

BRIEF FOR FEDERAL COMMUNICATIONS COMMISSION

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UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

—————  
No. 01-1392  
—————

BILTMORE FOREST BROADCASTING FM, INC.,

APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION,

APPELLEE

—————  
APPEAL FROM AN ORDER OF THE  
FEDERAL COMMUNICATIONS COMMISSION  
—————

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## **GLOSSARY**

(Glossary goes here)

UNITED STATES COURT OF APPEALS FOR THE  
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No. 01-1392

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BILTMORE FOREST BROADCASTING FM, INC.,

Appellant

v.

FEDERAL COMMUNICATIONS  
COMMISSION,

Appellee

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APPEAL FROM AN ORDER OF THE  
FEDERAL COMMUNICATIONS COMMISSION

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BRIEF FOR FEDERAL COMMUNICATIONS COMMISSION

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**STATEMENT OF ISSUES PRESENTED**

1. Whether the Commission properly interpreted its announced auction procedures for pending broadcast applications in finding that missing information from the bidding application could be supplied after the auction, that the auction winner's loan agreement with a large media owner did not affect its status as a qualified bidder under 47 U.S.C. § 309(I), and that the post-auction removal of a bidding credit did not require setting aside its auction win.

2. Whether substantial evidence supports the Commission's reversal of the ALJ's previously unreviewed determination that the applicant misrepresented facts relating to the availability of its original transmitter site.

## JURISDICTION

This Court has jurisdiction pursuant to 47 U.S.C. § 402(b).

## STATUTES AND REGULATIONS

Pertinent statutes and regulations are set out in the Statutory Appendix to this brief.

## COUNTERSTATEMENT

### **I. Background**

Appellant Biltmore Forest Broadcasting FM, Inc. (Biltmore Forest) and intervenor Orion Communications Limited (Orion) challenge the grant, after the Commission's first broadcast auction, of the application filed by Liberty Productions (Liberty) to construct a new FM broadcast station in Biltmore Forest, North Carolina and its denial of the mutually exclusive applications filed by Biltmore Forest, Orion, and two other applicants eligible to participate in the auction who neither filed timely notices of appeal nor intervened in this appeal. Liberty Productions, 16 FCC Rcd 12061 (2001) (Commission Decision) (JA 51); National Communications Industries, 6 FCC Rcd 1978 (Rev. Bd. 1991) (Review Board Decision) (JA 28), review denied, 7 FCC Rcd 1703 (1992) (JA 33), recon. denied sub nom. Liberty Productions, 7 FCC Rcd 7581 (1992) (JA 36); further recon. dismissed, 8 FCC Rcd 4264 (1993) (JA 43); National Communications Industries, 5 FCC Rcd 2862 (ALJ 1990) (Initial Decision) (JA 7).

When Biltmore Forest, Orion and Liberty filed their applications, the Commission's practice was to hold a comparative hearing to resolve any issue as to an applicant's basic qualifications to be awarded a broadcast license and to determine which of the fully qualified applicants would best serve the public interest. After an evidentiary hearing before the ALJ, the Commission and the Review Board affirmed the Initial Decision insofar as the ALJ disqualified Biltmore Forest and Liberty on transmitter site availability issues and selected Orion as the

comparative winner. Biltmore Forest and Liberty, among others, filed timely notices of appeal with this Court. None of the issues raised on appeal were considered by this Court, and the proceeding was remanded to the Commission for consideration in light of Bechtel v. FCC, 10 F.3d 875 (D.C. Cir.1993). Biltmore Forest Broadcasting FM, Inc. v. FCC, Case No. 92-1645 (D.C. Cir. Mar. 15, 1994). This Court in Bechtel invalidated the principal criterion on which the Commission had relied in selecting Orion as the comparative winner in this case.

The Commission ultimately adopted competitive bidding procedures to resolve pending cases, as is authorized by 47 U.S.C. § 309(l).<sup>1</sup> The staff identified Liberty, Biltmore Forest, Orion and two other applicants, as pre-July 1, 1997 applicants and thus under section 309(l)(2) the only eligible bidders for the construction permit for Biltmore Forest. The staff indicated that, if Liberty were to win the auction, the hearing proceeding would resume to consider the ALJ's adverse findings against Liberty on the false transmitter site certification issue, given that "neither the former Review Board nor the Commission, having disqualified Liberty on a site availability issue, considered the merits of the false certification issue."<sup>2</sup>

Liberty won the auction followed by Biltmore Forest, Orion and a fourth bidder. After the auction, the Commission unanimously found that an omission from Liberty's short-form auction application did not require dismissal of its pre-July 1<sup>st</sup> long-form application; that Liberty

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<sup>1</sup> Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, 13 FCC Rcd 15920 (1998) (Competitive Bidding R&O), recon. denied, 14 FCC Rcd 8724 (1999) (Competitive Bidding MO&O), aff'd sub nom. Orion Communications Ltd. v. FCC, 213 F.3d 761, 221 F.3d 196 (D.C. Cir. 2000) .

<sup>2</sup> Liberty Productions, Inc., 14 FCC Rcd 7637, 7640 ¶5 (OGC 1999) (JA 47). The Commission indicated that post-auction consideration of basic qualifications would also be necessary if either Biltmore Forest or Orion won the auction. Id. at ¶6 (JA 48).

was a qualified bidder despite its loan agreement with Cumulus Broadcasting; and that the post-auction removal of Liberty's 35 percent bidding credit did not require setting aside its auction win. 16 FCC Rcd at 12068-83 ¶¶14-48 (JA 58-72). A majority of the Commission, with one commissioner dissenting, also reversed the ALJ's disqualification of Liberty on the false certification issue. *Id.* at 12083-94 ¶¶49-72 (JA 73-83). Liberty paid the gross amount of its final bid. The staff granted the construction permit and dismissed the unsuccessful bidders' applications. Public Notice (Aug. 7, 2001).

The Commission (16 FCC Rcd 18966 (2001) (JA 93))<sup>3</sup> and this Court (Order, Case No. 01-1397 (Feb. 27, 2002)) denied motions to stay the Commission's decision pending judicial review.

## **II. Auction Issues**

Section 309(l)(2) provides that if the Commission uses an auction to resolve competing broadcast applications filed before July 1, 1997, it must limit the qualified bidders to the pre-July 1<sup>st</sup> applicants. Five applicants for Biltmore Forest were eligible to be qualified bidders because their applications, filed before July 1, 1997, had not been finally denied or dismissed. Each was required to file a "short-form" application (FCC Form 175) by August 20, 1999 in order to participate in the auction. The requirements for the short-form application were set forth in the July 9<sup>th</sup> Public Notice.<sup>4</sup> Each of the bidders claimed eligibility for a 35 percent bidding credit as a New Entrant with no other media interests.

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<sup>3</sup> Commissioner Martin, who had not been a member of the Commission when the agency granted Liberty's application, dissented from the denial of the stay motions. 16 FCC Rcd 18975 (JA 93).

<sup>4</sup> 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 (Jul. 9, 1999) (JA 109).

In contrast to most auctions, where only the winning bidder files a “long-form” application, each qualified bidder for Biltmore Forest filed a long-form application with the Commission before July 1, 1997. Hereafter we will refer to Liberty’s pending “long-form” application as its pre-July 1<sup>st</sup> application.

**A. Liberty’s Incomplete Short-form Application**

Section 73.5002, 47 C.F.R. § 73.5002, specifies that, in broadcast service auctions, bidders must file short-form applications containing “all required certifications, information and exhibits, pursuant to the provisions of 47 C.F.R. § 1.2105(a) and any Commission public notices,” and are subject to the provisions of section 1.2105(b) regarding the modification and dismissal of their short-form applications. The July 9<sup>th</sup> Public Notice stated that “[a]ll applicants . . . must certify under penalty of perjury that the bidder complies with the Commission’s policies relating to media interests of immediate family members.” 14 FCC Rcd at 10699 (Att. B) (JA 159).

Liberty’s short-form application did not include a certification that it complied with the Commission’s policies relating to the media holdings of family members, as directed by the staff’s July 9th Public Notice. This omission, the Commission concluded, was not a basis to summarily dismiss Liberty’s application, or to set aside the results of the auction. 16 FCC Rcd at 12068 ¶15 (JA 58). It found that the rules governing the filing and dismissal of short-form applications in broadcast auctions did not expressly provide that the omission of a certification

required by a public notice, 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 correct.<sup>5</sup> Id.

In this regard, section 73.5002(c) specifies that section 1.2105(b) governs the dismissal of short-form applications. That rule, however, requires the dismissal with prejudice, without the opportunity to correct after the short-form filing deadline, only of any application “that does not contain all of the certifications pursuant to this section.” Because the family media certification is not one of the certifications required by section 1.2105(a), the Commission concluded that neither rule expressly provided for the dismissal of Liberty’s short-form application. 16 FCC Rcd at 12068 ¶15 (JA 58).

The July 9<sup>th</sup> Public Notice, the Commission concluded, is also not explicit that the omission of this particular certification, or any other certification not required by section 1.2105(a), will render the short-form application defective and subject to dismissal pursuant to 1.2105(b). The Public Notice indicated that “failure to submit the required information by the resubmission date will result in the dismissal of the application and inability to participate in the auction.” But this general warning as to the importance of filing complete applications, the Commission noted, did not state that the omission of any of the required information will make it unacceptable for filing, such that the missing information could not be supplied after the August 20<sup>th</sup> deadline. 16 FCC Rcd at 12069 ¶16 (JA 59). It therefore provided insufficient notice of the consequences of

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<sup>5</sup> Section 1.2105(a) certifications include certification that the applicant is legally, financially, technically and otherwise qualified under section 308(b) of the Act, that it complies with the foreign ownership provisions of section 310, and that it complies with and will continue to comply with any service-specific requirements applicable to the licenses on which the applicant intends to bid. An exhibit identifying all parties with which the applicant has entered, or will have entered, into a partnership, an agreement or other arrangement relating to the licenses to be auctioned is also required. §1.2105(a)(viii).

not submitting this particular certification to warrant the drastic sanction of dismissing Liberty's application. Id. at 12070 ¶18 (JA 60).

Further militating against dismissing Liberty's application, in the Commission view, was the fact the staff had not advised Liberty of the omitted certification or provided it an opportunity to correct its short-form application. An applicant that failed to submit missing information after the resubmission date could be dismissed, the Commission noted, but only after being advised of the deficiency by a Public Notice. 16 FCC Rcd at 12069 ¶16 & n.23 (JA 59), citing, Competitive Bidding R&O, 13 FCC Rcd at 15976-77 ¶146. Given that Liberty's general partner has now certified compliance with the Commission's policies regarding media interests of family members, and the accuracy of that certification had not been challenged, the Commission saw no reason to dismiss Liberty's application. 16 FCC Rcd at 12070 ¶17 (JA 60).

Finally, the Commission considered Biltmore Forest's claim that it stopped bidding against Liberty after Orion dropped out, because it believed that the omitted certification would disqualify Liberty from further consideration. It found that fairness did not warrant setting aside the auction results or conducting a second auction, because of Biltmore Forest's mistaken misinterpretation of sections 1.2105 and 73.5002 to now require the dismissal of Liberty's short-form application. 16 FCC Rcd at 12070-71 ¶19 (JA 60-61). It noted that Biltmore Forest's mistake was based on an overbroad reading of July 9<sup>th</sup> Public Notice, rather than any conflict in the rules. Id. (JA 61). It found further that nothing in the Commission's rules, its orders adopting the rules or any public notice issued by the staff in connection with the Biltmore Forest auction affirmatively supported that interpretation. Id. (JA 60). In these circumstances, the Commission determined that Biltmore Forest's mistake had not impaired the integrity of the auction. Id. at 12070-71 ¶19 (JA 61).

**B. Liberty's Eligibility As A Qualified Bidder Under Section 309(1)(2)**

After the short-form deadline but before the auction, Liberty amended its short-form application to report the execution on September 10<sup>th</sup> of a loan agreement with Cumulus Broadcasting. The Commission rejected the claim that Liberty's obtaining financing from another broadcaster undermined the closed nature of the auction that, pursuant to section 309(1)(2), was restricted to applications filed before July 1, 1997. 16 FCC Rcd at 12073-74 ¶¶24-27 (JA 63-64).

The Commission noted its earlier determination, in adopting procedures for the pending pre-July 1<sup>st</sup> applications, that its uniform ownership disclosure rules, applicable to bidders in any Commission auction, were sufficient to effectuate congressional intent behind section 309(1)(2). 16 FCC Rcd at 12073 ¶24 (JA 63), citing, Competitive Bidding R&O, 13 FCC Rcd at 15942 ¶57. There, the Commission had advised that "consistent with Part 1 rules providing that a short-form application is considered newly filed if it is amended by a major amendment (see 47 C.F.R. § 1.2105(b)(2)), a change in the control of an application otherwise subject to section 309(1) would render the existing applicant ineligible to participate in an auction that is statutorily limited to pre-July 1<sup>st</sup> [1997] applicants." 13 FCC Rcd at 15942 at ¶57.

Applying that general policy to the facts of this case, the Commission determined that the Loan Agreement between Liberty and Cumulus would undermine the closed nature of the auction only if it effected a change in the control of the applicant. 16 FCC Rcd at 12073-74 ¶¶24-26 (JA 63). But it found nothing to indicate that the lender ever had, or would have in the future, any ownership interest in Liberty, let alone the controlling interest that would constitute a transfer of control. Id. at 12073-74 ¶26 (JA 63). Liberty voluntarily reported the Loan Agreement before the auction. It later certified, as required by the Part 1 rules, that the lender does not have

an option to acquire the license, or any right to broker time on or manage the stations. Id. No question was raised, the Commission noted, about the reliability of that certification. Id. (JA 64).

**C. Liberty’s Eligibility For A “New Entrant” Bidding Credit**

The only bidding credit available to participants in broadcast service auctions is the new entrant bidding credit for applicants with no, or very few, other media interests. It was adopted instead of the bidding credit for small businesses utilized in other auctions, in which eligibility depends on an entity’s gross revenues.<sup>6</sup> Competitive Bidding R&O, 13 FCC Rcd at 15994-95 ¶189.

Eligibility for this designated entity provision does not depend on the winning bidder’s size, but on whether “it, and/or any individual or entity with an attributable interest in the winning bidder, have [any] attributable interest in any other media of mass communications.” 47 C.F.R. § 73.5007(a). Attributable interests are defined in terms of the broadcast multiple ownership rules (47 C.F.R. § 73.3555 and Note 2), and the media interests of very substantial investors in or creditors of, a bidder claiming the credit are also considered. 47 C.F.R. § 73.5008(c). Cognizable non-ownership interests are defined, pursuant to 73.5008(c), as equity and/or debt interest(s) that exceed thirty-three percent of the winning bidder’s total asset value (that is, all debt plus all equity).

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<sup>6</sup> See 47 C.F.R. § 1.2110(b)(1), providing that “the gross revenues of the applicant ... shall be attributed to the applicant and considered on a cumulative basis and aggregated for determining whether the applicant (or licensee) is eligible for status as a small business under this provision.” Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures (Eighth Report and Order), 17 FCC Rcd 2962, 2963 ¶2 (2002).

The Commission found that Cumulus's numerous media interests were attributable to Liberty by virtue of the loan agreement because the proceeds of the loan exceed thirty-three percent of Liberty's total assessed value. 16 FCC Rcd at 12077-78 ¶¶ 34-37 (JA 67-68). In finding Liberty ineligible for the bidding credit, the Commission rejected Liberty's "erroneous [but] not . . . specious or frivolous" assertion that the loan agreement, because it was executed after the short-form filing deadline, did not affect Liberty's eligibility for the bidding credit. *Id.* at ¶¶40-43 (JA 69-70).

Loss of the claimed bidding credit, the Commission explained, did not change the core circumstances under which the auction had been conducted. This was different, it reasoned, from a post-auction increase in a bidding credit, which is not allowed because bidding credits confer significant financial advantages such that a post-auction increase alters circumstances that may have influenced the other participants' bidding strategies. 16 FCC Rcd at 12079 ¶39 (JA 69). But the Commission could not envision how Liberty's mistake as to its bidding status would have deprived the other bidders of information as to Liberty's valuation of the frequency, or would have affected the bidding strategies of the other bidders for the Biltmore Forest permit. *Id.* (JA 69).

The Commission also rejected the claim that the change in Liberty's bidding status constituted an impermissible major amendment of the short-form application, under section 1.2105(b). 16 FCC Rcd at 12079 ¶39 (JA 69). It noted that the definition of major amendment, which includes "changes in ownership of the applicant that would constitute an assignment or transfer of control, . . . and changes in an applicant's size which would affect eligibility for designated entity provisions," was not revised to reflect adoption of the new entrant or of the related debt/equity standards. *Id.* at 12073 ¶25 (JA 63). Thus, it found that, absent evidence that

Cumulus would have a controlling ownership interest in Liberty, the loan agreement did not constitute a major amendment within the meaning of section 1.2105(b). Id. No substantial question was raised as to the reliability of Liberty’s certification that the lender does not have, and will not have any ownership interest in the station. Id. at 12074 ¶26 (JA 64).

### **III. Misrepresentation Issue**

When Liberty filed its application it was required to specify a transmitter site and certify it had “reasonable assurance” of the site’s availability. Liberty specified a site on property owned by Vicky Utter and certified reasonable assurance. At the request of Orion, who also specified a site on Utter’s land, the ALJ added issues to determine, first, whether Liberty had reasonable assurance that its proposed transmitter site will be available and, second, whether Liberty had made misrepresentations to the Commission.<sup>7</sup>

Reasonable assurance does not relate to the applicant’s candor with the Commission or its “subjective belief” that the specified site will be available, Genessee Communications, 3 FCC Rcd 3595 (Rev. Bd. 1988), but whether there is objective evidence of a “meeting of minds resulting in some firm understanding as to the site’s availability,” Coast TV, 11 FCC Rcd 4074 par. 11 (1995), aff’d sub nom. Mission Broadcasting v. FCC, 113 F.3d 254 (D.C. Cir. 1997). An applicant will be disqualified for misrepresentation “only upon substantial evidence of an intent to deceive.” David Ortiz Radio Corporation v. FCC, 941 F.2d 1253, 1258 (D.C. Cir. 1991),

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<sup>7</sup> National Communications Industries, FCC 89M-1025 (rel. Mar. 30, 1989) (JA 1). Now that construction permits are awarded by auction, with the winner required to pay for the license and subject to additional penalties if it defaults for any reason (including the lack of a suitable transmitter site), the Commission has repealed the reasonable assurance requirement, Competitive Bidding R&O, 13 FCC Rcd at 15988 ¶174, and has determined to adjudicate unresolved site issues in pending cases only insofar as there is a question of misrepresentation. Id. at 15956 ¶99; Competitive Bidding MO&O, 14 FCC Rcd at 8733 ¶16, aff’d sub nom. Orion Communications Ltd.v. FCC, 213 F.3d 761, 221 F.3d 196 (D.C. Cir. 2000).

citing, Armando Garcia, 3 FCC Rcd 1065, 1067 (Rev. Bd.), review denied, 3 FCC Rcd 4767 (1988).

### A. Initial Decision

After an evidentiary hearing, the ALJ relying largely on the deposition and written statements of the site owner, who had not testified, resolved both the site availability and the misrepresentation issues against Liberty. 5 FCC Rcd at 2879 ¶8 (JA 24).

The site owner, Ms. Utter, initially had no recollection of ever meeting anyone connected with Liberty, but later remembered a brief meeting in August 1987 with Liberty's general partner, Valerie Klemmer, and Tim Warner, general manager of noncommercial station WQCS, whose tower is located on property adjacent to Ms. Utter's. 5 FCC Rcd at 2866-67 ¶¶42, 44, 2881 n.15 (JA 11-12, 26). She had no independent recollection of ever discussing the possibility of a lease although she signed a statement to the contrary on March 13, 1989 because Warner was "adamant about it." Id. at 2867 ¶45 (JA 12). The landowner was certain she never promised that Liberty could use the land, because Klemmer did not contact her again as she would have expected. Id. at ¶¶43-45 (JA 11-12). She was also sure she told Klemmer and Warner in August 1987 about her written agreement to lease another portion of her property to Orion in exchange for an annual payment of \$1,500 before the tower is built and \$4000 after it is built. Id. at 2866-67 ¶¶40, 47 (JA 11, 12). The ALJ also noted that Klemmer had no plans to investigate other sites if her negotiations with Utter did not work out. Id. at 2866 ¶41 (JA 11).

The ALJ determined that Klemmer had "absolutely no basis" to certify that Liberty had a transmitter site and "she knew she had no basis for so certifying." 5 FCC Rcd at 2879 ¶8 (JA 24). The ALJ surmised that "what appears to have happened" is that when Klemmer found out it would cost money to lease the property, "she decided not to follow through on that idea . . .

[and] certified to the only land she knew anything about.” *Id.* at 2867 ¶50 (JA 12). The ALJ found that the argument that “her feeble, half-hearted effort . . . constitutes ‘reasonable assurance’ strains credulity” and that Klemmer had “blatantly dissembled.” *Id.* at 2879 ¶8 (JA 24).

Liberty filed exceptions on both the site availability and the false certification issues.<sup>8</sup> The Review Board affirmed Liberty’s disqualification on the site availability issue and did not reach the issue of whether it misrepresented to the Commission when it certified that a transmitter site was available. *Review Board Decision*, 6 FCC Rcd at 1979 ¶12 (JA 29). With respect to the site availability issue, the Board agreed with the ALJ that “vague discussions with the site owner, and Liberty’s hopes and expectations,” did not establish the “requisite meeting of the minds required for reasonable assurance.” *Id.* at ¶11 (JA 29). Only in the context of whether reasonable assurance was shown, the Board “[found] 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.” *Id.*

The Commission denied Liberty’s application for review, 7 FCC Rcd 1703 (1992) (JA 33), and petition for reconsideration, 7 FCC Rcd 7581 (1992) (JA 36) and it dismissed a further petition for reconsideration, 8 FCC Rcd 4264 (1993) (JA 43), without considering the merits of the misrepresentation issue.

#### **B. The Commission’s Post-Auction Decision on the Misrepresentation Issue**

After Liberty’s auction win, the only site issue before the Commission was not whether Ms. Utter had given assurance that Liberty could use her property as a transmitter site, but whether Liberty’s certification of reasonable assurance was deliberately false. Resolution of that

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<sup>8</sup> Exceptions and Brief of Liberty Productions, filed June 4, 1990, at 3-23.

issue required that the Commission consider a factual finding previously considered only by the ALJ – whether Liberty’s principal “mistakenly believed that [the site owner] had agreed to lease the property and thus made the certification in good faith.” 16 FCC Rcd at 12085 ¶54 (JA 75).

The ALJ’s findings of fact were not entitled to deference on review, the Commission held, because they did not reflect an assessment of the credibility of Liberty’s two witnesses. The Commission pointed out that the ALJ had ignored Tim Warner’s lengthy testimony about the negotiations Klemmer allegedly had with the landowner before she certified reasonable assurance, and that he had cited no aspect of Ms. Klemmer’s demeanor on the witness stand, such as her coloration or nervousness, which could not be discerned by reading the written transcript, but which might convince an observing judge that the witness was testifying falsely. 16 FCC Rcd at ¶55 & n.67 (JA 75-76). The ALJ, however, had credited other aspects of Klemmer’s testimony, the Commission observed. *Id.* (JA 76). Thus, strong language in the Initial Decision that “Ms. Klemmer has blatantly dissembled,” that her efforts to secure a site were “feeble [and] half-hearted,” and that it “strains credulity” to argue this constitutes reasonable assurance, the Commission reasoned, reflected the ALJ’s ultimate resolution of the issue, and his skepticism that anyone could believe they had a promise as to the availability of a specific piece of land based on an oral conversation never put in writing or secured by a monetary payment. *Id.* at 12086 ¶56 (JA 76).

Finding no probative evidence of intentional deceit by Klemmer, let alone the substantial evidence necessary to disqualify an applicant for misrepresentation or lack of candor, the Commission reversed the ALJ’s disqualification of Liberty. *Id.* at 12085-72 ¶¶55-72 & n.65 (JA 75-83). The Commission considered the written statements and deposition of the landowner, but found that these reflected only a “very sketchy recollection” of the August 1987 conversation

with Klemmer and Warner. 16 FCC Rcd at 12090-92 ¶¶66-70 (JA 80-82). The Commission observed several inconsistencies in Utter's written evidence, Id. at ¶¶67-70 (JA 80-82), and noted in her deposition testimony that she had no clear memory of ever discussing the possibility of a lease with Klemmer was contradicted by her signed March 13, 1989 statement, and by the testimony of Orion's Brian Lee that she had told him about such a discussion. Id. at 12091 ¶68 (JA 81). The Commission found "troublesome" her admission that she had included information in the signed statement of which she had no independent recollection, based on Warner's insistence that such a discussion had occurred. Id. (JA 81).

The Commission noted that Klemmer and Warner testified that they met with Utter in August 1987, that they discussed leasing a specific portion of land for \$4000 year, and that they believed she would be willing to sign a lease to that effect in the future. Id. at 12087-88 ¶¶58-60 (JA 77). On the critical question of whether the certification was deliberately false, the Commission noted Klemmer's testimony that, after meeting with Utter, she and Warner had discussed the question of reasonable assurance and that she had relied on Warner's advice that she had reasonable assurance of the desired site. Id. at 12088-89 ¶62 (JA 78-79). The Commission also noted Warner's testimony that he based that advice on his experience with Ms. Utter honoring oral agreements, his experience securing transmitter sites generally, and his general understanding that a written agreement was not necessary for reasonable assurance. Id. (JA 78-79).

As to Liberty's having investigated only one site, the Commission noted Warner's testimony that he knew, based on his search for alternative transmitter sites for WCQS, that Utter's property was suitable for Liberty's purposes. Id. at 12090 ¶65 (JA 80). Warner had testified, the Commission observed, that he had advised Klemmer that Utter's was the best site but that there were other available sites. Id. at 12089 ¶63 (JA 79).

Utter's written lease with Orion providing for an upfront payment, the Commission concluded, was relevant for purposes of the false certification issue only insofar as Klemmer was aware, or should have been aware of, the lease in August 1987 when she certified reasonable assurance. Id. at 12092 ¶71 (JA 82). The Commission noted that both Warner and Klemmer testified that Utter had not mentioned, and they were unaware in August 1987 of, the Orion lease. Id. at 12087 ¶59 (JA 77). Although this testimony was contradicted by the fairly detailed recollection of Utter that the Orion lease had been discussed, the Commission found this "a bit curious" given that her deposition otherwise reflected only a "vague memory" of the August 1987 conversation. Id. at 12091 ¶68 (JA 81). The Commission also found it "problematic" that Warner, a career public broadcaster with no interest in Liberty, would be willing to jeopardize his position as general manager of WCQS or his contractual relationship with Utter, on which WCQS depended to access its transmitter site, by perjuring himself on Liberty's behalf. Id. at 12089-90 ¶64 (JA 79-80). Finally, the Commission found it "difficult to believe" that Klemmer would have falsely certified about a matter so familiar to a competing applicant if she were aware of the Orion lease and if Utter had used that lease to demand a similar monetary commitment from Klemmer. Id. at 12093-94 ¶72 (JA 84).

Thus, the Commission did not find substantial evidence to support the ALJ's finding that, based primarily on the landowner's statements and deposition and the existence of the written lease agreement, that Klemmer's certification was deliberately false. It therefore set aside that determination and this appeal followed.

### **SUMMARY OF ARGUMENT**

This case presents questions regarding the reasonableness of the FCC's conclusions that auction winner Liberty's application complied with Commission rules and that Liberty's 1987 certification regarding the availability of a site for its transmitter was truthful. With respect to the former, the Court has made clear that the Commission may not impose the drastic sanction of disqualification unless the relevant requirements are crystal clear. With respect to the latter the Court has emphasized that so long as the Commission carefully considers the claims, it has very broad discretion in assessing whether an applicant's representations to it have been truthful.

Liberty's omission from its application of a certification as to media interests of family members was properly found by the Commission not to be disqualifying. Liberty supplied the missing information, which reflects that Liberty had always been in full compliance with the relevant ownership policies. The Commission properly refused to disqualify Liberty, for what proved to be an inconsequential omission, when its rules and other pronouncements failed to give explicit notice that the deficiency in Liberty's application would be fatal.

Just before the auction, Liberty amended its application to reflect a loan agreement it had entered into with another broadcaster, Cumulus, and after the auction it certified that Cumulus would not have any ownership interest in its station. None of the other applicants presented any basis to question the accuracy of that representation. In these circumstances, the Commission had no obligation under its rules to require disclosure of the agreement or to question Liberty's eligibility to participate in the auction.

The Commission reasonably concluded that although the Cumulus loan deprived Liberty of a bidding credit that is reserved for "new entrants" with no or very few media interests, the loss of the bidding credit was not a "major amendment" to Liberty's application under the Com-

mission's rules. No agency precedent and nothing in the relevant public notices establish that a post-auction loss of a bidding credit in this manner amounts to a major amendment that, in this case, would have the effect of disqualifying Liberty.

Both opposing parties contend that the Commission erred when, following the auction, it set aside the ALJ's determination that Liberty's general partner Ms. Klemmer had misrepresented facts to the Commission when certifying as to the availability of a transmitter site. That portion of the ALJ's decision had never been reviewed or become final, but was now material to Liberty's qualifications after its auction win. The Commission carefully considered this issue. It had no incentive to resolve the issue in Liberty's favor – indeed, if anything, one would have expected the agency to favor the conclusion of its administrative law judge who had heard the case. However, after a thorough review of the record as reflected in its decision, the Commission concluded that there simply was not adequate evidence to prove the essential element of misrepresentation – that Liberty's general partner did not believe she had obtained reasonable assurance of the availability of a transmitter site and intended, by certifying to the contrary, to deceive the Commission. The opposing parties offer no substantial basis to upset the Commission's broad discretion in making such judgments about a party's truthfulness.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

Biltmore Forest challenges both the outcome of the auction and the Commission's post-auction decision that Liberty is basically qualified. Insofar as Biltmore Forest challenges the Commission's decision not to dismiss Liberty's application or conduct a second auction because of omissions from, or errors in, Liberty's bidding application, this Court has held, specifically in connection with the Commission's auction rules, that "the agency's interpretation of its own rule

is given ‘controlling weight unless it is plainly erroneous or inconsistent with the regulation.’” High Plains Wireless v. FCC, 276 F.3d 599 (D.C. Cir. 2002), citing, Capitol Network System v. FCC, 28 F.3d 201, 205 (D.C. Cir. 1994); Qwest Communications v. FCC, 252 F.3d 462, 467 (D.C. Cir. 2001). Regarding Liberty’s eligibility as a qualified bidder within the meaning of 47 U.S.C. § 309(l)(2), this Court “will defer to the agency’s interpretation assuming its interpretation is reasonable and consistent with the statute’s purpose,” since the agency is charged with administering that provision. Heidi Damsky v. FCC, 199 F.3d 527, 535 (D.C. Cir. 2000).

Insofar as Biltmore Forest challenges the Commission’s finding that Liberty did not make misrepresentations concerning its original transmitter site, “questions respecting misrepresentations of fact are . . . peculiarly within the province of the Commission.” WEBR, Inc. v. FCC, 420 F.2d 158, 164 (D.C. Cir. 1969). This Court reviews the factual findings upon which the Commission’s decision is based to ensure they are supported by substantial evidence. 5 U.S.C. § 706(2)(E). Contemporary Media v. FCC, 214 F.3d 187 (D.C. Cir. 2000). Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Schoenbohm v. FCC, 204 F.3d 243, 246 (D.C. Cir. 2000).

**II. THE COMMISSION REASONABLY DETERMINED THAT THERE WAS NO BASIS TO SET ASIDE LIBERTY’S AUCTION WIN FOR FAILURE TO COMPLY WITH AUCTION PROCEDURES.**

Needless to say, the Commission’s action in this case was not, as Biltmore Forest and Orion suggest (BF Br. at 16; Orion Br. at 7), financially motivated.<sup>9</sup> Liberty’s disqualification

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<sup>9</sup> Insofar as Biltmore Forest (Br. at 21) relies on Section 309(j)(7), limiting the Commission’s authority to rely on the public fisc in making certain auction-related decisions, that provision does not expressly apply to this licensing decision. See Bachow v. FCC, 237 F.3d 683, 692 (D.C. Cir. 2001), citing, 47 U.S.C §§ 309(j)(7)(A) & (B).

for any reason would have required, pursuant to 47 C.F.R. §§ 1.2105(g)(1) and (2), that it pay the difference between its bid and Biltmore Forest's bid plus a three percent penalty.<sup>10</sup> The United States Treasury, in other words, would have received more, not less, revenue from this auction if the Commission had ruled against Liberty. Auction winners are rarely disqualified, as Biltmore Forest observes (Br. at 16), but this is because meaningful penalties imposed on defaulting bidders have the desired effect of discouraging minimally qualified applicants from applying.<sup>11</sup>

This Court has been unmistakably clear that “fundamental fairness ... requires that an exacting application standard, enforced by the severe sanction of dismissal without consideration of the merits, be accompanied by the full and explicit notice of all prerequisites for such consideration.” Salzer v. FCC, 778 F.2d 869, 871-72 (D.C. Cir. 1985). See also Trinity Broadcasting v. FCC, 211 F.3d 618 (D.C. Cir. 2000); Satellite Broadcasting v. FCC, 824 F.2d 1 (D.C. Cir. 1987).

Ever cognizant of the very strict notice standards necessary to justify dismissal without consideration on the merits of an application, the Commission scrutinized its auction rules, its orders adopting the broadcast auction rules, and the public notices issued by the staff in connection with this particular auction for affirmative statements requiring the post auction dismissal of Liberty's application either because of the omitted certification or because of the mistakenly

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<sup>10</sup> This assumes that the Commission were to ultimately find that Biltmore Forest is qualified. There are unresolved questions about Biltmore Forest's representations concerning its transmitter site that would require Commission consideration before its application could be granted. See 14 FCC Rcd at 7640 ¶6 (OGC 1999) (JA 48); Initial Decision, 5 FCC Rcd at 2881 n.7 (JA 26).

<sup>11</sup> See Abundant Life, FCC 02-56 ¶8 (Feb. 25, 2002), appeal pending sub nom. Unity Broadcasters v. FCC, No. 02-1101 (D.C. Cir. filed March 27, 2002). (“One of the primary objectives of our auction rules is to ensure that only serious, financially qualified applicants receive construction permits and licenses, and to expedite provision of service to the public”).

claimed bidding credit. Finding none, the Commission properly declined to dismiss Liberty's application.<sup>12</sup>

**A. Omission Of The Family Media Certification Did Not Render Liberty's Short-Form Application Unacceptable For Filing Such That The Missing Information Could Not Be Submitted After The Auction.**

The Commission adhered to its rules in concluding that the omitted family media certification, required not by a Commission rule but by the staff's July 9<sup>th</sup> Public Notice, did not render Liberty's short-form application unacceptable for filing. The Commission reasonably found there was no impediment to the grant of Liberty's application, given that the omitted certification, supplied post-auction and unchallenged as to accuracy, has no impact on Liberty's basic qualifications.

There is no question that the family media certification should have been included in Liberty's short-form application, as directed by the staff's July 9<sup>th</sup> Public Notice, which stated that "bidders or attributable interest holders in bidders must certify under penalty of perjury that the bidder complies with the Commission's policies relating to the media interests of immediate family members." 14 FCC Rcd at 10699 (JA 159). The rule applicable to broadcast auctions expressly provides that the short-form application must contain "all required certifications,

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<sup>12</sup> Biltmore Forest argues (Br. at 19) that the Commission, having given unequivocally clear notice of the mandatory nature of the family media certification requirement, is required by the principles of Salzer to dismiss Liberty for noncompliance. Whatever the Commission's obligation if it had given such notice, it is quite clear, as discussed above, that the agency gave no such notice. Nothing in the rules or public notices issued in connection with this auction provided express notice that omission of this certification would be fatal to Liberty's application. In these circumstances, the Commission committed no error in refusing to dismiss Liberty's application. To have done so, indeed, would have been directly contrary to the teaching of Salzer.

information and exhibits, pursuant to the provisions of 47 C.F.R. § 1.2105(a), and any Commission public notices.” 47 C.F.R. § 73.5002(b).

The question here is whether the omission of this particular certification rendered Liberty’s auction application defective such that the omission, discovered only after the close of the auction, could not be corrected by Liberty. On that question, the rules are unclear. The modification and dismissal of short-form applications for a broadcast service auction are “subject to the provisions of 47 C.F.R. §1.2105(b).” That rule, in turn, requires the dismissal of a short-form application, without the opportunity to correct after the short-form deadline, only when the application does not contain one of the certifications pursuant to this section. The family media certification, however, is not one of the certifications listed in section 1.2105(a), omission of which cannot be corrected after the initial filing deadline.

As to the broader category of required information that may be submitted after the short-form deadline, the rule provides that an applicant failing to correct deficiencies in a timely manner may be dismissed, but only after being advised of the deficiency by a Public Notice. 47 C.F.R. § 1.2105(b)(3). Where, as in this case, the deficiency was not brought to the applicant’s attention before the auction or even discovered by the staff until after the auction, the rule is silent. It does not explicitly state that a short-form application not containing all the required information must be dismissed post-auction, without opportunity to correct.

The staff’s inadvertent acceptance of Liberty’s short-form application would, of course, not have precluded its subsequent dismissal, if one of the certifications required by section 1.2105(a) had been omitted, or if it was otherwise found to be in patent conflict with the Commission’s rules. 47 C.F.R. § 73.3564. That was not the case here, however, since no Commission rule required the family media certification.

The July 9<sup>th</sup> Public Notice, despite requiring submission of the family media certification, also did not provide sufficient notice of the consequences of its omission to justify the drastic sanction of dismissing Liberty's application. The Public Notice stated, in italics, that all applicants "must certify under penalty of perjury that the bidder complies with the Commission's policies relating to the media interests of immediate family members." 14 FCC Rcd at 10699 (Attachment B) (JA 159). It also stated, in boldface type: "Failure to submit required information by the resubmission date will result in dismissal of the application and inability to participate in the auction. See 47 C.F.R. § 1.2105(b)." *Id.* at 10697 (JA 157). But Section 1.2105(b) does not provide that an auction application, which omits any "required information," is defective and cannot be later amended. The only type of application that is defective and may not be resubmitted under section 1.2105(b) is an application not containing "all of the certifications required pursuant to this section." As noted above, the family media certification is not required by section 1.2105 or other Commission rule, only by the July 9<sup>th</sup> Public Notice. There is a patent conflict, in other words, between the admonition in the Public Notice and the Commission rule cited to support that warning. Even assuming that the Public Notice were otherwise clear as to the consequence of omitting required information, the citation of Section 1.2105(b) certainly obscured matters.

Apart from the confusing rule citation, the Public Notice itself was not explicit that omission of this particular certification is fatal, where the applicant has not been advised of the omission by Public Notice and provided an opportunity to amend the short-form application before the resubmission date. First, the only qualified bidders for this auction were applicants that filed their applications before July 1, 1997. The July 9<sup>th</sup> Public Notice, while stating that failure to submit required information will result in the applicant being excluded from the auc-

tion, did not expressly provide for the dismissal after the close of the auction of the winning bidder's pending pre-July 1<sup>st</sup> application because of a deficiency in its auction application.

Second, the Public Notice expressly stated that “[a]fter the deadline for filing the FCC Form 175 applications has passed, the FCC will process all timely submitted short-form applications ... and will subsequently issue a public notice identifying: (1) those short-form applications which are mutually exclusive and acceptable for filing (including FCC file numbers and the construction permits for which they applied); (2) those applications rejected; and (3) those short-form applications that have minor defects that may be corrected, and the deadline for filing such corrected applications.” 14 FCC Rcd at 10644 (JA 121). Despite the omitted family media certification, Liberty's auction application was included among the list of acceptable applications for Biltmore Forest, as was another pre-July 1<sup>st</sup> applicant, whose auction application also omitted this same certification.<sup>13</sup>

Having reasonably concluded that neither its auction rules nor the staff's pronouncements provided adequate notice that omission of the family media certification would be fatal to Liberty's previously filed application, the Commission properly refused to dismiss Liberty's application. In a comparable situation where the Commission granted the license to a bidder who had violated an auction rule found to be ambiguous, this Court held “that the rule did not afford adequate notice reflexive bidding was unlawful is itself sufficient justification for the Commission not to penalize [the bidder].” High Plains Wireless v. FCC, 276 F.3d at 607, citing, Satellite Broadcasting Co. Inc. v. FCC, 824 F.3d 1, 3 (D.C. Cir. 1987). As a matter of fairness

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<sup>13</sup> 16 FCC Rcd at 12070 n.28 (JA 60), citing, Public Notice: CLOSED BROADCAST AUCTION Status of Applications to Participate in the Auction, 14 FCC Rcd 14113, 14140 (Sept. 3, 1999), including Willsyr Communications, LP on the Accepted List as eligible to participate in the auction.

and fundamental due process the Commission could not have dismissed Liberty's application based on the missing certification.

Moreover, Liberty supplied the missing certification on November 24, 1999. Liberty's general partner declared under penalty of perjury that no member of her family has, or has had since the filing of Liberty's application, any ownership interest in any medium of mass communications, and the accuracy of her declaration was not challenged. The undisclosed information, discernible from Liberty's pre-July 1st application,<sup>14</sup> in other words, did not impact Liberty's qualifications.

Notwithstanding Biltmore Forest's suggestion (Br. at 18 & n.9), there was nothing novel about the Commission's conclusion that Liberty was not required to report, on the short-form application, information about the media holdings of family members of its only limited partner. The short-form application contained the requisite certification from the general partner that the limited partner is not, has not, and will not be involved, directly or indirectly, in the management or media-related activities of the partnership. And, insofar as Liberty also claimed a bidding credit, its November 10, 1999 amendment to its pre-July 1<sup>st</sup> application included a certification from the general partner that the limited partner is not a creditor of the partnership and that his equity share was far below the thirty-three (33) percent threshold that would make his interests attributable for purposes of the new entrant bidding credit. Having properly concluded that the media holdings of the limited partner were not attributable for purposes of the bidding credit,

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<sup>14</sup> Liberty was required to list any such interest on its August 1987 application and, pursuant to 47 C.F.R. § 1.65, it was required to report within 30 days any significant changes in the information furnished in its pending applications.

Liberty was not required to disclose his media interests (or his wife's) on the short-form application. 16 FCC Rcd at 12080-83 ¶¶44-48.

Because the Commission scrupulously followed its announced auction procedures and the deficiency in Liberty's application was not a matter of substance, Biltmore Forest's reliance (Br. at 18) on McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955) and Superior Oil Company v. Udall, 409 F.2d 1115 (D.C. Cir. 1969) is misplaced. In both cases this Court held that the Secretary of Interior lacked authority to either award the lease to the high bidder or first drawn applicant or to hold a new sale or public drawing, where the Secretary himself recognized that the winning bid or first-drawn application was defective under unambiguous regulations, agency precedent or agency documents setting forth the terms of the competition. In McKay, for example, the Secretary was required to set aside the lease issued to the winner of the public drawing, where the Secretary recognized "his application was defective and that it was filed in an inherently unfair situation which would have caused it to be rejected had the real situation been disclosed before the drawing." 226 F.2d at 40. The Secretary's failure to follow regulations mandating dismissal of the application, this Court found, "unjustly deprived" the second-drawn applicant of the lease. Id. at 41.

In Superior the high bidder's bid was unsigned, a deficiency the Secretary had acknowledged was "a matter of substance . . . [that] cannot be waived." 409 F.2d at 1119. In refusing to allow the Secretary to conduct a second sale in lieu of awarding the lease to the second high bidder, the Court was concerned that "bidders who comply faithfully and scrupulously with bidding regulation should not in effect be penalized by the errors of less careful bidders who fail to follow correct procedures." Id. at 1120. The Court's concerns have no obvious relevance here, where nothing in the rules or the staff's public notices made clear that Liberty's

failure to submit the family media certification would result in dismissal of its application without opportunity to later correct -- and where the omission was not as fatal to the integrity of the application as a missing signature on a bid.

**B. The Commission Reasonably Resolved Allegations Concerning Liberty's Loan Agreement With Cumulus.**

Section 309(l) specifies that if it employs a system of competitive bidding to resolve competing broadcast applications filed before July 1, 1997, "the Commission shall . . . (2) treat persons filing such applications as the only persons eligible to be qualified bidders." Orion contends (Br. at 25-26) that this restriction on bidder eligibility may have been contravened because Liberty was financed by Cumulus, a broadcaster with numerous media holdings, and the Commission did not require that Liberty submit a copy of its loan agreement with Cumulus.

But the Commission, in implementing section 309(l)(2), considered whether to prescribe special disclosure requirements to ensure against the participation by new investors. It concluded that its general auction rules, requiring applicants filing short-form applications to identify controlling ownership interests as well as all parties holding a ten percent or greater ownership interest, were sufficient. See Competitive Bidding R&O, 13 FCC Rcd at 15942 ¶57.

Orion, despite filing comments in the rulemaking proceeding and being a party to the subsequent court appeal, did not directly challenge this determination except in the context of this adjudicatory licensing proceeding. Whether Orion now challenges the general policy determination made in the rulemaking or only its application to this licensing proceeding is not entirely clear. In any event, Orion's argument that the Commission should have required disclosure of the Cumulus loan to verify that it did not undermine congressional intent behind section 309(l)(2) is very similar to arguments considered by the Commission in the rulemaking

proceeding. The Commission was not persuaded at that time that special disclosure standards were necessary to effectuate congressional intent behind section 309(1)(2), and nothing belatedly raised by Orion in this adjudicatory licensing proceeding caused the Commission to change its mind. In refusing to require disclosure of the Cumulus Loan or conclude that it rendered Liberty ineligible to participate in an auction statutorily limited to pre-July 1<sup>st</sup> applications, the Commission did nothing here other than apply the conclusion it reached when it declined to adopt a rule requiring disclosure of non-ownership interests.

The Commission properly applied that general policy to the circumstances of this case. Before the auction Liberty voluntarily disclosed the September 10<sup>th</sup> Loan Agreement with Cumulus in a September 27, 1999 amendment to its application. 16 FCC Rcd at 12072 ¶23 (JA 62). Neither the statute nor any auction rule prohibits an auction applicant from borrowing money to participate in an auction. Orion suggests (Br. at 26) that the loan agreement potentially disturbed an underlying premise of the decision to resolve this case by auction – that the pending July 1<sup>st</sup> applicants competing in the auction would not be financially disadvantaged because all qualified bidders had incurred similar expenses in prosecuting their applications through the now defunct hearing process. But this general expectation, see Competitive Bidding R&O, 13 FCC Rcd at 15941 ¶56, does not require that the Commission “delve into the financial situation of competing pre-July 1<sup>st</sup> applicants or otherwise take steps to equalize the[ir] particular financial circumstances.” Competitive Bidding MO&O, 14 FCC Rcd 8724, 8739 ¶26 (1999).

That the lender was an existing broadcaster with numerous media holdings was not a basis for the Commission to exclude Liberty from the auction. Just before the start of this auction, the Commission advised that, although media interests of substantial investors would be considered for purposes of the new entrant bidding credit, “this debt/equity standard does not

preclude an individual or entity (including any existing broadcaster) from investing any amount in a prospective auction applicant.”<sup>15</sup>

There was also no basis for the Commission to question Liberty’s eligibility as a qualified bidder under Section 309(l)(2) or to require submission of the actual loan agreement, after the auction. In its November 10<sup>th</sup> amendment, Liberty’s general partner certified, as required by §1.2112, that the only agreement affecting the ownership and control of Liberty is its Limited Partnership Agreement, and that neither the applicant nor anyone with an attributable ownership interest in, or managerial position with, the applicant owns ten percent or more of any FCC-related business. With regard to the Cumulus loan, she also certified that “the proceeds of the loan will exceed thirty-three (33) percent of [the applicant’s] total asset value” but that the loan agreement “does not provide Cumulus with any option to acquire the construction permit or license for the Biltmore Forest station or any right to broker time on or manage the station.” (Amendment, Exhibit D) (JA 432 ).

None of the applicants below presented a scintilla of evidence that Cumulus has, or will ever have, any ownership interest in the construction permit or the license, let alone the ten percent or greater interest that would require Liberty to submit a copy of the agreement to the Commission, or a controlling interest such that Liberty’s application would be considered newly filed under section 1.2105(b) and thus ineligible for inclusion in an auction statutorily limited to applicants who filed their applications before July 1, 1997. 16 FCC Rcd at 12073-74 ¶26.

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<sup>15</sup> Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses (Attribution Order), 14 FCC Rcd 12541, 12545-46 ¶10 (1999).

Broadcast applicants are held to a high standard of candor precisely because “effective regulation is premised upon the agency’s ability to depend upon the representations made to it by its licensees...” Leflore Broadcasting Company v. FCC, 636 F.2d 454, 461 (D.C. Cir. 1980). If a substantial or material question of fact is presented as to whether grant of an application serves the public interest, the Commission is obliged to designate a hearing issue. 47 U.S.C. § 309(e). Absent a substantial and material question of whether Cumulus has, or will have, any ownership interest in Liberty by virtue of the Loan Agreement, the Commission had no reason to look behind Liberty’s verified statements or to require disclosure of the agreement. SBC Communications Inc. v. FCC, 56 F3d 1484, 1496 (D.C. Cir. 1995). (“The Commission is fully capable of determining which documents are relevant to its decision-making, for us to hold the Commission is bound to review every document deemed relevant by the parties would be an unwarranted intrusion into the agency’s ability to conduct its own business.”) Having no reason to question the veracity of Liberty’s certifications regarding the Cumulus loan, the Commission reasonably exercised its discretion not to require its submission.<sup>16</sup>

**C. The Commission Properly Refused To Disqualify Liberty Because It Improperly Claimed A 35 Percent Bidding Credit.**

Biltmore Forest cites no agency precedent for the proposition that a post-auction loss or diminution of a bidding credit claimed on the winning bidder’s short-form application has any consequence to the auction winner other than to affect the amount it must pay for the license. It relies instead on cases in which the Commission has refused to waive 47 C.F.R. § 1.2105(b)’s

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<sup>16</sup> Orion appears to suggest (Br. at 26) that the Commission had a duty to require disclosure because “Liberty’s certifications previously have been found wanting.” But Orion overlooks the Commission’s ultimate resolution of the site certification issue in Liberty’s favor.

prohibition against major amendments to short-form applications so as to permit a winning bidder to increase its bidding credit. Specifically, the Commission has held that “modification of an applicant’s small business status does not constitute a minor change under our competitive bidding rules, and that providing [the auction winner] with more favorable financial benefits after the close of the auction . . . would adversely affect the integrity of the auction process.” Two Way Radio Of Carolina, 14 FCC Rcd 12035, 12039 (1999), affirming, 12 FCC Rcd 958 (WTB 1997). Clear Call, Inc., 12 FCC Rcd 965, 969 (WTB 1997). Here, however, the post-auction removal of the bidding credit did not confer a financial benefit on Liberty, or adversely impact the other bidders. Quite the contrary – loss of the credit meant Liberty had to pay more than \$800,000 more.

And, in contrast to the cases cited by Biltmore Forest (Br. at 25-26), the loss of the bidding credit claimed on Liberty’s August 19<sup>th</sup> short-form application did not constitute a major amendment within the meaning of 47 C.F.R. § 1.2105(b). A major amendment includes “changes in ownership . . . , changes in the applicant’s size which would affect eligibility for designated entity provision, and changes in the license service areas identified on the short-form application.” But Liberty did not lose its bidding credit because of changes in ownership, size, or license service areas, but because of its September 10<sup>th</sup> loan agreement with Cumulus.

In adopting the new entrant bidding credit for broadcast service auctions, however, the Commission did not revise section 1.2105(b)(2)’s definition of major amendment to encompass changes in eligibility for the new entrant bidding credit. A change in a winning bidder’s eligibility for the new entrant bidding credit would be a major amendment only if it resulted from “changes in ownership of the applicant that would constitute an assignment or transfer of

control.” 16 FCC Rcd at 12073 ¶25 (JA 63). That, of course, is not what happened here.<sup>17</sup> The Commission stripped Liberty of the bidding credit because it determined that, by virtue of the Loan Agreement, Cumulus’s numerous media interests were attributable for purposes of the new entrant bidding credit. *Id.* at 12077-78 ¶¶34-37 (JA 67-68).

Nothing in the staff’s July 9<sup>th</sup> Public Notice establishes that the loss or reduction of a previously claimed new entrant bidding credit constitutes a major amendment under section 1.2105(b). The staff advised:

As described more fully in the Commission’s Rules, after the August 20, 1999, short-form filing deadline, applicants may make only minor non-technical corrections to their FCC Form 175 applications. Applicants will not be permitted to make major modifications to their applications (*e.g.*, change their construction permit selections or proposed service areas, change the certifying official or change control of the applicant or change bidding credits). See 47 C.F.R. § 1.2105.

14 FCC Rcd at 10644 (JA 121).

Biltmore Forest (Br. at 23-24) interprets this to mean that any change in a bidder’s eligibility constitutes a “major amendment” effectively disqualifying the applicant from participating in the auction or from being awarded the permit if it is the winning bidder. But the cited passage purports only to describe “the Commission’s Rules” and specifically cites Section 1.2105. In terms of eligibility for a bidding credit, that rule expressly addresses only “changes in an applicant’s size.” As noted above, however, changes in an applicant’s size do not affect eligibility for

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<sup>17</sup> Biltmore Forest’s reliance on Media Ventures Adjustment for IVDS Licenses, 10 FCC Rcd 8610 (1995), (Br. at 24 n.12) is misplaced. That case involved a situation where an applicant made changes in its service areas after the relevant deadline. The Commission took away the winning applicant’s licenses for those service areas not originally claimed because the rule expressly states that “changes in license service areas identified on the short-form application” constitute major amendments under section 1.2105(b).

the new entrant bidding credit. Certainly, the staff, by articulating a more comprehensive definition of “major amendment” than the rule provides, did not effect an amendment of that rule for purposes of this auction. Moreover, the staff’s subsequent September 17, 1999 Public Notice made clear that the loss of a bidding credit was not disqualifying. It indicated that in the case of the loss of the bidding credit “the Commission will make the appropriate adjustments in the New Entrant Bidding Credit prior to the computation of down and final payment amounts due from any affected winning bidders.”<sup>18</sup> Biltmore Forest has cited nothing in the rules, the case law, or the various Public Notices issued in connection with this auction to support the proposition that Liberty’s changed bidding status constitutes a major amendment or that it disqualifies Liberty from being awarded the construction permit.

**III. SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION’S DETERMINATION THAT LIBERTY DID NOT MISREPRESENT FACTS RELATING TO ITS ORIGINAL TRANSMITTER SITE.**

Both appellant Biltmore Forest and intervenor Orion contend that the Commission erred when, following the auction, it set aside the portion of the ALJ’s 1990 decision in which he had determined that Liberty, through its general partner Valerie Klemmer, had misrepresented facts to the Commission when it certified as to the availability of a transmitter site. Both opposing briefs focus on claims that the Commission was bound by the ALJ’s conclusion on this point because it was based on “credibility” determinations and because it had become the “law of the case.” Both arguments are mistaken. The ALJ’s misrepresentation finding was not based on any credibility determination that was entitled to special deference from the Commission on review.

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<sup>18</sup> Public Notice: Closed Broadcast Auction 224 Qualified Bidders, DA 99-1912, pp. 5-6 (Sept. 17, 1999) (JA 172-173).

Moreover, the ALJ's decision concerning a possible misrepresentation had never been reviewed and had never become final. The Commission was free, indeed obligated, to set aside the ALJ's conclusion here following the auction after determining that there was not substantial evidence to support his finding of misrepresentation.

The Commission explained that the issue before it “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.” 16 FCC Rcd at 12084 ¶ 52 (JA \_\_). This is, as the Commission properly concluded, a separate issue from whether Liberty actually had reasonable assurance of a transmitter site, an issue upon which it had initially been disqualified but which subsequently had become irrelevant in the auction context and thus had been abandoned by the Commission.<sup>19</sup> The Commission’s prior determination that Liberty had not had reasonable assurance of a transmitter site did not foreclose a finding that Ms. Klemmer mistakenly believed she had reasonable assurance, either because she misinterpreted the site owner’s statements or because she misunderstood the legal standard required for reasonable assurance. 16 FCC Rcd at 12085 ¶ 54 (JA \_\_).

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<sup>19</sup> It is well established that the Commission may revise its licensing procedures “mid-stream” and apply the new procedures to pending applications. Bachow Communications v. FCC, 237 F.3d 683 (D.C. Cir. 2001). We do not understand either Biltmore Forest or Orion to challenge the Commission’s decision not to revisit the site availability issue on which Liberty was disqualified in the pre-auction comparative context. In any event, the Court has already held in Orion Communications, Ltd. v. FCC, 221 F.3d 196 (unpublished judgment), a proceeding in which Biltmore Forest and Orion were both parties, that there was “nothing arbitrary or capricious in the FCC’s decision to decline to pursue unresolved claims that applicants had not met the filing requirements in place at the time they filed their applications.”

By virtue of Liberty's auction win and the special auction procedures for hearing cases, the misrepresentation issue, which could be avoided in the Review Board's disposition of Liberty's exceptions and the Commission's denial of its application for review, became material to whether Liberty had the requisite qualifications to be awarded the permit. That issue was not previously considered by either the Review Board or the Commission; both adhered to routine adjudicatory practice of reviewing only issues relevant to their respective decisions, Colonial Communications, Inc., 6 FCC Rcd 2296 (1991), citing, Deep South Broadcasting v. FCC, 278 F.2d 264, 266 (D.C. Cir. 1960).<sup>20</sup>

There is no merit to Biltmore Forest's suggestion (Br. at 10) that the Commission somehow considered the merits of the misrepresentation issue when it denied Liberty's petition for reconsideration. The Commission denied the petition for reconsideration because it "d[id] not rely on new facts or newly discovered evidence, as required by [47 C.F.R.] 1.106(b)(2)." 7 FCC Rcd 7586 ¶36 (JA 41). Its earlier denial of Liberty's application for review "without stating reasons" was not a basis to grant reconsideration of arguments "already considered and rejected without comment in denying the application for review." Id. But this clearly did not signify that the Commission had considered (and rejected) the merits of the misrepresentation issue, since the underlying order had simply affirmed a Review Board decision that, in turn, had not addressed the merits of the misrepresentation issue. See 6 FCC Rcd at 1979 ¶12 (JA 29).

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<sup>20</sup> To prevent multiple remands for further evidentiary findings, an Administrative Law Judge rules in the Initial Decision "upon all the material issues of fact, law or discretion presented by the record." 47 C.F.R. § 1.267. Port Huron Family Radio, Inc., 4 FCC Rcd 2532 n.1 (Rev. Bd. 1989), citing, RKO General, Inc., 61 FCC 2d 1062, 1064 (1976); Alkima Broadcasting Co., 30 FCC 932, 933 n.2 (1961).

Notwithstanding Appellant's claim (BF Brief at 27), no portion of the Initial Decision involving Liberty's application, or of the agency's disposition of any administrative appeal to that Initial Decision, ever became final, given Liberty's appeal to this court. As the Commission properly found, the principles of *res judicata* do not apply here, because the agency's resolution of the site *availability* issue was not finally litigated, and given the changed licensing scheme, will never be finally litigated. 16 FCC Rcd at 12084-85 ¶ 54 & n.64 (JA 74-75). Without considering the merits of any issue raised on appeal, this Court simply remanded this case to the Commission "for further consideration in light of this court's decision in Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993)," Order, Case No. 92-1645 (D.C. Cir. Mar. 15, 1994). That action did not resolve any issue relating to Liberty's application, and the post-auction adjudication of the misrepresentation issue pursuant to auction procedures adopted to resolve cases affected by Bechtel is consistent with the terms of the Court's remand order.<sup>21</sup> Under those procedures, Liberty was entitled to participate in the auction because its application was never finally denied or dismissed. Competitive Bidding R&O, 13 FCC Rcd at 15952 ¶89.

Where the Commission is called on to consider allegations of misrepresentation or a lack of candor, "[a] party's 'intent to deceive' is ... an 'essential element' ...." Fox Television Stations, Inc., 10 FCC Rcd 8452, 8478 (1995), quoting Swan Creek Communications, 39 F.3d at 1222. Disqualification requires "substantial evidence of an intent to deceive." David Ortiz v. FCC, 841 F.2d 1253, 1257 (D.C.Cir. 1991). With that standard in mind, and aware of the deference ordinarily owed to an ALJ's findings, the Commission did not lightly set aside the ALJ's finding of misrepresentation here. It did so only after a thorough canvassing of the record as a

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<sup>21</sup> The law of the case argument (BF Brief at 26-29) is not properly before this Court, pursuant to 47 U.S.C. § 405, since it was not argued to the Commission.

whole revealed no probative evidence, let alone substantial evidence, on the critical issue of whether Liberty's transmitter site certification was deliberately false. See 16 FCC Rcd at 12085-94 ¶¶55-72 (JA 75-83).

The Commission pointed out that the ALJ had not made specific demeanor findings as to either of Liberty's two witnesses, Ms Klemmer and Tim Warner, and that his ultimate resolution of the issue turned largely on the written statements and deposition testimony of the landowner, Ms. Utter, who did not testify. 16 FCC Rcd at 12085-86 ¶¶55-56 (JA 75-76). He largely ignored the testimony of Tim Warner, which had fully corroborated Klemmer's testimony. Moreover, the ALJ credited other aspects of Klemmer's testimony on other issues, which was inconsistent with a finding that she lacked credibility as a witness. See, e.g., 5 FCC Rcd at 2871-72 ¶¶113-18 (JA 16-17).

The Commission was, of course, aware of the ALJ's language to the effect that Ms. Klemmer had "blatantly dissembled."<sup>22</sup> However, the Commission found that that language reflected the ALJ's ultimate determination on the misrepresentation issue, rather than a description of Klemmer's countenance while testifying or a disbelief of her testimony. 16 FCC Rcd at 12085-86 ¶¶55-56 (JA 75-76). Similarly, it was not the witnesses' demeanor that "strain[ed] credulity," but the "argu[ment] that [Klemmer's] feeble, half hearted effort to obtain some of [Ms.] Utter's land . . . constitutes 'reasonable assurance.'" 5 FCC Rcd at 2879 ¶8 (JA 24). There was simply nothing in the record that warranted a conclusion that the ALJ's ultimate resolution of the issue was influenced at all by his observation of a less than candid demeanor on the part of either witness so that his analysis turned on information unavailable to

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<sup>22</sup> 16 FCC Rcd at 12086 ¶56 (JA 76), citing, 5 FCC Rcd 2879 (JA 24) ("Valerie Klemmer has blatantly dissembled in a manner that doesn't befit a prospective broadcast permittee").

the Commission in reading the written transcript. Indeed, it seems apparent that the ALJ's ultimate resolution of the issue was informed by his incredulity that anyone could believe an oral agreement conveyed reasonable assurance that a specific piece of property would be available. See e.g., National Communications Industries, FCC 89M-1025 ¶6 & n.1 (JA 2).

Without denigrating the legal sufficiency of the ALJ's findings because of the lack of express credibility findings, the Commission was not required to give any special deference to findings based on inferences drawn from the substance of the record rather than testimonial inferences derived from his observation of Liberty's witnesses. Penasquitos Village v. NLRB, 565 F.2d 1074, 1078 (9<sup>th</sup> Cir. 1977). (“[T]he administrative law judge’s opportunity to observe the witnesses’ demeanor does not, by itself, require deference with regard to his or her derivative inferences. Observation of demeanor makes weighty only the observer’s testimonial inferences.”).

In reviewing an initial decision by an Administrative Law Judge, “the agency has all the powers that it would have in making the initial decision,” 5 USC § 557(b), and “[a]ll decisions . . . shall include a statement of findings and conclusions and the reasons or basis thereof, on all material issues of fact, law or discretion.” The agency’s longstanding practice is to engage in de novo review of an Initial Decision when exceptions are filed.<sup>23</sup> With the elimination of the Review Board in 1996, exceptions to an Initial Decision are now considered by the full Commission. 47 C.F.R. § 1.276.

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<sup>23</sup> Amendment of Parts 0 and 1 of the Commission’s Rules With Respect to Adjudicatory Re-regulation Proposals, 56 FCC 2d 527, 536 (1976). See also 47 U.S.C. § 409(c)(2), providing that the provisions in Section 5(c) of the Administrative Procedure Act, 5 U.S.C. § 557 shall apply to adjudicatory proceedings involving applications for initial licenses before the Commission.

Even assuming that the ALJ's ultimate finding of misrepresentation, because it rejected the oral testimony of Liberty's witnesses, could be construed as implicit credibility findings, it is well established that "the Commission is not absolutely bound by [the ALJ's] credibility findings," WHW Enterprises, Inc. v. FCC, 753 F.2d 1132, 1141-42 (D.C. Cir. 1985), citing, FCC v. Allentown Broadcasting Corp., 349 U.S. 358, 364 (1955) (citing, Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951)), and may "upset them [if] its reversal is supported by substantial evidence." Id. See also Swan Creek Communications v. FCC, 39 F.3d 1217, 1221 (D.C. Cir. 1994). ("Although the Review Board and the Commission reversed the ALJ on the lack of candor issue, the Commission is not bound by the ALJ's findings so long as its own findings are supported by substantial evidence.") This Court has made clear in a case involving the NLRB, in language equally applicable to review of decisions made by the Commission, that

"Where the Board has disagreed with the ALJ, as occurred here, the standard of review with respect to substantiality of the evidence does not change." United Food & Commercial Workers v. NLRB, 768 F.2d 1463, 1469-70 (D.C. Cir. 1985) (citing, Universal Camera Corp. v. NLRB, 340 U.S. 474, 496, 95 L.Ed. 456 (1951); General Teamsters Local Union No. 174 v. NLRB, 723 F.2d 966, 971 (D.C. Cir. 1983)). Nevertheless, cases have made clear that "[t]he findings and decision of the [ALJ] form an important part of the 'record' on which [the] judgment of substantiality is to be based," International Brotherhood of Teamsters Local No. 310 v. NLRB, 587 F.2d 1176, 1180 (D.C. Cir. 1978), and that the Board, when it disagrees with the ALJ, must make clear its disagreement ... General Teamsters, supra, 723 F.2d at 971." Id. at 1470. (Alteration in the original). In the end, however, "[s]ince the Board is the agency entrusted by Congress with the responsibility for making findings under the statute," it is not precluded from reaching a result contrary to that of the [ALJ] when there is substantial evidence to support each result," and is "free to substitute its judgment for the [ALJ]'s." Carpenters Local 33 v. NLRB, 873 F.2d 316, 319 (D.C. Cir. 1989).

International Bro. of Elec. Workers, AFL-CIO v. NLRB, 215 F.3d 11, 14-15 (D.C. Cir. 2001).

Here the Commission fully explained its disagreement with the ALJ. and its decision, explained in great detail with extensive citations to hearing testimony, is both reasonable and

supported by substantial evidence in the record. See 16 FCC Rcd at 12087-94 ¶¶57-72 (JA 77-83). The ALJ had glossed over the critical question of intent, presumably because, as he observed in adding the misrepresentation issue, “[i]t’s mind-boggling how an applicant can represent that they have ‘reasonable assurance’ that a specific piece of property (with precise coordinates) is available when nothing, absolutely nothing, between the landowner and the applicant has been reduced to writing.” National Communications Industries, FCC 89M-1025 ¶6 & n.1. (Mar. 30, 1989) (JA 2). He found, based on Klemmer’s having investigated only one site just six days before the application was filed, that “[h]er feeble, half-hearted effort” provided absolutely no basis to certify and “she knew it.” 5 FCC Rcd at 2879 ¶8 (JA 24). But Klemmer’s lack of diligence in securing permission to use her desired site is not necessarily probative in itself of intentional deceit when making a certification to the FCC as to site availability. The critical issue is what Ms. Klemmer believed when she certified that the site was available. Even Orion acknowledges that Ms. Klemmer had only “minimal ... understanding of her rights and liabilities.” (Br. at 13-14).

The Commission also explained its disagreement with the ALJ as to the reliability of the landowner’s, Ms. Utter’s, written statements and her deposition, and their probity in establishing intentional deceit on the part of Ms. Klemmer. The ALJ gave particular weight to her statements that in any discussion of a lease she would have insisted on a commitment and that Klemmer knew about her lease with Orion in August 1987. 5 FCC Rcd at 2867 ¶¶46, 48-50 (JA 12). Viewed as a whole, the evidence from Utter reflects no clear memory of her August 1987 conversation with Klemmer and Warner. Her assertion that she would have required a commitment to secure a lease does not reflect what she actually recalls saying, but what she is sure she would have said. It is contradicted by her deposition stating she has no clear recollection of such a

discussion ever taking place. See 5 FCC Rcd at 2867 ¶45 (JA12). She also gave conflicting statements on very basic matters, such as whether she had ever met Klemmer, whether she recalled the meeting at all, and whether she was aware of Klemmer's plan to file an application. 16 FCC Rcd 12092 ¶69 (JA 82).

Warner was comfortable advising Klemmer she had reasonable assurance for a future lease based on their meeting. 16 FCC Rcd at 12088-89 ¶62 (JA 78-79). He understood from WCQS's attorney that a written agreement was not legally necessary for there to be reasonable assurance and his experience with Utter was that she had not required a written agreement or monetary compensation before she would allow WCQS employees to access their transmitter (located on adjacent property) through her land. Id.

The Commission addressed the conflict between Klemmer's and Warner's testimony on one hand, and the three statements and deposition of the landowner, Ms. Utter, on the other. Utter denied ever giving them assurance of the site's availability and is certain she advised them of her lease agreement with Orion. The landowner's written evidence reflected, at best, only a "very sketchy recollection," rather than comprehensive and coherent memory of the August 1987 meeting with Klemmer and Warner. 16 FCC Rcd at 12090-92 ¶¶66, 69 (JA 80, 82). Even crediting only the landowner's "vague memory" and disregarding altogether the contrary testimony of Liberty's witnesses, the Commission found no substantial evidence of intentional deceit. The landowner had variously denied that the meeting ever occurred, or recalled meeting Klemmer but being unaware of her intent to apply for the permit, or recalled meeting Klemmer and discussing the possibility of leasing a portion of her land for a transmitter site. Given these inconsistencies, the Commission saw no reason to give substantial weight to statements that

purported to provide detailed description of what was said or might have been said. Id. at 12092 ¶69 (JA 82).

The Commission was cognizant of the direct conflict between Utter's written evidence and the testimony of Liberty's witnesses and, "upon the record, reasonably resolved that issue on behalf of the applicant." WEBER v. FCC, 420 F.2d 158 (D.C. Cir. 1969). On the critical element of intent to deceive, Klemmer and Warner testified that they believed, after their August 1987 meeting with Utter, that she had agreed to lease a specific portion of the property for \$4000 per year with only the duration of the lease to be worked out. 16 FCC Rcd at 12088-89 ¶¶61-62 (JA 78). Their understanding was that Utter would be willing to enter into a written lease if Liberty got the construction permit. After the meeting, Klemmer certified the site would be available based on Warner's advice that she had reasonable assurance the site would be available. Warner based that advice on his experience in securing transmitter sites, his previous experience with Utter and his understanding that a written commitment was not required to confer reasonable assurance. 16 FCC Rcd at 12088-89 ¶62 (JA 78).

In crediting the testimony of Liberty's witnesses, the Commission carefully considered whether Warner's testimony could have been biased either because of his friendship with his neighbor, Ms. Klemmer, or because of any connection with Liberty.<sup>24</sup> Despite lengthy cross-examination and intense questioning from the ALJ, Warner repeatedly testified that he had no ownership or managerial interest in Liberty. 16 FCC Rcd at 12089 ¶64 (JA 79). Nothing in the record contradicts that claim. The Commission was skeptical that Warner, a career public

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<sup>24</sup> Klemmer and Warner were friends and neighbors. 16 FCC Rcd at 12087 ¶58 (JA 77). Warner testified that he had no interest in Liberty and was fairly committed to public broadcasting. Id. at 12089-90 ¶ 64 (JA 79).

broadcaster with no interest in Liberty, would have risked his managerial position at WCQS as well as his contractual relationship with Utter on which that station depended to access its transmitter, by perjuring himself on Liberty's behalf. Id. at ¶64 (JA 79).

Finally, the Commission explained its disagreement with the ALJ's as to the significance of Utter's written lease with Orion for a different portion of her property from that specified as Liberty's transmitter site. 16 FCC Rcd at 12092-93 ¶¶71-72 (JA 82-83). The Commission found that the lease, while arguably probative of whether Utter gave assurance that Liberty could use the specified site, was not relevant to the critical issue of intentional deceit unless Klemmer knew about the lease when she certified reasonable assurance of the site's availability. Id. at 12092-93 ¶71 (JA 82-83). But the Commission did not find substantial evidence of such knowledge. The landowner's vivid recollection of telling Warner and Klemmer about the Orion lease is at odds with her otherwise vague memory of the August 1987 encounter, and uncorroborated except for the hearsay testimony of Orion owner Brian Lee, who demanded that Utter explain Liberty's specification of a site on land already leased to Orion. Id. at 12091-93 ¶¶67-69, 72 (JA 81-83). Given Utter's vague memory of the August 1987 conversation and clear interest in assuring Orion that her dealings with Liberty were consistent with their lease agreement, the lease agreement did not provide substantial evidence that the certification was deliberately false.

Both Warner and Klemmer testified that they were not aware of the lease when the application was filed. 16 FCC Rcd at 12087, 12093 ¶¶59, 72 (JA 77, 83). Warner in particular was certain he would have remembered any mention of the lease because he was familiar with Brian Lee. It was "problematic" that Warner would be willing to testify falsely on Liberty's behalf, based solely on his personal friendship with Klemmer. He had no interest in Liberty. But perjury would have jeopardized his managerial position at WCQS and an ongoing

relationship with Utter which was critical to that station being able to access its site. Id. at 12089-90 ¶¶64 (JA 79-80). It was also “difficult to believe” Liberty would have falsely certified about a site so familiar to a competing applicant if Utter advised Klemmer of her written lease with Orion and then specifically relied on it to exact a similar commitment from Liberty. Id. at 12093-94 ¶¶72 (JA 84). In the absence of evidence that Klemmer was aware of the lease in August 1987 – and the Commission found no such evidence – its existence was irrelevant to whether the certification of reasonable assurance was deliberately false. See id.

This is far different from the situation presented in WHW Enterprises v. FCC, 753 F.2d 1132 (D.C.Cir. 1985), relied on extensively in both opposing briefs. There the Review Board, reversing the ALJ’s finding that the applicant lacked candor, was nonetheless “disquieted” by the applicant’s listing of an ownership of an asset with full knowledge he did not possess legal title. WHW Enterprises, Inc., 89 FCC 2d 799, 807 (Rev. Bd. 1982). This Court ultimately reversed the Review Board’s decision in the applicant’s favor. It held that the ALJ’s determination that a broadcast applicant lacked candor “[wa]s supported by both the record and the ALJ’s own credibility findings.” 753 F.2d at 1141. It was unmistakable that the ALJ in that case had made credibility findings based on his observation of the demeanor of testifying witnesses. In that case, the ALJ did not merely characterize the applicants’ arguments as “straining credulity.” Instead, he found that a witness’ “refusal to concede the real motive” evidenced “a serious lack of candor” and that “his demeanor . . . ‘was that of a person who, when faced with an embarrassing situation, persists in his claim despite its hollowness.’” Id. at 1139, citing, WHW Enterprises, Inc., 89 FCC 2d 821, 879 (ALJ 1981). Here the ALJ’s finding of misrepresentation plainly was not supported by substantial evidence, even if only the evidence from the non-

testifying landowner is considered. That alone distinguishes this case from WHW Enterprises v. FCC.

**CONCLUSION**

For the foregoing reasons, the Court should affirm the Commission's grant of a construction permit to Liberty Productions.

Respectfully submitted,

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May 30, 2002

UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

BILTMORE FOREST BROADCASTING FM, INC.,	)	
	)	
APPELLANT	)	
	)	
V.	)	
	)	
FEDERAL COMMUNICATIONS COMMISSION,	)	No. 01-1392
	)	
APPELLEE	)	
	)	
	)	
	)	
	)	

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying “Brief for Appellee” in the captioned case contains 13857 words.

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July 19, 2002