Biltmore Forest FM station. *Id.* at 2881. The Review Board upheld the ALJ's decision following a *de novo* review of the record evidence. *National Communications Industries*, 6 FCC Rcd 1978 (Rev. Bd. 1991). The Commission, too, upheld the ALJ's determination that Liberty was not basically qualified. *National Communications Industries*, 7 FCC Rcd 1703 (1992). Thus, three separate reviews concluded that Liberty was not qualified to own a license. The Lee family then divested its other radio station, as required by the ALJ's Order, and commenced operation of the Biltmore Forest Station.

Liberty (among other losing applicants) appealed the Commission decision to the U. S. Court of Appeals for the District of Columbia Circuit. While this appeal was pending, the D.C. Circuit decided in an unrelated case that the Commission's application of the integration criterion to comparative hearings was arbitrary and capricious. *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993).[1] The D.C. Circuit, however, did not overturn the Commission's character policy, which has long held that an applicant who intentionally

[1] The integration criterion gave credit to those applicants who promised to integrate ownership with the management of a broadcast station.

misrepresents facts on an application lacks the character qualifications to be a Commission licensee. Nor did the court reach any other issue relevant to this case. *See, e.g., Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986). In light of *Bechtel*, the D.C. Circuit remanded all comparative proceedings before the D.C. Circuit—including the underlying case at issue here—to the Commission for further consideration, and ordered that all other pending comparative hearings before the Commission be resolved consistent with the D.C. Circuit's holding. On February 25, 1994, the Commission announced that it would "hold[] in abeyance the processing of applications and the adjudication of hearing proceedings" while it determined how to implement the D.C. Circuit's order. *Public Notice*, *FCC Freezes Comparative Proceedings*, 9 FCC Rcd 1055 (released February 25, 1994).

During this period, Orion, which had begun the process of building out the station at Biltmore Forest, was eventually awarded interim operating authority, as well. *Orion Communications Ltd. v. FCC*, 131 F.3d 176, 181 (D.C. Cir. 1997).

Approximately a year following the award of interim operating status, the Commission adopted a new method for awarding licenses to resolve all the pending comparative cases: a competitive bidding procedure. *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses*, 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, *mem.*, 221 F.3d 196 (D.C. Cir. 2000). In determining how to resolve the pending Biltmore Forest case at issue here, the Commission decided to auction the construction permit first and then, if necessary, resolve any qualifications issues involving the winning bidder. *Liberty Productions*, FCC 99I-11 (Released May 12, 1999). This was the only case in which the Commission permitted a party who had been found lacking in basic character qualifications nevertheless to participate in the auction.

The auction closed in October of 1999 with Liberty as the highest bidder. The Commission then addressed Liberty's qualifications, revisiting the decision of the ALJ that Liberty had made intentional misrepresentations to the Commission. Now, more than ten years after the ALJ assessed the evidence and credibility of the witnesses first-hand and concluded that Liberty had engaged in intentional deceit and did not have a site available—and several years after both the Review Board and the Commission affirmed that ALJ's decision—the Commission concluded that the ALJ's finding was not supported by substantial evidence. *Liberty Productions*, FCC 01-129, ¶55 (Released May 25, 2001). This new conclusion conflicted with the finding of the ALJ years before, and with the specific testimony the Review Board had previously credited. It, however, paved the way for the Commission to grant Liberty's application.

II. STANDARD

As noted by the majority, determination of whether a stay is appropriate must be based on a balancing of four factors: (1) the likelihood that the parties seeking a stay will prevail on the merits of their appeal; (2) the likelihood that the moving party will be irreparably

harmed absent a stay; (3) the prospect that others would be harmed if a stay is granted; and (4) the public interest in granting a stay. *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 673-674 (D.C. Cir. 1985), *citing Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). "The traditional stay factors contemplate individualized judgements in each case," and "the formula cannot be reduced to a rigid set of rules." *Standard Havens Products v. Genco Industries*, 897 F.2d 511, 512 (Fed. Cir. 1990), *citing*, *Hilton v. Braunskill*, 481 U.S. 770, 777 (1987) "In considering whether to grant a stay pending appeal, [a] court assesses [the] movant's chances for success on appeal and weighs the equities as they affect the parties and the public." *Standard Havens Products v. Genco Industries*, 897 F.2d at 513, *citing*, *E.I. Dupont De Nemours and Company v. Phillips Petroleum Company*, 835 F.2d 277, 278 (1987).

III. ORION HAS A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

In evaluating the likelihood of success on appeal, the petitioner need "not establish an absolute certainty of success." *Iowa Utilities Board et al v. Federal Communications Commission*, 109 F.3d 418, 423 (8th Cir. 1996), *citing*, *Population Institute v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986). Rather, as the plain language of the test indicates, a petitioner need only demonstrate that success is "likely" on the merits. As discussed below, I believe that a substantial likelihood of success exists.

First, the Commission took the highly unusual step of reviewing the record evidence relating to an issue that was not part of the D.C. Circuit's remand decision. As explained *supra*, the D.C. Circuit remanded this case as one of many before the court that involved comparative hearings, with instructions to the Commission to review its decisions in light of the court's finding that an aspect of the FCC's comparative hearing process was arbitrary and capricious. The Commission in this case, however, reconsidered not just the aspects relating to the comparative hearing process, but also the findings relating to character. This step was odd for several reasons. First, the D.C. Circuit had not addressed the Commission's longstanding character policy, and thus it was not at issue. Second, the ALJ's finding with respect to character was an important factor in the ALJ's decision that Liberty was not qualified to own a license, and the evidence relating to Liberty's misrepresentation was the basis for the determination that no site was available. That decision, and the reliance upon testimony that explicitly contradicted Liberty's sworn testimony, had been affirmed by both the Review Board and the Commission. Third, the Commission's revisiting of the character issue required assessing the credibility of witnesses in testimony collected by the ALJ, in person, over ten years ago. Fourth, this was the only case in which the Commission permitted a party who had been found lacking in basic character qualifications to participate in the auction.

Yet, the Commission's action was not merely unusual, it also was unsupported by precedent. No specific authority justifies the Commission's new review of an ALJ's findings when those findings formed the basis of a decision that ultimately was affirmed by both the Review Board and the Commission. There can be no question that the ALJ's finding that there was no site availability—the issue upheld by the Review Board and the

Commission—was based on the ALJ's determination that Liberty lied when it said it had a site available.

The Commission alleges that a new review of the ALJ's findings was warranted because the Review Board and the previous Commission had failed to make specific findings with respect to the ALJ's conclusion that Liberty had misrepresented site availability. *Liberty Productions*, FCC 01-129, ¶¶ 50-51. Yet, the Review Board and Commission did find that there was no site available, which necessarily discredited Liberty's sworn testimony. Indeed, the Review Board made a specific factual finding crediting the very testimony upon which the ALJ based his finding of misrepresentation:

> The ALJ found that Liberty never had reasonable assurance that the site which it specified in the 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 statement and deposition testimony of the site owner. Her testimony was in turn corroborated by the fact that other applicants who [] sought permission to use the land were required to enter into a written lease…*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.*

National Communications Industries, 6 FCC Rcd at 1979 (Review Board 1991)(emphasis added). *See, also, National Communications Industries*, 7 FCC Rcd at 1704 (Commission affirming the ALJ's conclusion that Liberty was not basically qualified to be a Commission licensee). Thus, both the Review Board and the Commission made findings that credited the testimony of the witnesses upon which the ALJ's finding of misrepresentation was based—findings that could not have been made without discredited Liberty's testimony. The Review Board, moreover, specifically discrediting Liberty's testimony by finding "no reason in the record" to reject the site owner's testimony.

The Commission should have deferred to these findings. Instead, it appears that the Commission reweighed the record evidence. This is particularly troubling since the initial trier of fact had taken the testimony and released a decision approximately ten years earlier. The Commission routinely defers to the ALJ's factual findings on matters of credibility. As Commissioner Tristani noted in her dissent to the underlying decision,

> *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 credibility and motive by the person or body that hears the testimony.

Dissenting Statement of Gloria Tristani, Liberty Productions, FCC 01-129.

The Commission, in arguing that the ALJ's findings were entitled to no deference in this instance, claimed that the ALJ failed to make specific credibility findings. *Liberty Productions*, FCC 01-129, ¶20. This assertion is incorrect. The ALJ found that Liberty's arguments "strained credulity." *National Communications Industries*, 5 FCC Rcd at 2879. Moreover, the ALJ found that she "blatantly dissembled in a manner" not befitting a Commission licensee. One can easily infer from such findings that the ALJ did assess the credibility of the Liberty witness before him. Moreover, there is no general requirement that the ALJ make a more specific credibility finding. Without such a requirement, the Commission's decision to reverse a prior Commission affirmance of the ALJ's conclusions seems problematic.

The Commission's analysis of the record evidence also raises additional questions. For instance, the Commission stated that substantial evidence did not support a finding of deceit on the part of Liberty. However, the Commission has long held that "the 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." *Leflore Broadcasting Co. v. FCC*, 636 F.2d 454, 462 (1980). The Commission admits that there existed a "direct conflict" between the testimony of the site owner and Liberty principals supporting the conclusion that Liberty had intentionally misrepresented the availability of a site. *Liberty Productions*, FCC 01-129, ¶66. The ALJ had before him the deposition testimony of the site's owner who testified both that she never intended to lease the site to Liberty, and that any applicant interested in the site would have had to sign a written lease. He also had heard, in person, the testimony of the very Liberty principals he found not to have been credible. Moreover, the site owners' testimonial evidence was supported by what the Commission again termed "admittedly troublesome" documentary evidence. *Id.*, ¶71. The Commission stated that "[i]t is somewhat problematic that [the site owner], having just signed a lease providing for up-front payments before the license was awarded, would have been willing to consider leasing [to the Liberty principal] a portion of her property for the same purpose without requesting a similar monetary commitment." *Id.* In light of the evidence available to the ALJ and the conclusions drawn therefrom, and the Commission's recognition of these factors, it is uncertain what additional quantum of evidence would have been necessary to prove intentional deceit in this or any case.

Finally, when reviewing the ALJ's finding of intentional misrepresentation with respect to site certification, the Commission refused to consider whether Liberty exhibited a *pattern* of misrepresentation. Misrepresentation issues also were raised with regard to three other issues: Liberty's failure to attach a family media interest certification to its original short-form application; its erroneous claim of a new entrant bidding credit; and its failure to disclose various ownership relationships. While *intentional* misrepresentation may not have been found with respect to each of these factually

inaccurate statements, the Commission should have assessed whether these inaccurate statements—in conjunction with the findings of the ALJ regarding *intent* to deceive on the site certification issue—raised a substantial question as to whether a pattern of misrepresentation existed.

IV. ORION WILL BE IRREPARABLY HARMED IF A STAY IS NOT GRANTED IN THIS CASE

"The basis for injunctive relief…has always been irreparable harm and inadequacy of legal remedies." *Sampson v. Murray,* 415 U.S. 61, 88 (1974). Courts have consistently found that denial of a stay will result in irreparable harm if it leads to the loss of an ongoing business. *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Wisconsin Gas Company v. Federal Energy Regulatory Commission*, 758 F.2d 669, 673 (D.C. Cir.1985). In this instance, failure to grant a stay will result in the complete loss of the Lee family's broadcast business. Zebulon Lee had run station WSKY-AM in Asheville, North Carolina for 46 ears, during which time he had become a well-recognized member of the broadcast establishment of western North Carolina. Relatives of Zebulon Lee played integral roles in the operation of WSKY-AM, and these same family members have also assisted in running the Biltmore Forest station. This case is especially troublesome since the Lees divested station WSKY-AM only as a result of a condition placed on the grant of the Biltmore Forest application. Under these circumstances, denying the stay will result in irreparable harm to the Lees by denying them the opportunity to continue operating their only remaining station as an ongoing business.

V. LIBERTY'S ECONOMIC LOSS DOES NOT JUSTIFY DENYING A STAY

As noted by the majority, Liberty stands to incur substantial interest charges should the stay be granted. These charges, Liberty claims, will remain unpaid until it receives advertising revenue. Courts, however, have long held that economic loss, in and of itself, does not constitute irreparable harm unless it threatens the very existence of an ongoing business. *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d at 843; *Wisconsin Gas Company v. Federal Energy Regulatory Commission*, 758 F.2d at 673. There is no indication that incurring these interest charges would threaten the very existence of Liberty, or that the loss could not be recoverable in the future. *Iowa Utilities Board et al v. Federal Communications Commission*, 109 F.3d at 425 (Revenues and customers lost to competition which can be regained through competition are recoverable). Indeed, given the financial backing of Cumulus Broadcasting, Inc., it is unlikely that any loss due to lack of advertising revenues during the stay period will threaten the existence of Liberty's ongoing business. However, grant of the stay will result in the complete loss of the Lee family's broadcast business. In light of these unique facts, it seems reasonable to stay the expiration of interim operating status until the Commission determination is final.

VI. THE PUBLIC INTEREST FAVORS GRANTING A STAY IN THIS INSTANCE

The public interest will be served by granting a stay in this limited instance. Those that "played by the rules" when comparative hearings were the order of the day should not be unduly harmed simply because the Commission decided to resolve such cases under a system of competitive bidding. In particular, Orion acted in reliance upon specific Commission dictates.

I do not believe that expediting the selection of a licensee for Biltmore Forest provides a sufficient public interest justification for denying a stay. Rather, by ensuring that Orion is not unduly harmed, the Commission will better preserve the integrity of the competitive bidding system.

VII. CONCLUSION

I find it problematic that the Commission revisited an ALJ's finding to disqualify an applicant on character issues when a previous Commission had already affirmed the ALJ's basic decision that no site was available. It also is troubling that the Commission performed a new review of the ALJ's character findings when the case was remanded to the Commission on issues not involving our character policy. Because of these irregularities, as well as the manner in which the Commission reviewed the ALJ's findings, I believe there exists a substantial likelihood that Orion will succeed on the merits of this case. I further believe that the Lee family will suffer irreparable harm if a stay is not granted, particularly because the Lees divested their only other station in order to own and operate the station at issue here. Moreover, the grant of a stay will cause Liberty only a temporary economic loss. Consequently, a balancing of the equities clearly favors Orion over Liberty, and I believe granting the stay would be appropriate.