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Misrepresentation and the FCC

Brian C. Murchison*

INTRODUCTION

Virtually since the beginning of radio and television licensing, the Federal Communications Commission has encountered the problem of misinformation.¹ Whether adjudicating cases where a number of applicants compete for a valuable license, or investigating viewer complaints about an existing station, the Commission requires certain information from those appearing before it.² Crucial agency decisions often turn on such informa-

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1. See Note, *Broadcast License Revocation for Deception and Illegal Transfer*, 15 GEO. WASH. L. REV. 425 (1947); Brown, *Character and Candor Requirements for FCC Licensees*, 22 LAW & CONTEMP. PROBS. 644 (1957).

2. Even with deregulation in the 1980s, the FCC requires certain information from those seeking licenses or otherwise appearing before it. Applicants for radio and standard television licenses continue to compete for construction permits on the basis of established criteria, according to which they make representations to the FCC during the licensee selection process. Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 5 R.R.2d 1901 (1965). For the continued vitality of these criteria, see *Deregulation of Commercial Television*, — F.C.C.2d —, 56 R.R.2d 1005, 1021 (1984). Licensees operating in a “deregulated” environment must still maintain lists of public issues and responsive programming as part of their enduring “bedrock obligation” to serve the public interest. *Deregulation of Radio*, 84 F.C.C.2d 968, 49 R.R.2d 1, *clarified*, 87 F.C.C.2d 797, 50 R.R.2d 93 (1981), *aff’d in part sub nom. Office of Communication of United Church of Christ v. F.C.C.*, 707 F.2d 1414 (D.C. Cir. 1983); *Deregulation of Commercial Television*, *supra* at 1031. Groups seeking minority status in low power television lotteries must represent minority ownership interests. Amendment of the Commission’s Rules to Allow the Selection from Among Certain Competing Applications Using Random Selection on Lotteries Instead of Comparative Hearings, 93 F.C.C.2d 952, 966, 53 R.R.2d 1401, 1414 (1983). Licensees must provide information as to employees, positions held, and recruiting efforts in Equal Employment Opportunity reports. 47 C.F.R. § 73.2080; see also *Metropolex*

tion. When a person submits misstatements—deliberately, recklessly, negligently, or innocently—the effect is to diminish the agency's power to reach informed administrative decisions.³

And yet, while the FCC has often voiced this concern—that the integrity of its work depends on the objective accuracy of individual submissions⁴—the agency's central interest in this area has been something quite different. That interest has been the “character” of the individual, and whether the act of supplying the misinformation amounted to a “misrepresentation.”⁵

Specifically, the question has been whether the individual *intended to deceive* the agency.⁶ In the Commission's eyes, a showing of intent to deceive signals a strong possibility that the intentional deceiver cannot be relied upon to observe FCC rules in the future; an instance (or several) of defective character be-

Communications of Florida, 96 F.C.C.2d 1090, 55 R.R.2d 886 (1984) (designation of misrepresentation issue involving accuracy of EEO information). Licensees receiving FCC inquiries as to station operations and conformance with FCC rules must respond with the requested information. *See, e.g.,* Triad Broadcasting, Inc., 96 F.C.C.2d 1235, 55 R.R.2d 919 (1984) (forfeiture imposed for material misinformation in response to agency inquiry). This list is not exhaustive, but demonstrates the agency's ongoing need for specific information in order to carry out its mandate. As long as the FCC requires *some* information—some accountability—on the part of those it licenses, the phenomenon of misinformation will no doubt endure.

3. Sissela Bok makes the same point about intentional deceivers in her book, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 19 (1978), where she writes: “To the extent that knowledge gives power, to that extent do lies affect the distribution of power; they add to that of the liar, and diminish that of the deceived, altering his choices at different levels.”

4. *See, e.g.,* RKO General, Inc. v. F.C.C., 670 F.2d 215, 232 (D.C. Cir. 1981) (“The FCC has an affirmative obligation to license more than 10,000 radio and television stations in the public interest, each required to apply for renewal. . . . As a result the Commission must rely heavily on the completeness and accuracy of the submissions made to it, and its applicants in turn have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate.”); *Sea Island Broadcasting Corp.*, 60 F.C.C.2d 146, 37 R.R.2d 1235 (1976), *recon. denied*, 64 F.C.C.2d 721, 40 R.R.2d 1053 (1977), *aff'd sub nom.* *Sea Island Broadcasting Corp. v. F.C.C.*, 627 F.2d 240 (D.C. Cir. 1980); *Greenco, Inc.*, 39 F.C.C.2d 726, 732, 26 R.R.2d 1046, 1051 (1973). *See also* Sharp & Lively, *Can the Broadcaster in the Black Hat Ride Again? Good Character Requirement for Broadcast Licensees*, 32 FED. COM. L.J. 173, 183 n.40 (hereafter, “Sharp & Lively, *Good Character*”).

5. *See, e.g.,* WOKO, Inc., 10 F.C.C. 454 (1944), *rev'd sub nom.* WOKO, Inc. v. F.C.C., 153 F.2d 623 (D.C. Cir. 1946) *rev'd*, 329 U.S. 223 (1946); *Fox River Broadcasting, Inc.*, 93 F.C.C.2d 127, 53 R.R.2d 44 (1983).

6. *Lewel Broadcasting Co.*, 86 F.C.C.2d 896, 911-12, 49 R.R.2d 871, 884 (1981) (“. . . the failure to disqualify the applicant in a particular case turns on a conclusion that the evidence does not support a finding of deliberate misrepresentation”).

comes the basis for a prediction as to future performance.⁷ In a number of celebrated cases, the FCC has responded to a showing of intentional deception, or reckless disregard of the truth, by totally disqualifying the individual from the airwaves.⁸ Since 1946 the individual's "willingness to deceive"—rather than any other factor—has emerged as the essence of a misrepresentation case.⁹

In the ensuing years, the FCC has exhibited symptoms of an agency at war with itself in the area of misrepresentation. Since a finding of intent to deceive is linked to the sanction of disqualification, the FCC has shown an often paralyzing reluctance to find the requisite intent in any but the most flagrant, inescapable cases. Whether out of ambivalence about its mind-reading prowess, or a simple disinclination to disqualify a member of the industry from the licensing process, the agency strains to avoid a finding of intent to deceive. This hesitance has gone largely unnoticed—perhaps because attention has focused on those notorious cases where the evidence of intent to deceive was overwhelming, and the FCC indeed moved to disqualify.¹⁰ But in situations involving any ambiguity, the FCC shrinks away from drawing inferences, and, employing any of several modes of analysis, makes little of the alleged lies.¹¹

7. *Id.* at 912, 49 R.R.2d at 884 ("The critical question is whether we can rely on representations made by this licensee."). The FCC has recently shown dissatisfaction with inconsistencies in its cases involving character and has questioned whether there is indeed any "nexus between character and future license performance." Policy Regarding Character Qualifications in Broadcast Licensing, 87 F.C.C.2d 836, 841 (1981). See also Sharp & Lively, *Good Character*, *supra* note 4 (questioning FCC character policies and proposing a standard of competence).

8. See, e.g., WOKO, Inc., *supra* note 5; WMOZ, Inc., 36 F.C.C. 201 (1964); Nick J. Chaconas, 28 F.C.C.2d 231, 21 R.R.2d 576 (1971), *recon. denied*, 35 F.C.C.2d 698, 24 R.R.2d 811 (1972), *aff'd sub nom.* Chaconas v. F.C.C., 486 F.2d 1314 (D.C. Cir. 1973); Western Communications, Inc., 59 F.C.C.2d 1441, 37 R.R.2d 999 (1976), *aff'd* Las Vegas Valley Broadcasting Co. v. F.C.C., 589 F.2d 594 (D.C. Cir. 1978), *cert. denied* 441 U.S. 931 (1979).

9. F.C.C. v. WOKO, Inc., 329 U.S. 223, 226-227 (1946).

10. See Abel, Clift and Weiss, *Station License Revocations and Denials of Renewals, 1934-1969*, 14 J. BROADCASTING 411 (1970); Weiss, Ostroff and Clift, *Station License Revocations and Denials of Renewal, 1970-78*, 24 J. BROADCASTING 69 (1980); Tallin, *The RKO Case: Unique Facts with Extraordinary Circumstances*, 35 FED. COM. L.J. 275 (1983); Note, *The Struggle to Define Character in FCC License Renewal Decisions: RKO General, Inc.*, 22 B.C.L. REV. 409 (1981).

11. Twenty years ago, Professor Jaffe noted that "much of [the FCC's] policy is vague and ineffectual. It has thundered and threatened much more than it has regu-

As discussed herein, the FCC's various ways of avoiding a finding of intent to deceive are certainly not new. But the current FCC is following these traditions without question or pause. Moreover, today's FCC has recently increased the burden which a party must shoulder in requesting that the Commission designate a misrepresentation for hearing.¹² Although the FCC defends that heightened burden as necessary to deter frivolous charges, the standard seems destined to block meritorious claims as well.

This possibility is particularly troubling in an era of unprecedented deregulation. As the FCC's Review Board has pointed out, the agency "more so now than ever" must depend on the "absolute candor of the applicants . . . because our license application forms rely increasingly on bare representations and less on documentation."¹³ The FCC Chairman himself, advocating a "marketplace approach" to regulation, has stated that even in the "unregulated" environment which he envisions, "[l]ying or other malfeasance toward the Commission . . . would be among the few bases on which the Commission would be likely to strip a licensee of its exclusivity."¹⁴ Despite these acknowledgements of the importance of accurate information, especially in the streamlined 1980s, the Commission remains wedded to a highly pliable standard—the intent test—which may do little to discourage deceivers, and to precedents which appear to condone some dishonesty.

lated." Jaffe, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 48 (1965). See also Sharp & Lively, *Good Character*, *supra* note 4, at 200: "Where a penalty is absolute, there is often a tendency for the deciding body to overlook minor infractions which seem unworthy of the ultimate penalty. This course of action undermines the agency's credibility. It tells regulatees that the FCC talks a tough line on misrepresentation, but does not back it up with action. It also encourages broadcasters who successfully engage in minor deceptions to continue that practice with impunity." While Sharp & Lively note the problem, they acknowledge only that "minor deceptions" may go unheeded—a premise challenged by this Article. Moreover, they seem to have no trouble with the intent standard as a way of dealing with misinformation, *id.*, at 183-84, n.40, whereas this Article identifies that standard as the heart of a number of problems.

12. *Riverside Broadcasting Co., Inc.*, — F.C.C.2d —, 53 R.R.2d 1154 (1983), *aff'd*, — F.C.C.2d —, 56 R.R.2d 618 (1984).

13. *Superior Broadcasting of California*, 94 F.C.C.2d 904, 909, 54 R.R.2d 773, 776-77 (1983).

14. Fowler and Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 *TEX. L. REV.* 207, 247 (1982).

This Article will explore the offense of misrepresentation before the FCC from the standpoint of its dubious cornerstone—intent to deceive. It will trace the emergence of that element and its probable ineffectiveness to further the agency's stated policies. The Article will then discuss the intent test in practice, suggesting that in cases where the FCC has disqualified parties for lying, the test has been superfluous, and in cases where the FCC has cleared parties of lying, the test has dissolved with some frequency into confusion and contradiction in long, expensive administrative hearings and appeals. The Article will then note recent agency action which seems to solidify the traditional approach and to make allegations of misrepresentation all the more difficult to prove. It concludes that the FCC is an agency moving in two different directions: on the one hand, stating a strong policy requiring accuracy and threatening a potent sanction for offenders; on the other hand, developing a definition of liability which allows maximum discretion for appraising individual cases, so that the decision-makers may avoid imposing the sanction. As a result, if the intent test is retained in this era of deregulation, industry may soon decide that telling certain lies to the FCC is, "more so now than ever," an acceptable risk to take.

I. THE DOCTRINE OF INTENT: EARLY THEMES

From the birth of the Commission in 1934 to 1939, the FCC was relatively tolerant of licensee misconduct, and renewed licenses even after finding considerable rule violations.¹⁵ With the broadcast industry in its infancy, the agency "seems to have regarded a poor station as better than no station at all," and was "reluctant to deprive a community of its only radio broadcast station."¹⁶ By 1940, the Commission evinced a tougher policy on rule violations;¹⁷ the central question was the choice of penalties. Accordingly, in the earliest misrepresentation decisions, the FCC's central concern was the selection of appropriate sanctions for the particular misstatements at hand—not to delineate the offense and all its elements. Still, these early cases show the Commission's concept of misrepresentation taking form, with al-

15. Note, *supra* note 1, 15 GEO. WASH. L. REV. at 442.

16. *Id.*

17. *Id.* at 443.

lusions to the role of intent and to the policies underlying the regulatory interest in accurate information.

The 1940 case of *WSAL*¹⁸ involved the FCC's power under the Communications Act to revoke a license. Section 312(a) of the Communications Act, as then written, authorized the Commission to revoke "for false statements" made in applications or other statements of fact required by the agency.¹⁹ Finding that existing station *WSAL* had misstated its capital by some 85% in its application two years before, the FCC stripped *WSAL* of its license for "false and fraudulent statements and representations."²⁰

The case was an important assertion of the FCC's power to revoke. A secondary—and tantalizing—aspect of the opinion is its fitful discussion of "fraudulence." While the FCC, in calling the statements "fraudulent," indicated a belief that *WSAL*'s statements had been intentionally false, the opinion nowhere stated that "intent to deceive" was *necessary* for revocation. Moreover, in an order appended to the *WSAL* opinion, the FCC "modified" its findings of fact to note that the licensee had been "entirely unfamiliar with the procedure and requirements of the Commission," and that he "lacked full knowledge of the true impact of the information supplied the Commission."²¹ Nonetheless, the FCC affirmed the revocation—in effect, deciding that the licensee deserved to lose his license, regardless of mental

18. *WSAL*, 8 F.C.C. 34 (1940). For a brief discussion of *WSAL*, *Mayflower Broadcasting Corp.*, 8 F.C.C. 333 (1940), and *Navarro Broadcasting Association*, 8 F.C.C. 198 (1940), not in terms of my subject—the intent standard—but in terms of the FCC's balancing of considerations in assessing character, see *Sharp & Lively, Good Character*, 32 FED. COM. L.J. at 181-83.

19. 47 U.S.C. § 312(a)(1). As it originally appeared in the Communications Act of 1934, Section 312 granted "to the Commission the authority to revoke station licenses on certain grounds specified therein, without regard to whether the prohibited acts are willfully, knowingly, or repeatedly committed." H.R. REP. NO. 1750, 82d Cong., 2d Sess., *reprinted in* 1952 U.S. CODE CONG. & AD. NEWS 2234, 2246. Revocation was thus allowable for "violations ranging from the most serious to the least minor and affecting those who may innocently violate regulations of the Commission on technical matters." S. REP. NO. 44, 82d Cong., 2d Sess. —, *reprinted in* P & F RADIO REGS. Current Service 10:282. Section 312 was amended in 1982 to provide for license revocation for misstatements only when knowingly made. Congress' concern was to retain revocation for serious offenses, including willful misstatements, and to provide for lesser sanctions for "minor or less serious violations." *Id.*

20. 8 F.C.C. at 34, 37.

21. *Id.* at 38.

state. For a brief moment, at least, the Commission appeared willing to disqualify a broadcaster despite lack of clear intent to deceive, and without a definite conclusion as to the broadcaster's future reliability to observe FCC rules.

A second 1940 case, *Mayflower Broadcasting Corporation*,²² involved not a revocation proceeding under Section 312(a), but a charge of lying raised during the licensing process. The applicant claimed that its stock was issued and outstanding and that it had a certain amount of cash; in fact, the stock had not been issued and the applicant held only demand notes.²³ The FCC apparently believed that Mayflower's deception was intentional, but, again, the opinion does not make intent a necessary element. The case is important for the two policy grounds identified by the FCC as justifying Mayflower's disqualification: (1) its conduct impeded "the progress of the Commission in carrying out its mandate"; and (2) it could not be "entrusted with the burdens imposed by a broadcast license."²⁴ These policies underlie misrepresentation cases even today: the agency's interest in fully-informed decision-making and smooth functioning of the administrative process; and the interest in granting licenses only to those of reliable character.²⁵

A third key case from 1940 is *Navarro Broadcasting Association*,²⁶ where the FCC unaccountably shrank from the strict penalty of *WSAL* and *Mayflower*. In a revocation hearing involving intentional misrepresentations, the FCC accepted the argument it had rejected in *WSAL*—that the licensee was now "ready to act in good faith," and could be "trusted with the public responsibilities" of a broadcast license.²⁷ This decision is "impossible to reconcile" with the others,²⁸ and the Commission did not even try.

Thus, although clear-cut statements on the effects of misrepresentation or the role of intent had yet to emerge, the FCC's willingness to disqualify at least some of the time was clear, forcing defense lawyers to stop arguing against the legitimacy of dis-

22. 8 F.C.C. at 333.

23. *Id.* at 335.

24. *Id.* at 338.

25. See *RKO General v. F.C.C.*, *supra* note 4.

26. 8 F.C.C. 198 (1940).

27. *Id.* at 199, 200.

28. See Note, *supra* note 1, at 443.

qualification as a sanction *per se*. They had to find a new strategy to save their clients' licenses in misrepresentation cases, and they may have sensed that the FCC would grow dissatisfied with the vagueness and minimal deterrent value of the "ready-to-act-in-good-faith" formula of *Navarro*. The new strategy quickly emerged: first, to argue that a necessary element of misrepresentation was intent to deceive; and, second, to say that the applicant or licensee at hand had no such intent.

In the 1942 case of *Panama City Broadcasting Co.*,²⁹ that argument was almost unbelievably successful. There, an entrepreneur-lawyer of varied business interests, John H. Perry, allowed a front group to apply for a station without revealing to the FCC that Perry was the real party in interest. Perry was not a local resident of the proposed community of license and had connections with the local newspaper. His lawyer considered these factors to be drawbacks to his broadcast application, advised Perry to conceal his involvement in the application until the FCC granted the license, and Perry agreed.

When the FCC learned of the scheme after granting the license, it began revocation proceedings, ultimately finding that it had been "grossly misled" and calling the deception "deliberate and not innocent."³⁰ But the FCC faulted Perry's agents, not Perry; to the FCC, Perry's flaw was simply his "bad judgment" in selecting associates.³¹ Unlike the intentional deceivers in *Navarro*, Perry demonstrated no "personal fault" in the eyes of the FCC.³² And although the FCC had disqualified WSAL's hapless principal in a similar set of circumstances, the FCC spared Perry as a man who had "intended to make the application in his own name," but who had been misadvised to conceal his interest.³³ *Respondeat superior* was but a "technical rule of law" having no place in FCC licensing.³⁴ Perry's success was thus in convincing the agency that intent to deceive was the key element of the offense, that the knowledge and intentions of his

29. 9 F.C.C. 208 (1942).

30. *Id.* at 215.

31. *Id.* at 216.

32. *Id.*

33. *Id.* at 216-17.

34. *Id.* at 216.

agents were not imputable to him, and that his own state of mind fell considerably short of the requisite intent.

Still, there were voices on the Commission favoring the strict approach found in *WSAL*—that presence or absence of intent to deceive should not be determinative. Three of the seven Commissioners dissented in *Panama City*, urging that even if Perry's omissions were due to "bad judgment," he should be disqualified.³⁵ Negligence in selecting agents and supplying misinformation should be enough; otherwise, to allow Perry to keep his license "would be to reward him for his own bad judgment."³⁶ At stake was the FCC's fundamental interest in obtaining accurate information from those it regulates, regardless of the party's state of mind: "The issues involved in this proceeding directly affect the integrity of the proceedings before the Commission, and, indeed, of the administrative process."³⁷

Panama City is a central case for a number of reasons. First, it effectively established intent to deceive as the cornerstone of misrepresentation. Ironically, the intent test explicitly emerged in a case where it became the basis for *clearing* an individual of the charge. Second, the opinions in *Panama City* made different uses of the policies underlying the FCC's approach to misrepresentation. The majority, in clearing Perry, found no "personal fault," thus emphasizing only the "character" policy of *Mayflower*.³⁸ The dissent, however, addressed both *Mayflower* policies: that the misstatements, regardless of intent, snarled and abused the administrative process, and that even "bad judgment" related to character.³⁹

A final observation is that the FCC had three options in *Panama City*: it could have (a) disqualified Perry altogether, an approach consistent with *WSAL*; (b) acknowledged that Perry lied and absolved him—an approach which would have diluted the impact of *WSAL* and *Mayflower*; or (c) distanced Perry from the misinformation by characterizing his participation as merely negligent. The Commission's choice of the third option makes for a particularly unpersuasive opinion. The Commission appar-

35. *Id.* at 219-22.

36. *Id.* at 220.

37. *Id.* at 222.

38. 8 F.C.C. at 338.

39. 9 F.C.C. at 220-22.

ently sought to have it both ways: to spare the particular liar and yet continue to voice a strong deterrent policy against lying. The perfect vehicle for those conflicting goals was the intent test; with it, the FCC could continue to condemn lying in general, while at the same time reserve flexibility to characterize Perry's mental state as something other than intentional and thus the misstatement at hand as something other than a lie.

A fifth case in the 1940s introduced other key elements in the agency's developing approach to misrepresentation. In *WOKO, Inc.*,⁴⁰ the FCC denied a renewal application on the ground that the licensee had filed annual reports for twelve years concealing the identity of the beneficial owner of a 24% interest in the licensee's stock. Claiming that it had not intended to deceive the agency, the licensee said it lacked "definite information concerning the identity" of the 24% owner who was listed in the corporate records under another name.⁴¹ The FCC brushed aside the argument. First, there was motive: the 24% owner was a CBS network official who sought to conceal his interest because WOKO was seeking network affiliation through his office and disclosure would be "embarrassing" to him professionally.⁴² Second, there was documentation: stock certificates and a series of incriminating letters established a long course of deception.⁴³ The FCC had no trouble denying renewal on the basis of clear-cut intent to deceive.

In the Court of Appeals,⁴⁴ WOKO argued that the misinformation was immaterial; that the agency had not relied on the misinformation in granting previous renewals; and that the sanction was a "radical" departure from cases like *Navarro* where the FCC had balanced the licensee's past record with the instance of misrepresentation. In *WOKO*, the FCC had refused to conduct such a balancing test. Convinced on all three points, the Court of Appeals overturned the nonrenewal as arbitrary and capricious agency action.

The Supreme Court reversed the Court of Appeals:

It is said that in this case the Commission failed to find that the

40. *Supra* note 5.

41. 10 F.C.C. at 464.

42. *Id.* at 461.

43. *Id.* at 465-66.

44. *WOKO, Inc. v. F.C.C.*, 153 F.2d 623 (D.C. Cir. 1946).

concealment was of material facts or had influenced the Commission in making any decision, or that it would have acted differently had it known that the [24% owners] were beneficial owners of the stock. We think this is beside the point. The fact of concealment may be more significant than the facts concealed. *The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones.*⁴⁵

Here, the Court contributed mightily to a definition of misrepresentation before the FCC. After *WOKO*, the misinformation need not be material; the agency need not have relied on the information; indeed, the deceiving party's primary purpose need not be to deceive the FCC, for the licensee in *WOKO* sought chiefly to delude CBS through nondisclosure in public documents. *WOKO*'s misrepresentation had thus been a function of two elements: the submission of erroneous information, coupled with a "willingness to deceive." On the basis of these elements, the Court upheld the FCC's discretion to remove a license despite a positive past record. *WOKO* thus came to stand for the legality of the harshest of measures for any intended deception.

Yet there was an additional comment in the Supreme Court's *WOKO* opinion that has been fairly ignored: "A denial of an application for a license because of the *insufficiency* or deliberate falsity of the information lawfully required to be furnished is not a penal measure."⁴⁶ What is this "insufficiency" which the Court mentions in the disjunctive with "deliberate falsity"? One commentator reads this as "the knowing submission of insufficient information,"⁴⁷ but that reading requires the insertion of scienter, an element which the Court itself left out. The Court instead may be suggesting that insufficiency—knowing or unknowing—could be a legitimate concern of the FCC and could warrant nonrenewal. Under this view, intent to deceive may not always be necessary. And yet since *WOKO* involved a clear case of intentional deception, the Court dwelt no further on the tantalizing idea of "insufficiency" as possibly justifying nonrenewal along with "deliberate falsity."

Thus, the key element in the developing definition of misrepresentation was intent to deceive. And in the late 1940's,

45. *F.C.C. v. WOKO, Inc.*, 329 U.S. 223, 226-27 (1946) (emphasis added).

46. *Id.* at 228.

47. Byrne, *RKO General: Some Lessons To Be Learned*, 27 ST. LOUIS U.L.J. 145, 148 (1983).

communications lawyers were brilliantly successful in arguing that their clients' significant misstatements or omissions were not intentional. An applicant's claim of local residence, while "inaccurate and on a material point" was excused as "an error in judgment rather than of intent to deceive."⁴⁸ Failure to disclose a 49% interest in another station, while clearly a material omission, was deemed a "misunderstanding."⁴⁹ The FCC also excused misstatements where the presence of intent to deceive was a "close question," but the evidence was ultimately "inconclusive."⁵⁰

The FCC may well have been correct in these individual cases in declining to find intent to deceive; the correctness of the factual findings is not worth debating now. The question is whether the intent test itself made sense even as it emerged in the early history of the FCC. As noted, the *Mayflower* case identified two policies underlying the insistence on accuracy: first, the FCC's need as a regulatory agency to be fully informed as it carries out its statutory mandate; and second, the public interest in licensing individuals of desirable "character" to a scarce public resource. Does the intent test "fit" these policies? Arguably not. The first policy is simply a demand for accurate information. The intent test promotes this policy only insofar as it allows the FCC to make a rough estimate as to whether an individual will misinform the agency in the future, on the theory that one who intends to misinform today is likely to do the same tomorrow, and thus is likely to impede the administrative process and to promote inferior decision-making. But all this could also be said of one who does not intend to misinform but who nevertheless negligently misinforms the FCC. If he is negligent once, he may be negligent again, with the same result: impeded processes and inferior decisions. The intent test thus winnows

48. *Air Waves, Inc.*, 11 F.C.C. 184, 190 (1946). There the principal of a competing applicant identified his domicile and home address as Baton Rouge, the proposed community of license. In reality, he had lived in New Orleans for ten years; by identifying a relative's address in Baton Rouge as his domicile, he would obtain comparative credit for local residence. After acknowledging the "necessity of determining [the] intent" behind such misinformation, the FCC ruled in the principal's favor. The FCC did not elaborate on how it reached this decision, except to say that "on consideration of all the factors involved, we are inclined to [this] view. . . ." *Id.* at 190.

49. *Charleston Broadcasting Co.*, 12 F.C.C. 438, 442 (1947).

50. *The Northern Corporation*, 15 F.C.C. 60, 82-83 (1950).

out too few to be an adequate vehicle for furthering the first policy.

As for the second—the “character” interest—it may well be legitimate to probe the mental state of a licensee to ensure that only worthy public servants are occupying the airwaves. And yet the question could be asked: how is a merely negligent supplier of misinformation better suited for an FCC license than one who intends to deceive? The “character” of both is arguably deficient, especially if the misinformation is material.

Thus, the test fashioned in the 1940s may have been insufficient from the start to serve its underlying policies. A stricter test would have been more consistent—a test along the lines of the *WSAL* case or the dictum on “insufficiency” in *WOKO*. Because of its need for accurate information, the Commission might have penalized those submitting material misinformation either through disqualification or a steep, preordained monetary forfeiture. State of mind should not have been a factor because of its tenuous connection to the underlying policies. An objective requirement that all assertions made to the FCC be accurate would have promoted more accurate information and greater responsibility on the part of those appearing before the Commission.

But in focusing on intent, the FCC clearly chose another path. Perhaps the FCC was harkening back to common law fraud with its element of willful deception.⁵¹ Or perhaps the agency’s sense was that mental state was a worthwhile framework, especially in the early years when government regulations and procedures were still new and unfamiliar to industry. Or perhaps the FCC felt that “character” under Section 308 of the Act involved a measure of purposefulness rather than of negligence or “bad judgment.” Whatever the impulse, the test as developed in the 1940s survives intact today.

II. THE INTENT STANDARD IN PRACTICE

a. *The “Easy” Cases*

Since the 1940s, the intent standard has survived almost unquestioned. The lack of criticism—whether from within the

51. See generally Keeton, *Fraud: The Necessity for an Intent to Deceive*, 5 U.C.L.A. L. REV. 583 (1958).

agency, from the communications bar, or from citizen groups—is surely one reason for its long life. As noted, an inquiry based on mental state gives the agency flexibility. It affords defense lawyers room to argue the circumstances of each case so that there are virtually no “precedents” which can command a certain result. Citizen groups alleging misrepresentation plainly do not benefit from the standard, but seem not to have specified the standard itself as a problem—only the agency’s reluctance in ambiguous cases to draw inferences and to make a finding of intentional deception.⁵²

The test’s longevity may also stem from the fact that, in a number of celebrated cases where the circumstantial evidence of intent to deceive was overwhelming, the Commission moved decisively to disqualify on that basis, and the outcome seemed fair. Cases such as *WMOZ, Inc.*,⁵³ *Nick J. Chaconas*,⁵⁴ *Western Communications, Inc.*,⁵⁵ and *RKO General, Inc.*,⁵⁶ gave legitimacy to the intent test because, in each, culpable intent was dramatically apparent and the FCC’s question—whether the broadcaster intended to deceive—seemed an acceptable one for the agency to be asking.

In the notorious case of *WMOZ, Inc.*, the FCC sought to discover whether a licensee had filed accurate program logs with its renewal application. The evidence was inescapable that the station’s principal had, in fact, forged the logs to reflect inflated amounts of public affairs and news programming.⁵⁷ The FCC was able to compare one of the forged logs with the original in the station’s files; the FCC also learned that the applicant’s principal had supervised the preparation of the new logs, even to the point of using forged signatures and initials of a deceased an-

52. See, e.g., *Riverside Broadcasting Co., Inc.*, — F.C.C.2d —, 53 R.R.2d 1154 (1983), *aff’d*, — F.C.C.2d —, 56 R.R.2d 618 (1984).

53. 36 F.C.C. 201, 1 R.R.2d 801 (1964).

54. 28 F.C.C.2d 231, 21 R.R.2d 576 (1971), *recon. denied*, 35 F.C.C.2d 699, 24 R.R.2d 811 (1972), *aff’d sub nom.* *Chaconas v. F.C.C.*, 486 F.2d 1314 (D.C. Cir. 1973).

55. 59 F.C.C.2d 1441, 37 R.R.2d 999 (1976), *aff’d sub nom.* *Las Vegas Valley Broadcasting Co. v. F.C.C.*, 589 F.2d 594 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 931 (1979).

56. 78 F.C.C.2d 1, 47 R.R.2d 921 (1980), *aff’d in part, rev’d in part, sub nom.* *RKO General, Inc. v. F.C.C.*, 670 F.2d 215 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982).

57. *Supra* note 53 at 212-13, 1 R.R.2d at 820-21.

nouncer.⁵⁸ This evidence was part of “a record of attempted fraud and deception virtually without equal in Commission history,” and was easily sufficient to discredit the principal’s convoluted defense (that he had been framed by a young assistant and a rebellious staff).⁵⁹ The FCC had no trouble concluding that the applicant lacked “the requisite character qualifications to be a licensee of this agency.”⁶⁰

Similarly, in *Nick J. Chaconas*, the licensee had falsified operating logs. The FCC’s task of identifying culpable intent was none too difficult; the agency had on hand both an FCC investigator’s photocopy of the original logs as well as the licensee’s own logs as subsequently altered. From this evidence, the FCC concluded that Chaconas had lied to the agency “to escape embarrassing inquiry,”⁶¹ and that, like the *WMOZ* principal, he lacked “the basic character qualifications to remain a licensee.”⁶²

Western Communications, Inc. involved a network affiliate engaged in clipping—the deletion of portions of the network feed without reporting such deletions to the network.⁶³ In effect, Western was overscheduling local commercials and thus interrupting network programs and commercials. When the FCC sent four inquiries to the licensee based on viewer complaints, Western denied its practices each time in letters sent to the Commission.⁶⁴ The FCC stripped Western of its license. The Commission stated that Western’s clipping and repeated denials each constituted independent grounds for disqualification.⁶⁵

The circumstantial evidence in the case showed conclusively that the four letters were intended to deceive the FCC. The FCC merely compared Western’s assertions with the network’s own records on the length of time legitimately available for local commercials. These discrepancies evinced a station policy of “protracted and flagrant” clipping;⁶⁶ the four letters were thus seen as “clearly designed to conceal” Western’s opera-

58. 36 F.C.C. at 239, 1 R.R.2d at 851.

59. *Id.* at 238, 220, 1 R.R.2d at 849, 830.

60. *Id.* at 239, 1 R.R.2d at 851.

61. *Supra* note 54, 28 F.C.C.2d at 234-35, 21 R.R.2d at 579.

62. *Id.*

63. *Supra* note 55, 59 F.C.C.2d at 1442, 37 R.R.2d at 1002.

64. *Id.* at 1446-49, 37 R.R.2d at 1006-09.

65. *Id.* at 1445, 1447, 37 R.R.2d at 1005, 1007.

66. *Id.* at 1445, 37 R.R.2d at 1005.

tions and policies.⁶⁷ Of particular interest in the case was the FCC's statement that even one of the four Western letters, "standing alone, would be sufficient grounds for the denial of Western's renewal application."⁶⁸ Thus, in accord with the discussion in *WOKO* years before, the FCC stressed that a single instance of "willingness to deceive" could trigger the maximum penalty.

A fourth example is *RKO General, Inc.*, where the FCC, in a highly controversial 4-3 decision, ruled *inter alia* that RKO lacked candor during renewal proceedings.⁶⁹ This conduct constituted an independent justification for the agency's sanction: nonrenewal of RKO's three multi-million dollar VHF television licenses. RKO had withheld material information concerning an SEC probe of the licensee's parent company. Moreover, when a competing applicant argued before the agency that RKO had violated its duty to disclose the SEC inquiry, RKO affirmatively denied the validity of the competing applicant's charges. The FCC—and later the Court of Appeals⁷⁰—found that in all this, RKO lacked candor: the court called this conclusion "uncontraverted and uncontestable" based as it was on a comparison between "what RKO said in its earlier pleadings—and what it did not say—with RKO's subsequent admissions. . . ."⁷¹

With *WOKO*, these are four of the most oft-cited cases for the proposition that willful deception of the FCC is forbidden and that disqualification is the sanction. But these are relatively "easy" cases. They involve misstatements in documents which the agency could compare with other, directly related documents in order to reach a decision. And the misstatements were material: they concealed station practices to obtain license renewal or to prevent agency sanctions. In each, the circumstantial evidence of intentional deception was unavoidable. And so, the agency did not appear at all unreasonable in taking action on the basis of mental state.

Indeed, the "intent to deceive" standard in these cases was hardly necessary. The Commission could have assessed each

67. *Id.* at 1449, 37 R.R.2d at 1009.

68. *Id.* at 1447, 37 R.R.2d at 1007.

69. *Supra* note 55, 78 F.C.C.2d at 92-104, 47 R.R.2d at 994-1003.

70. 670 F.2d at 228-36.

71. *Id.* at 234.

case not in the framework of intent, but in terms of the regulator's need for accurate information. Regardless of the mental state of the principals of WMOZ, Western Communications, RKO, or Nick Chaconas, the FCC could have ruled to disqualify on the basis of the materiality of the misinformation it had received. The act of submitting such patently erroneous documents could have been viewed as an unacceptable interference with the administrative process. If such misstatements had gone undetected, the FCC likely would have made one decision, (*i.e.*, grant of a renewal application) rather than another (grant of the spectrum space to someone else). The framework of intent in such cases was therefore not required.

b. The "Harder" Cases

For a large number of other cases, the FCC did not have the conclusive circumstantial evidence of intent seen in *WMOZ*, *Nick J. Chaconas*, *Western*, and *RKO*. Thus, it was not possible merely to compare one set of logs, records or pleadings with another, and draw the none-too-difficult inference of culpable mental state from significant discrepancies or alterations. The "harder" cases involve some—although not always a great deal of—ambiguity. It is here that the FCC would be expected to develop a thoughtful approach to intent—to work out factors to be considered in each case, or to suggest inferences to be drawn in situations lacking conclusive documentary evidence.⁷² But

72. The FCC might have looked to the tort of misrepresentation and the common law cases involving deception in commercial relations. In the English case of *Derry v. Peek*, 14 App. Cas. 337 (1889), the House of Lords ruled that a plaintiff who purchased stock in reliance on a false prospectus had the task of establishing intent to deceive on the part of the defendant directors. Lord Herschell stated a test similar to the standard the FCC would one day adopt, that intent to deceive is established "when it is shown that a false representation has been made (1) knowingly; or (2) without belief in its truth; or (3) recklessly, careless of whether it be true or false." 14 App. Cas. 337, 374 (1889). Thus, a defendant would escape liability on a showing that he entertained an "honest belief" in the truth of his misstatements.

As Professor Leon Green has written, Lord Herschell's was a "forbidding formula," placing a heavy burden on the plaintiff and according relief to a defendant on the basis of belief. Green, *The Communicative Torts*, 54 TEX. L. REV. 1, 29 (1975). In Green's estimate, the formula "did not discourage the deceiver. In fact, his deceptions became more difficult to prove, and their penalties more readily avoided." *Id.* at 27. Courts then began to enlarge the concept of deceptive intent to include situations where the speaker, although honestly believing his statements, "consciously realized that the information upon which he was relying was insufficient to be convincing."

the FCC's decisions drift on a sea of subjectivity; ambiguity becomes exculpatory. In many of these "harder cases," the Commission adopts one of at least four modes of analysis. Useful labels for these modes are: (a) psychoanalytic; (b) literalist; (c) "administrative feel"; and (d) "human frailty." Each enables the decision-maker to avoid the imposition of the ultimate sanction. The argument here presented is not that the FCC wrongfully cleared the particular individuals in these cases, but simply that the "[agency] has allowed its concern over a remedy to infect its analysis of liability."⁷³

Keeton, *supra* note 51 at 589. In the language of one court "[A] party who is aware that he has only an opinion and represents that opinion as knowledge, does not believe his representation to be true." *Cabot v. Christie*, 42 Vt. 121, 126 (1869), cited in Keeton, *supra*, at 591.

A next step taken by some courts was to infer intentional deception when a speaker misstated facts that were susceptible of knowledge but which the speaker carelessly omitted to discover: ". . . if a person makes a statement that a thing that is susceptible of knowledge is true, it is implied that he knows it to be true of his own knowledge, and if he has no such knowledge, he is guilty of actual fraud." *National Bank v. Hamilton*, 202 Ill. App. 516, 521 (1916), cited in Green, *supra*, at 28 n.87. Here the borderline between intentional deception and negligent misrepresentation obviously blurred, with courts "either declaring outright that the fault is equally great and the reliance of the plaintiff equally justified, or adopting the rather obvious fiction that duty to learn the facts or not to speak without knowing them is the full equivalent of knowledge." PROSSER, *LAW OF TORTS* 705 (1971).

Courts also had at their disposal the notion of "innocent misrepresentation." For example, on a showing of mutual mistake between parties to a contract, courts could decree rescission of the transaction and restoration of the status quo. *Id.* at 710. The elimination of the intent standard, according to Professor Green, "made the equitable remedy of rescission more acceptable to the cheater, but it also saved the victim the expense and difficulties of making proof" of intent to deceive. Green, *supra*, at 28.

Professor Green compared these developments to the "erosions of all formulas when subjected to litigation in many courts over many years." *Id.* at 29. As he wrote: "This is not the first time that a rule of law too arbitrary and difficult to administer has been flattened out by a stout fiction until it could be replaced by rules of substantive flexibility more responsive to the duty imposed over a wide range of tortious transactions." *Id.* And in the view of Professor Keeton, the common law saw benefits in departing from the *Derry v. Peek* formulation, "since it would be monstrous to require direct proof or something in the nature of an admission of bad faith." Keeton, *supra*, at 584.

The FCC has moved differently. It did not take an ever-expanding view of intent to deceive; having established disqualification as to sanction, the Commission was loath to employ that sanction regularly. Requiring "direct proof" of intent to deceive was not considered "monstrous" when so much was at stake.

73. *Sony Corp. of America v. Universal City Studios*, 104 S. Ct. 774, 818 (1984) (Blackmun, J., dissenting), *reh'g denied*, 104 S. Ct. 1619 (1984). The author of this Article participated in representing the broadcaster before the Review Board in *Gross Telecasting, Inc.*, discussed *infra*. As stated, I am not commenting on the merits of

1. The “Psychoanalytic” Mode

A leading case in the “psychoanalytic” mode is the 1970 decision in *Greco, Inc.*⁷⁴ The question was whether Cook, whose station’s renewal application was pending, had lied in a hearing before an Administrative Law Judge (“ALJ”); the direct testimony of three other witnesses at the hearing had contradicted Cook’s testimony.⁷⁵ The ALJ ruled that Cook had indeed lied, and denied his renewal. The FCC reversed, without discussing any of the particulars of Cook’s testimony, without referring to demeanor findings, without considering possible motive, and without mentioning the deference, if any, that should be accorded the ALJ’s unqualified conclusions. Instead, the FCC stressed “the drastic consequences of an adverse ruling (*i.e.*, disqualification)” and “the difficulty of remembering fully conversations that occurred three to five years before the testimony.”⁷⁶ The FCC rejected the view of Cook’s testimony as “deliberate lying (perjury),” but characterized it as:

[A] faulty shading of recollection—an attempt to recall long past conversations where the consequences may have unconsciously influenced Cook’s reflection in a manner favorable to himself.

. . . We think that this effort—perhaps understandable human nature in the circumstances and reflecting adversely on Cook—cannot be said to be deliberate falsehood (or perjury), with the degree of certainty that we believe is reasonably called for with respect to a finding of this nature. We stress that our holding is based on the particular facts of this case, and does not represent in any way a retreat from the important policy of *WOKO* that we cannot temporize with deliberate deception of the Commission. No matter how unblemished the reputation of the principal in the community no one is allowed “one bite” at the apple of deceit. We believe that by this time the message has been received by broadcast licensees that a station can get into greater and indeed the most difficulty by a course of deception or lack of candor when an issue is raised.⁷⁷

This key passage in the history of misrepresentation before the FCC provided new flexibility in treating such cases. The FCC first identified a mental state short of intent to deceive: “faulty

that or any other case, but only on the Commission’s questionable modes of analyzing the issue of misrepresentation.

74. 39 F.C.C.2d 732, 26 R.R.2d 1046 (1973).

75. *Id.* at 769-70 (Initial Decision).

76. *Id.* at 737, 26 R.R.2d at 1052.

77. *Id.*

shading of recollection." While the words "faulty shading" implied an element of willfulness, the FCC quickly attributed such willfulness to Cook's "unconscious": Cook's recollection was "unconsciously influential . . . in a manner favorable to himself." According to the FCC this capacity for self-deception was "understandable human nature" and did not amount to "deliberate falsehood."

In a sense, the agency's analysis in *Grenco* was nicely sophisticated. It acknowledged a complexity at the core of such human activity, the mind's paradoxical ability to "shade" the truth without awareness of its deliberate evasion. The Commission's portrayal of Cook is thus consistent with a standard psychoanalytic approach to the problem of self-deception, where the "self-deceiver" is seen as:

[O]ne who doesn't *perceive* his own fakery, who can't *see through* the smokescreen he himself puts up. We also say that in a way he sincerely *believes* the story he tells while "deep inside him" he *knows* it is not true. He makes it *appear* to himself that something is so. We say the self-deceiver is *unaware* of his own deception; and, in straight psychoanalytic language, we speak of his *unconscious* wishes and fantasies.⁷⁸

The psychoanalyst's terminology is thus "morally neutral"—the notion that the self-deceiver "does not have control over what one is doing."⁷⁹

In adopting such an approach, the FCC was able to avoid a finding of intent to deceive. But in opening the door on the subject of self-deception, the FCC betrayed no awareness that self-deception can be assessed in other ways as well—and in ways that relate to the agency's concern for "character." Besides the nonjudgmental, psychoanalytic view, there is the position espoused by some philosophers that the self-deceiver is blameworthy.⁸⁰ According to this view, the hallmark of the self-deceiver is "bad faith"—the relinquishment of responsibility for personal actions, the lack of personal integrity, the malaise of "inner dis-

78. H. FINGARETTE, *SELF-DECEPTION* 34 (1969).

79. *Id.* at 139, 141. Bok, too, notes the "intricate capacities of each person for denial, deflection, distortion, and loss of memory," and that "deceptive messages, whether or not they are lies, can also be more or less affected by self-deception, by error, and by variations in the actual intention to deceive." LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 15-16 (1978).

80. For a discussion of Sartre and Kierkegaard on the subject of self-deception, see Fingarette, *supra* note 78 at 92-110.

integration.”⁸¹ Another formulation is that the self-deceiver has opted for fragmentation instead of unity of the self, and thus is incapable of acting as a spiritual or ethical agent.⁸² Self-deception is thus seen as the essence of human failure, and is condemned on a moral basis.⁸³

The *Grecco* opinion contains no concern that Cook’s “faulty shading of recollection” indicated any lack of “character.” This is one problem with the case—the complete lack of analysis of self-deception as an element of “character,” or as an indicator of Cook’s future reliability as a licensee.

Instead, the FCC was consistent with the psychoanalytic, neutral perspective—noting the “influence” of Cook’s “unconscious,” at the same time differentiating between self-deceiving statements and deliberate, outright lies. But even within this chosen approach, the case presents problems. Having opted for a psychoanalytic perspective, the FCC could have taken at least two legitimate paths: to provide some guidance as to how the FCC should make such sophisticated distinctions on a regular basis or at least how the FCC made such a distinction in the case of Cook; or to say that, given the acknowledged ambiguity of the problem, an administrative licensing agency would do well to abandon this kind of inquiry as irrelevant to its mandate, and adopt an altogether different way of handling instances of misinformation. The Commission did neither. It offered no explanation of its decision to put Cook’s testimony in one category rather than another, and no suggestions for disposition of future cases. It used its recognition of the ambiguity of the unconscious merely as a reason to exonerate Cook—never acknowl-

81. *Id.* at 96, where Fingarette discusses Sartre’s BEING AND NOTHINGNESS.

82. *Id.* at 104, where Fingarette discusses Kierkegaard’s EITHER/OR, Vol. II; PURITY OF HEART; and THE SICKNESS UNTO DEATH.

83. A third school of thought, represented by Fingarette himself, *Id.* at 136-150, departs from both the neutral and judgemental approaches, and holds that an individual’s move into self-deception is “morally ambiguous.” *Id.* at 136. On the one hand, self-deception is viewed as a “spiritual disorder” involving a “rejection of personal responsibility,” *Id.* at 82, 141; on the other hand, “[t]he greater the integrity of the person, and the more powerful the contrary individual inclinations, the greater the temptation to self-deception.” *Id.* at 140. As Professor Fingarette explains: “It is because the movement into self-deception is rooted in a concern for integrity of spirit that we temper our condemnation of the self-deceiver. We feel that he is not a mere cheat. We are moved to a certain compassion in which there is awareness of the self-deceiver’s authentic inner dignity as the motive of his self-betrayal.” *Id.*

edging the possibility that its psychological insights showed the severe limitations—perhaps futility—of the intent standard in the context of allocating broadcast licenses.

Commissioner Johnson, dissenting, refused to accept the finding that Cook's testimony was neither precisely a lie, nor precisely honest, but a "shading" somewhere in the middle. Johnson noted that Cook had not once claimed a failure of memory; Johnson also maintained that the ALJ's "first hand" examination of Cook's demeanor should be given great weight.⁸⁴ In Johnson's view, the FCC's opinion was best explained as "a desperate desire to avoid imposing the penalty which inevitably follows from a finding of misrepresentation."⁸⁵ Johnson was melancholy at the prospect: "When we come to the point where we are no longer willing to ensure that our licensees exhibit honesty in proceedings before this Commission, then we are surely lost."⁸⁶

The *Grengo* formula is popular with the current FCC, particularly the Review Board.⁸⁷ But it has spawned perplexing de-

84. 39 F.C.C.2d at 740, 26 R.R.2d at 1053. Johnson wrote: "When Cook, who recalled numerous historical details, . . . denied the substance of the conversation as related by [another witness], the Administrative Judge informed Cook that there was a distinct difference between 'not recalling' a conversation and 'denying' that it ever took place. Mr. Cook, nevertheless, denied the conversation, and the Judge—who, unlike the majority, had the opportunity to examine the witnesses' demeanor first-hand—believed [the other witness]. The majority nevertheless attributes this discrepancy in testimony to Cook's 'shady recollection'—a conclusion which makes no sense on the present record." *Id.*

85. *Id.* at 741, 26 R.R.2d at 1054.

86. *Id.*

87. The Review Board is playing an increasingly pivotal role in adjudications at the FCC. As recounted in Freedman, *Review Boards in the Administrative Process*, 117 U. PA. L. REV. 546 (1969), the Review Board was the product of a 1961 amendment to the Communications Act, 47 U.S.C. § 155(d)(1), designed to relieve the Commission of the task of reviewing exceptions to all initial decisions of hearing examiners. In regulations promulgated by the agency in 1962, the Board was established to hear appeals from hearing examiner decisions in all adjudications except renewal or revocation proceedings. The latter limitation stemmed from the fact that the FCC "apparently gave Congress informal assurances at the time the amendment was enacted that review of initial decisions in so-called 'death sentence' cases would remain directly in the Commission," but as Professor Freedman notes, the exception could not "be justified on principle." *Id.* at 550. In December, 1981, the Commission amended its rules to provide for expanded Review Board Responsibilities. 46 FR 58681, Dec. 3, 1981. Under Section 0.361 of the FCC rules, the Board may now review initial decisions "in all adjudicative proceedings unless at the time of designation, the Commission designates otherwise." Thus, appeals of not only construction permit grants, but also

cisions. *West Jersey Broadcasting*⁸⁸ concerned the hearing testimony of a renewal applicant's principal. On the first day of testifying, the principal initially denied the existence of certain unreported stock options, and then said he could not recall them; on the second day, he corrected himself and was forthcoming on the matter. Based primarily on unfavorable demeanor findings, and the fact that the existence of the options had been raised well before the hearing by another party, the ALJ disqualified the applicant for lack of candor.⁸⁹ The Review Board reversed, characterizing the problematic testimony both as "fleeting or incipient lack of candor" and (citing *Grengo*) as "faulty shading of recollection."⁹⁰ But "lack of candor" logically signifies intent to deceive, while "faulty shading," at least as described in *Grengo*, involves the unconscious and not an intentional lie or omission. Ultimately, the Board seemed to throw its arms up in confusion as to what it was trying to say, wondering aloud "whether or not it is theoretically possible to 'prove' or 'disprove' the presence or absence of precise recollection on this point and from this record."⁹¹ The Board finally characterized the testimony as a "monetary misstatement, regardless of causation. . ." and a "passing equivocacy . . . in a timely manner set aright by the witness's own willing expatiation."⁹² At the heart of all this may have been a reasonable judgment that the initial testimony, while likely intentionally evasive, was not materially so. But since intent to deceive of any kind could trigger the death penalty, the Board drifted into the contradictions already mentioned—the rather unintelligible twin findings of lack of candor and *Grengo*-like "shading."

In *Superior Broadcasting of California*,⁹³ the Board was again mired in the *Grengo* formulation. There a director of a

renewal and revocation proceedings will normally be taken by the Board in the first instance. The full Commission is still authorized, but not required, to render what amounts to a third opinion—after the initial decision, and after the Board's review—upon granting an application for review pursuant to Section 1.115 of the FCC rules. 47 C.F.R. 1.115.

88. 90 F.C.C.2d 363, 51 R.R.2d 1243 (1982).

89. 90 F.C.C.2d 377, 379 (1982); 89 F.C.C.2d 478, 510, 533 (1978) (Initial Decisions in *West Jersey*).

90. 90 F.C.C.2d at 370, 51 R.R.2d at 1248.

91. *Id.*

92. *Id.*

93. 94 F.C.C.2d 904, 54 R.R.2d 773 (Rev. Bd. 1983).

VHF television applicant had told the FCC that his 52% interest in another broadcast property was “non-voting” stock. It was later discovered that he simply “refrain(ed)” from voting the shares—not that it was “non-voting stock.”⁹⁴ Citing *Grenco*, the Board characterized the misstatement as “heedless shading of his interests so as to tint those interests with the most favorable comparative coating”; further, that the statement was “less than candid” and “concerned a matter of decisional importance.”⁹⁵ The Board did not explain how an effort “to tint” financial interests (a formulation smacking of intent) could amount to a “heedless shading” (a phrase which strips away the notion of intent in the same sentence). Equally puzzling, the Board imposed a “slight-to-moderate demerit” on the applicant, whereas in *Grenco* the FCC awarded no penalty whatsoever for “shading.” On its face, then, the decision can only be sorted out as a rather remarkable judgment that the misstatement at issue was somewhat intentional (“tinted”), somewhat unconscious (“shaded”), somewhat careless (“heedless”), and that a slight demerit was appropriate. Such are the inevitable contradictions when “intent to deceive” is disqualifying, when a given record shows probable intent, but when the Board wishes to impose a lesser sanction.

The “psychoanalytic” mode, illustrated by *Grenco* and its progeny, shows an agency on both solid and sinking ground. On the one hand, the discussion in *Grenco* is insightful; self-deception may well be at the root of many misstatements rendered to government agencies. On the other hand, self-deception may indicate problems of “character” and unreliability. But, even if all this is true, the FCC is hardly equipped to be grappling with such varieties of mental state; the contradictions of *West Jersey* and *Superior Broadcasting* attest to that.

2. The “Literalist” Mode

In other of the “harder” cases, the FCC opts for a second mode—what I call the “literalist” approach. Here, the Commission’s result is the same as in *Grenco*—exculpation or at least non-disqualification—but the framework differs. As explained

94. 94 F.C.C.2d at 908-09, 54 R.R.2d at 776.

95. *Id.*

by an ALJ in *D.H. Overmyer Communications Company, Inc.*,⁹⁶ a decision recently cited with approval by the Fowler FCC,

[I]t is not the function of the Commission, or of presiding officers, to pronounce magisterial judgments upon the general truth-telling propensities of a witness. Decisions are not like a psychiatric report in which there is an evaluation of a subject's "personality." In decisions there is merely an assessment, on criteria traditionally significant, that the witness's testimony should or should not be credited. The assessment may in fact be unjust to the witness, whose actual virtues may be in complete contradiction to an unfavorable conclusion on his testimony. For the trier of fact has only the testimony and the manner of its delivery to go on; he has, of course, no access to the witness's hidden character.⁹⁷

With this premise—that there is “only the testimony and the manner of its delivery to go on”—the FCC in its literalist mode examines a party's statement on its face, virtually in isolation from the circumstances of the case or the question of motive. The hallmark of this approach is that it is decidedly averse to the drawing of any inferences.

Several cases are illustrative. In the *Overmyer* opinion, even though a licensee's Vice President was found to have committed a “deliberate, conscious misrepresentation” in an application prepared under the President's direction, the ALJ chose to credit the “plausibility, even if only minimal,” of the President's testimony in the absence of “affirmative evidence of malicious intent.”⁹⁸ The ALJ noted his own “personal disbelief” and even his “incredulity” at portions of the President's testimony, but seemed to say that only a smoking pistol (“affirmative evidence of malicious intent”) would suffice to counter a literal reading of the President's statements.⁹⁹

Similarly, in *KPFW Broadcasting*,¹⁰⁰ a 1974 case, the Commission rejected Broadcast Bureau allegations that a licensee's pleadings contained misstatements, on the grounds that the pleadings, while “pressed to the outer limits of acceptable advocacy, on balance . . . appear to be founded on a plausible interpretation, albeit narrow and self-serving. . .”¹⁰¹ The narrow,

96. 56 F.C.C.2d 918 (ALJ 1974).

97. *Id.* at 924.

98. *Id.* at 925-30.

99. *Id.* at 928.

100. 47 F.C.C.2d 1090, 30 R.R.2d 1239 (1974).

101. *Id.* at 1095 n.11, 30 R.R.2d at 1246 n.11.

self-serving "plausibility" in *KFPW* failed to trigger any FCC discussion on possible lack of candor.

In *RKO General, Inc.*,¹⁰² the FCC in 1980 condemned statements that are "technically correct" but misleading as to the known facts, and the Court of Appeals firmly stated that the "duty of candor is basic, and well known."¹⁰³ But by 1982, the Fowler Commission was openly willing to accept questionable but "technically true" statements. In *Radio WAVS, Inc.*,¹⁰⁴ one question was whether a broadcaster had surrendered control of his station to a proposed transferee before obtaining FCC authorization for the transfer. Intimately tied to the control issue was a second question—whether either party had lied to the agency about the participation of the proposed transferee (Harold Gore) in a format change implemented while the transfer application was pending. Such participation, if found, could lend support to an allegation of unauthorized transfer. The broadcaster had represented to the FCC that the format change was suggested by "Harold Gore, a 5% stockholder,"¹⁰⁵ although it became clear that at the time that Gore proposed the format change to the broadcaster, Gore was *not* a stockholder, but the prospective buyer of the station. Since Gore later did become a stockholder, the Commission was content that the statement was "technically correct," and thus not a misrepresentation.¹⁰⁶ Nor was the "technically correct" statement found to be lacking in candor; in fact, although the issue as designated was whether the parties had "misrepresented facts or were lacking in candor,"¹⁰⁷ the FCC declined to discuss the candor question.

The Commission approved this mode again in 1983 when it declined to review the Review Board's decision in *Gross Telecasting, Inc.*¹⁰⁸ There the Board cited *KFPW* approvingly in holding that a licensee's response to an FCC inquiry, while "narrowly responsive" and definitely lacking in candor, was nevertheless "technically accurate" and "literally true," and thus not

102. 78 F.C.C.2d 1, 98 n.421, 47 R.R.2d 921, 999 n.421.

103. *RKO General, Inc. v. F.C.C.*, *supra* note 4 at 232.

104. 92 F.C.C.2d 1037, 52 R.R.2d 1231 (1982).

105. 92 F.C.C.2d at 1050, 52 R.R.2d at 1242.

106. *Id.*

107. 92 F.C.C.2d at 1038, 52 R.R.2d at 1232.

108. FCC 83-443 (November 21, 1983).

a misrepresentation and not disqualifying.¹⁰⁹ As in *Radio WAVS*, there was no discussion of the weight, if any, to be given to other factors—such as possible motivation—in a case involving a statement that was deemed to be *merely* “technically accurate.”

Thus, instead of triggering intensified scrutiny, a finding that a statement is only technically true can have the effect of halting the agency’s inquiry. Again, the cases suggest an FCC shying away from a finding of intent to deceive—and hence avoiding the use of disqualification as a sanction.

3. “Administrative Feel”

A third mode may also be identified—the unenviable methodology known as “administrative feel,”¹¹⁰ “hunch” or “induction.”¹¹¹ Here the decision-maker neither psychoanalyzes nor looks only at the literal meaning of the representation. Instead, the decision-maker plunges headlong into a case, surfacing usually with a lengthy discussion of the facts and a conclusion. The resulting opinion may focus on a possible motive for deception; then again, it may not.¹¹² It may rely heavily on the ALJ’s de-

109. *Gross Telecasting, Inc.*, 92 F.C.C.2d 204, 222-223, 52 R.R.2d 851, 864-65 (Rev. Bd. 1982).

110. This memorable term is borrowed from the agency’s comparative renewal saga, *Cowles Florida Broadcasting, Inc.*, where the FCC stated: “In reaching [our] conclusion, we are aware that a measure of subjectiveness is unavoidably involved, given the absence of standards. . . . But our conclusion is based . . . on our administrative ‘feel’ acquired through years of overseeing television operations.” 60 F.C.C.2d 372, 422, 37 R.R.2d 1487, 1544 (1976), *recon. denied and clarified*, 62 F.C.C.2d 953, 39 R.R.2d 541 (1977), *recon. denied*, — F.C.C.2d —, 40 R.R.2d 1627 (1977), *vacated and remanded sub nom. Central Florida Enterprises, Inc. v. F.C.C.*, 598 F.2d 37 (D.C. Cir. 1979), *cert. dismissed*, 441 U.S. 957 (1979), *recon. sub nom. Cowles Broadcasting, Inc.*, 86 F.C.C.2d 993, 49 R.R.2d 1138 (1981), *aff’d*, 683 F.2d 503 (D.C. Cir. 1982). In the court’s view, “[s]uch intuitional forms of decision-making, completely opaque to judicial review, fall somewhere on the distant side of arbitrary.” 598 F.2d at 50.

111. These terms were used in the Review Board’s scathing reversal of portions of an Initial Decision involving misrepresentation in *WHW Enterprises, Inc.*, 89 F.C.C.2d 799, 806, 51 R.R.2d 409, 414 (Rev. Bd. 1982).

112. For example, in the initial decision in *Gross Telecasting, Inc.*, 92 F.C.C.2d 250, 426 (1981), the Administrative Law Judge held that the licensee lied in a letter responding to an agency inquiry on possible clipping practices. The ALJ focused on motive, noting that the licensee’s letter was “intended to resolve, favorably to [the licensee], any suggestion that [the licensee] may be involved in a most serious violation.” *Id.* On appeal, the Review Board ignored the discussion of motive. 92

meneor findings, or allude to their nonbinding effect.¹¹³ It may

F.C.C.2d 204, 217-23, 52 R.R.2d 851,861-65 (1982). The F.C.C. declined to review the case further. FCC 83-443 (Nov. 21, 1983).

Compare New Continental Broadcasting Co., 88 F.C.C.2d 830, 837, 50 R.R.2d 1117, 1124 (Rev. Bd. 1981) ("A determination of lack of candor of misrepresentation requires evidence of an intention and a motive to deceive, mislead, or conceal."); Scott & Davis Enterprises, Inc., 88 F.C.C.2d 1090, 1100, 50 R.R.2d 1251, 1259 (Rev. Bd. 1982) (allegations consisting of "list of immaterial errors, oversights, and ambiguities" in application "no substitute" for "*prima facie* showing of a logical reason or desire to deceive. . ."); *with* Grenco, Inc., 39 F.C.C.2d 732, 735, 26 R.R.2d 1046, 1050 (1973) (principal denied participating in a strike application; a "mere desire" to "impede and obstruct" a construction permit application not significant in the absence of evidence of "some overt act" in furtherance of a strike application).

113. The significance of an ALJ's opinion—including his demeanor findings—"depends largely on the importance of credibility in the particular case." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951). The Administrative Procedure Act provides that an agency reviewing an ALJ's decision "has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule." 5 U.S.C. § 557(b). Thus, as Professor Davis has noted, an agency "may substitute judgment for that of the examiner on any and all questions, including even the credibility of the witnesses, whose behavior the examiner observes but the agency can know only from the record." K. DAVIS, *ADMINISTRATIVE LAW TEXT* 222 (1972). At the FCC, discussion of ALJ demeanor findings usually takes place in Review Board decisions, and the amount of the deference to such findings fluctuates from case to case.

Compare Muncie Broadcasting Corp., 89 F.C.C.2d 123, 129, 51 R.R.2d 46, 51 (Rev. Bd. 1982) (ALJ demeanor findings entitled to "considerable weight"); *with* WWH Enterprises, Inc., 89 F.C.C.2d 799, 808, 51 R.R.2d 409, 415 (1982) (Review Board, dismissing ALJ speculations as to motive, reverses a finding of misrepresentation, stating that ALJ's demeanor findings "need not be considered"); West Jersey Broadcasting Co., 90 F.C.C.2d 363, 369-70, 51 R.R.2d 1243, 1247-48 (1982) (Review Board reverses ALJ finding of lack of candor where ALJ based the finding largely on "careful observation" of witness at hearing).

In Fox River Broadcasting, Inc., 88 F.C.C.2d 1145, 1157 (1981), the Administrative Law Judge, in finding a lack of candor, noted that the principal "displayed a chamelon-like [sic] glibness" at hearing, and was "both unsuccessful and unconvincing" in his testimony. On appeal, the Review Board reversed, never addressing that key finding, but noting generally that review of ALJ "findings" is not limited to a "clearly erroneous standard." 88 F.C.C.2d 1132, 1140-41, 50 R.R.2d 1321, 1328 (Rev. Bd. 1982). The full F.C.C., affirming the Board, said only that, while the principal's statements "may have appeared to the ALJ as 'glib' they do not establish any overt or intentional deception." 93 F.C.C.2d 127, 129, 53 R.R.2d 44, 46 (1983). Dissenting, Commissioner Jones complained about the FCC's failure to come to grips with the ALJ's demeanor findings: "In deciding the always elusive question of truthfulness, the ALJ had the benefit both of the record of [the principal's] apparently inconsistent statements and his observation of [the principal's] demeanor while attempting to reconcile them. The Board, and in turn we, have only the lifeless record. In this situation, it seems to me that the ALJ's finding that [the principal] had lied should be affirmed unless it is clear from the record that it was wrong, and in my judgment that is not the case." *Id.* at 130-31, 53 R.R.2d at 47.

find significance in the fact that material information not provided by a party was susceptible of knowledge, or it may ignore such a fact or possibility.¹¹⁴ The result is based seemingly on the “feel” of the case, and not on any list of factors or considerations; a party losing before an ALJ may take heart in the prospect that the facts may elicit a different “feel,” “hunch,” or “induction” higher in the adjudicatory ladder. Prime examples are the case of *American International Development, Inc.*,¹¹⁵ considered in Part III, and the *Fox River Broadcasting*¹¹⁶ case, considered in Part IV.

4. “Human Frailty”

A fourth approach in the “harder” cases can be called the “human frailty” mode. Here, even the FCC is apparently abashed at the prospect of exonerating a party on the basis of unconscious “shading,” with a finding that the representations are somehow “technically true,” or with a finding based on the feel of a case. In the “human frailty” mode, the party’s intent to

114. *Compare* Western Communications, Inc., 59 F.C.C.2d 1441, 1450, 37 R.R.2d 999, 1010 (1976), *aff’d sub nom.* Las Vegas Valley Broadcasting Co. v. F.C.C., 589 F.2d 594 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 931 (1979) (renewal applicant disqualified for misrepresentations of station managers; principal “failed to take adequate precautions to insure the responses were accurate and complete. . . . [N]o adequate investigation was conducted by the licensee to determine the true situation at the stations.”) *with* Action Radio, Inc., 51 F.C.C.2d 803, 806, 33 R.R.2d 51, 55 (1975) (renewal applicant relied “to an unwarranted extent upon information supplied by its program director,” failed “to interview persons with knowledge of the subject matter of the Commission’s inquiries,” and failed “to submit full and complete responses to such inquiries” resulting “in the submission of inaccurate and incomplete statements which could have, and should have, been avoided;” nevertheless, licensee’s responses to FCC not found to be misrepresentations). In *Gross Telecasting, Inc.*, *supra* note 108, the ALJ noted the quickness of the licensee’s response to an agency inquiry, and commented that neither the principal nor his chief employee “made any review of logs and conducted no investigation.” 92 F.C.C.2d at 426. The implication was that Gross Telecasting had information at its disposal which would have made its representations to the Commission complete and accurate, and that Gross Telecasting’s failure to include such information was indicative of intent to deceive. On appeal, the Review Board asserted that “[w]hile the station may have ill-advisedly attempted to minimize its culpability by omitting mention of [that information], that shortcoming in itself does not support a conclusion of misrepresentation.” 92 F.C.C.2d at 222, 52 R.R.2d at 864.

115. 75 F.C.C.2d 67 (1979), *rev’d in part*, 75 F.C.C.2d 109, 46 R.R.2d 1177 (Rev. Bd. 1979), *result aff’d*, 86 F.C.C.2d 808, 49 R.R.2d 1029 (1981).

116. 88 F.C.C.2d 1132, 50 R.R.2d 1321 (Rev. Bd. 1982), *aff’d* 93 F.C.C.2d 127, 53 R.R.2d 44 (1983).

deceive is inescapable, leading the FCC to find other ways around its own standard.

In two related opinions, the FCC determined that the President of CBS network had exhibited an "apparent willingness to be less than candid" with the Commission,¹¹⁷ and had possibly "lied to the Commission investigators" about promotions for a series of CBS-aired tennis matches.¹¹⁸ The FCC also noted that "CBS apparently lacks adequate controls to insure that high level officers responsible for network operations do not misrepresent facts to the Commission."¹¹⁹ Nevertheless, the FCC spared the network even the burden of a hearing on whether the misrepresentations justify revocation of CBS's licenses. The sanction deemed appropriate was mild: a short-term renewal for a single CBS television station. The FCC explained that network management was not accustomed to "direct contact" with FCC staff, and may have been unaware of the seriousness of lying,¹²⁰ moreover, in such a "highly competitive corporate environment, apparent misrepresentations to the Commission may have been made in order to protect the careers of the individuals involved."¹²¹ Thus, the frailty of top CBS executives, buffeted as they are by the high winds of cut-throat intra-corporate competition, was essentially exculpatory.

In another case, *Janus Broadcasting Company*,¹²² a licensee who had lied to the Commission later "recanted"—but only after a former employee blew the whistle and notified the FCC of the lie. The Commission found the misrepresentation to be "serious" but again spared the licensee from disqualification on "human frailty" grounds:

The seriousness of the misrepresentation is mitigated somewhat . . . by [the licensee's] explanation that he had no intention to lie to Commission investigators when he went into the interview, but that when faced with the question of admitting what he regarded to be minor error, he took the easy way out.¹²³

117. CBS, Inc., *Tennis Match*, 67 F.C.C.2d 969, 975, 42 R.R.2d 863, 870 (1978).

118. CBS, Inc., 69 F.C.C.2d 1082, 1091, 43 R.R.2d 1085, 1094-95 (1978).

119. 69 F.C.C.2d at 1091, 43 R.R.2d at 1095.

120. *Id.* at 1092, 43 R.R.2d at 1096.

121. *Id.* at 1092-93, 43 R.R.2d at 1096.

122. 78 F.C.C.2d 788, 47 R.R.2d 805 (1980).

123. *Id.* at 791-92, 47 R.R.2d at 808. Three Commissioners dissented, stating that the majority "glosses over the fact that this 'recantation' in effect came at the point of

Today's FCC is also sympathetic to this fourth mode. In *Coastal Bend Family Television, Inc.*,¹²⁴ the Review Board found a "serious lack of candor bordering on misrepresentation"; the statements at issue were deemed "fanciful," "disingenuous," and containing "an element of hocus pocus."¹²⁵ But, in a rather astonishing conclusion, the Board refused to disqualify the applicant, ruling that because the record "reveals *so many* blunders and miscues . . . they cast doubt on the willfulness of [the applicant's] intent to deceive." Since "the distinction between willful and clumsy lack of candor is sufficiently blurred," the Board imposed the "slightly lesser sanction of a substantial demerit."¹²⁶

This opinion provides a distressing variation on the "human frailty" mode. In *CBS* and *Janus*, the FCC at least was willing to hold straightforwardly that intentional deception had taken place. In *Coastal Bend*, the Board appears initially to find intentional deception, but immediately reverses its characterization when faced with the choice of sanctions. The plentitude of misstatements becomes a reason, not for total disqualification, but for doubts as to the "willfulness" of the applicant's intent to deceive—as if the Board could surgically remove "willfulness" from "intent." None too deftly, the Board transmutes "disingenuous" lack of candor into "clumsy" human frailty in the span of a few sentences, and then declines to disqualify.¹²⁷ A reasonable, if strange, conclusion from the case would be that if one's misstatements are sufficiently numerous, it may be possible to argue that the sheer volume alone indicates lack of intent to deceive.

The fact that a reader of FCC cases can identify multiple agency approaches to misrepresentation cases highlights this Article's basic concern: the intent test's chameleon-like ability to become whatever the decision-maker wishes it to be. Without a definition of factors to be considered in each case, the decision-maker has maximum discretion to imbue the inquiry with whatever considerations seem useful or convenient at the time.

a gun. In so doing, the Majority encourages 'stonewalling' from licensees who find themselves in [a similar] position." *Id.* at 795, 47 R.R.2d at 810.

124. 94 F.C.C.2d 648, 54 R.R.2d 367 (Rev. Bd. 1983).

125. 94 F.C.C.2d at 658-59, 54 R.R.2d at 374.

126. *Id.* at 659, 54 R.R.2d at 374 (emphasis added).

127. *Id.* at 658-59, 54 R.R.2d at 374.

Moreover, with these precedents, broadcasters may be justified in assuming that the *WOKO* message is a thing of the past, and that if one's lies are less obvious than those of *WMOZ*, Western Communications, *RKO*, and Nick Chaconas, the risk of telling them may be an acceptable business decision to make.

III. ONE MIND, THREE MENTAL STATES

Another aspect of misrepresentation before the FCC is the unhappy collision of the intent test with the FCC's tri-level adjudicatory system and the burden of proof required to establish intent to deceive.

FCC cases can pass through three decision-makers.¹²⁸ The ALJ conducts a hearing, and issues an initial Decision; the Review Board hears appeals and essentially considers the matters in controversy *de novo*; the full Commission in its discretion may grant an application for review and thereby agree to give the case a third independent assessment. Given the subjectivity of the intent test, it is therefore possible for each level within the FCC to characterize a party's mental state in a different way.

The chance of obtaining three quite different results is heightened when each level decides the case based on the preponderance of the evidence. That evidentiary standard, of course, merely requires the fact-finder to believe that "the facts asserted are more probably true than false."¹²⁹ In the 1981 case of *Steadman v. S.E.C.*,¹³⁰ the Supreme Court upheld the preponderance of evidence standard as appropriate for SEC administrative hearings on charges of fraud. The Court explicitly rejected a series of lower court cases calling for a "clear and convincing evidence" standard in such cases.¹³¹ The full FCC and the Re-

128. See 47 C.F.R. § 0.341 (1984) (authority of Administrative Law Judges); 47 C.F.R. § 0.361 (1984) (authority of Review Board); 47 C.F.R. § 1.115 (1984) (procedures for filing applications of review with the full Commission).

129. McBaine, *Burden of Proof: Degrees of Belief*, 32 CAL. L. REV. 242, 262 (1944).

130. 450 U.S. 91 (1981).

131. *Id.* at 95. In *Sea Island Broadcasting Corp. v. F.C.C.*, 627 F.2d 240 (D.C. Cir. 1980), the court held that revocation of an FCC license was governed by the "clear and convincing" standard, citing *Collins Security Corp. v. S.E.C.*, 562 F.2d 820 (D.C. Cir. 1977), one of the cases later to be disapproved by the Supreme Court in *Steadman*. In the wake of *Steadman*, the FCC has held in a renewal proceeding that misrepresentation can be established by a preponderance of the evidence. *Lewel Broadcasting, Inc.*, 86 F.C.C.2d 896, 914, 49 R.R.2d 871, 885-86 (1981). In *Lewel*,

view Board have acknowledged *Steadman* as confirming the burden of proof required in FCC misrepresentation cases,¹³² although the Commission more recently has indicated that another formulation (“clear, precise, and indubitable” evidence) may now be appropriate.¹³³

Assuming for the moment that *Steadman* applies, it is hard to quibble with the appropriateness of “preponderance of the evidence” as a standard for the ALJ. But its use in the *de novo* appellate considerations of the Review Board and FCC, especially in misrepresentation cases, is another matter altogether. In the frequently “close” misrepresentation cases, whether a fact is determined to be “more probably true than false”—*i.e.*, whether the scales tip more one way than the other—may depend on the eye of the beholder, as well as on the beholder’s chosen “approach” to the issue.

The case of *American International Development, Inc.*¹³⁴ illustrates the possibilities. Three parties filed competing applications for a new FM station in Phoenix: American International Development, Inc. (“AID”), Herbert W. Owens, Jr. (“Owens”), and KXIV, Inc. (“KXIV”). The parties, as usual, traded charges of misrepresentation and other offenses. The FCC designated a list of issues for hearing—including issues to determine whether either AID, Owens or KXIV tried to deceive the FCC in the application process.

The chart below shows the outcomes of the misrepresentation issues as the case traveled from the ALJ, to the Review

the FCC distinguished renewal proceedings from the revocation context of *Sea Island*: “Because the Communications Act affords the licensee significantly less security at the end of, than during, the license term, we do not believe that *Sea Island* requires proof by ‘clear and convincing’ evidence in renewal proceedings.” *Id.* at 914, 49 R.R.2d at 886. Whether the *Sea Island* standard remains appropriate for revocations, given *Steadman*, is open to question; the Review Board has already ventured that *Steadman* “implicitly overrul[es]” *Sea Island*. Fox River Broadcasting, Inc., 88 F.C.C.2d 1132, 1136 n.9, 50 R.R.2d 1321, 1324 n.9 (1982).

132. Lewel Broadcasting Co., Inc., 86 F.C.C.2d at 914, 49 R.R.2d at 885-86 (1981); Fox River Broadcasting, Inc., 88 F.C.C.2d at 1136 n.9, 50 R.R.2d at 1324 n.9. See also Central Texas Broadcasting Co., Ltd., 90 F.C.C.2d 583, 597, 51 R.R.2d 1478, 1488 (Rev. Bd. 1982) (sep. statement of Member Jacobs), *recon. denied*, 92 F.C.C.2d 914, 52 R.R.2d 1383 (Rev. Bd. 1982).

133. Riverside Broadcasting Co., Inc., 53 R.R.2d 1154, 1157 (1983), *aff’d* 56 R.R.2d 618 (1984). See *infra* Part V.

134. 75 F.C.C.2d 67 (ALJ 1979), *rev’d in part*, 75 F.C.C.2d 109, 46 R.R.2d 1177 (Rev. Bd. 1979), *result aff’d*, 86 F.C.C.2d 808, 49 R.R.2d 1029 (1981).

Board, to the FCC. The ALJ disqualified Owens and KXIV for misrepresentation; cleared AID of misrepresentation; and awarded the license to AID. Six months later, the Review Board disqualified Owens and AID; cleared KXIV; and picked KXIV as the winner. After another eighteen months, the full Commission disqualified Owens; cleared AID; cleared KXIV of *disqualifying* acts of misrepresentation; assessed AID and KXIV comparatively; and gave AID the license.

	<u>ALJ</u>	<u>Review Bd.</u>	<u>FCC</u>
<u>AID</u>	no misrepresentation	misrepresentation	no misrepresentation
<u>KXIV</u>	misrepresentation	no misrepresentation	no disqualifying misrepresentation
<u>OWENS</u>	misrepresentation	misrepresentation	misrepresentation
<u>Winner</u>	AID	KXIV	AID

The allegation against AID was that certain signatures of AID's principal, Mrs. Zozoya, were forged by her husband in documents filed with the FCC, including the application. KXIV, in its effort to "uncover any basic qualifying flaws that might exist" in the AID application, had hired a "documents expert" who testified that several of the Zozoya signatures were forgeries.¹³⁵ At hearing, Mrs. Zozoya, who was legally blind, conceded that some of the signatures in question were not hers, but that she had indeed signed both certification pages on the application and a loan commitment letter.

The ALJ found that Mrs. Zozoya's signatures were genuine and therefore that AID was innocent of the misrepresentation charges. His opinion first considered the demeanor of the parties; he concluded that both Mrs. Zozoya and the expert were credible witnesses. He was then left with the question of which testimony was more probably true. While the expert was "forthright and honest," the expert's testimony—that Mrs. Zozoya had signed only one of the two pages of the application—"just [didn't] make sense," was "inconsistent with human knowledge and experience," and was "improbable."¹³⁶ This appeared to be the ALJ's way of saying that the preponderance of evidence favored AID. There was no discussion of possible motive or

135. 75 F.C.C.2d at 85.

136. *Id.* at 87.

whether the alleged misrepresentation could be considered material.

The Review Board had a sharply different view of the preponderance of the evidence. Acknowledging only briefly “the judge’s advantage in seeing and hearing the witnesses personally,” the Board disclaimed any binding power of demeanor findings.¹³⁷ The Board then rejected the ALJ’s conclusion—that the expert’s testimony was “improbable” and “inconsistent with human knowledge and experience”—as abstract and “unsound.”¹³⁸ The Board then assessed the expert’s experience much more favorably than had the ALJ. Finally, the Board disclosed that it, too, had examined the signatures, and that it would be “impossible” to consider them genuine.¹³⁹ The preponderance of the evidence—the expert’s opinion and the Board’s own perusal of the signatures—showed that the signatures were forgeries and that Mrs. Zozoya (and therefore AID) had “pursued a conscious course of misrepresentation” at the hearing.¹⁴⁰ The Board also suggested a possible motive but conceded there was no “direct evidence” of it.¹⁴¹

The full Commission then took a third look at the question: Based on our careful review of the record, we believe that the Board’s analysis must be rejected. Our disagreement with the Board is fundamental: we are simply not convinced that the disputed signatures are forgeries. Because of this conviction, we shall resolve the signature/misrepresentation issue in AID’s favor, reversing the Board’s disqualification.¹⁴²

In reaching this conclusion, the Commission accorded weight to the ALJ’s demeanor findings, scoffed at the suggested possible motive, and relied in part on its own independent appraisal of the signatures. The Commission’s view of the preponderance of the evidence was simply that “it is conceivable” that Mrs. Zozoya signed all the documents.¹⁴³

Even greater disparities marked the opinions of the three levels with respect to the mental state of KXIV. Knowing that

137. *Id.* at 126, 46 R.R.2d at 1191.

138. *Id.* at 126-27, 46 R.R.2d at 1191-92.

139. *Id.* at 128, 46 R.R.2d at 1192.

140. *Id.* at 128, 46 R.R.2d at 1193.

141. *Id.* at 129, 46 R.R.2d at 1193.

142. 86 F.C.C.2d at 815, 49 R.R.2d at 1035.

143. *Id.* at 817, 49 R.R.2d at 1036.

it could lose the contest under the standard comparative issue, KXIV had "sought to bolster its comparative posture by requesting permission to show that it had an unusually good broadcast record."¹⁴⁴ KXIV filed a pleading stating it would show that (1) its public affairs programming in a given period exceeded that of all 27 other stations in the Phoenix market; (2) its news coverage exceeded all other Phoenix radio broadcasters except one, an all-news station; (3) KXIV had brought one of the first woman-moderated public affairs shows to the Phoenix market; and (4) it had pioneered one of the few regularly-scheduled drive-time public affairs shows.¹⁴⁵ The ALJ granted KXIV permission to adduce this information at trial; KXIV then withdrew the request. Owens moved for a misrepresentation issue against KXIV, maintaining, on the basis of KXIV's logs, that KXIV had lied to the agency about its past broadcast record.¹⁴⁶

The logs were devastating. They showed that (1) contrary to KXIV's assertions, its public affairs programming in the given period did *not* exceed that of all other stations, but was a distant second; (2) KXIV was third in news coverage, rather than second; (3) KXIV's female announcer hosted an entertainment show, rather than a public affairs program, and was on the air regularly for only four months; and (4) the drive-time show was predominantly entertainment, not public affairs.¹⁴⁷

On this issue, the ALJ omitted any discussion of demeanor, but reached a conclusion as to KXIV's mental state on the basis of the number of misstatements, their materiality, and a possible motive. The pattern suggested that KXIV was engaged in "outright falsehoods," and did not deserve the "benefit of the doubt."¹⁴⁸ The statements went clearly beyond immaterial "puffery," since programs represented as "public affairs" had always been logged at KXIV as "entertainment."¹⁴⁹ Finally, in the ALJ's view, KXIV may have been motivated by the desire to induce the other parties to settle. Interestingly, the ALJ con-

144. 75 F.C.C.2d at 88.

145. *Id.* at 88-89.

146. *Id.* at 89.

147. *Id.* at 89-91.

148. *Id.* at 103.

149. *Id.*

demned the conduct not on “character” grounds but because such pleadings “abuse or burden the Commission’s processes.”¹⁵⁰

On appeal, the Review Board disagreed with the ALJ, finding that three of KXIV’s four statements were innocent “mischaracterizations,” and that only the fourth was “categorically wrong and unexplained.”¹⁵¹ The Board apparently felt that the misinformation was immaterial since the shows erroneously labelled as “public affairs” did contain some public affairs “elements.”¹⁵² Of most importance to the Board was the lack of a plausible motive: the fact that KXIV filed the pleading to seek a hearing on its past performance “negates any suggestion of deception.”¹⁵³ Thus, the Board’s view of the preponderance of the evidence was that the document was an “exaggeration . . . not the sort of calculated deception that destroys a reasonable expectation of reliability.”¹⁵⁴ Having disqualified AID on the basis of the so-called forged signatures, the Board ruled that KXIV’s “exaggerations” were not disqualifying, and that KXIV deserved the license.

The full Commission, on appeal, produced a result as to KXIV that was different from either the ALJ’s or the Board’s. The FCC first nodded in favor of the Board in noting that several of KXIV’s statements were arguably exaggerations and that only one was “categorically false and unexplained.”¹⁵⁵ The FCC then approved the ALJ’s sentiment that KXIV, in each instance, knew or should have known that the statements were false, and that such an irresponsible pleading must be condemned.¹⁵⁶ Then, without any discussion of (a) motive; (b) materiality; (c) mitigating factors; (d) the preponderance of the evidence; or (e) the fact that KXIV had been completely disqualified by the ALJ, the FCC simply imposed a “substantial comparative demerit” on KXIV.¹⁵⁷ Escaping the death penalty, but saddled

150. *Id.*

151. *Id.* at 136-37, 46 R.R.2d at 1198.

152. *Id.*

153. *Id.* at 136, 46 R.R.2d at 1198.

154. *Id.*

155. 86 F.C.C.2d at 817, 49 R.R.2d at 1036.

156. *Id.*

157. *Id.* at 818, 49 R.R.2d at 1037.

with a damaging demerit in addition to other comparative weaknesses, KXIV lost the contest to AID.

This case, with its astonishing range of opinions on whether AID or KXIV were liars, is an example of the "administrative feel" approach—virtually a parody of the arbitrariness of misrepresentation cases. FCC personnel spent some four years probing, re-probing, and probing yet again the inner thoughts of radio applicants. The inquiry was blatantly subjective: demeanor was considered in one instance, not at all in another; speculations as to likely motives were raised at one level, ridiculed at the next; statements were deemed material or immaterial—but imprecisely, at best. The combination—of tri-level adjudication, the intent test, and the preponderance of evidence standard—produced only head-spinning verbiage. More important, the final agency word—the Commission's—was simply that: the final word, the end of the road. There is no sense in the *AID* case that the multiplicity of review succeeded in winnowing out nonessentials and narrowing in on an ultimate finding of who, if anyone, intended to deceive.

IV. DISCUSSION FROM WITHIN: THE *FOX RIVER* CASE

In January, 1982, the Review Board issued its opinion in *Fox River Broadcasting, Inc.*,¹⁵⁸ containing a lengthy discourse on the offense of misrepresentation, the agency's policy interests, and the appropriate sanctions. While it was a major agency discussion of misrepresentation, the Board's opinion—and the FCC's subsequent disavowal—did nothing to solve the problems raised thus far in this Article.

The Board's comments in *Fox River* did not arise in a vacuum; two factors most likely were instrumental. First, the Commission had issued its decision in *RKO* some eighteen months before, with President Carter still in the White House and his appointee, Chairman Ferris, heading the FCC.¹⁵⁹ In the wake of that decision, charges of misrepresentation and lack of candor assumed even more prominence than usual in pleadings before the Commission.¹⁶⁰ As the Board stated in *Fox River*, ". . . an

158. 88 F.C.C.2d 1132, 50 R.R.2d 1321 (Rev. Bd. 1982).

159. *RKO General, Inc.*, 78 F.C.C.2d 1, 47 R.R.2d 921 (1980).

160. "Since September 1 of 1981 the [Review] Board has heard oral argument in sixteen cases, and in half of them it was alleged that one or more of the applicants had

unfamiliar reader would deduce that our processing files are a collective rap sheet of the nation's pathological liars."¹⁶¹ Thus, the Board clearly believed it time to discourage misuse of the misrepresentation charge, and *Fox River* was an opportunity to deliver a distinct warning to broadcasters and their lawyers.

Second, the Court of Appeals had issued its own decision in *RKO* less than two months before *Fox River*, upholding nonrenewal of one of RKO's stations on the basis of "lack of candor."¹⁶² By the time of the court's decision, Ronald Reagan had become President and had appointed new leadership to the FCC. The Review Board's *Fox River* opinion may have been a vehicle to float an interpretation of the *RKO* litigation within a politically reconstituted FCC, to send a signal to industry on the new Commission's sense of the outcome in *RKO*, and to indicate how that Commission might handle charges of misrepresentation and lack of candor in the future.¹⁶³

The background for the Board's discussion in *Fox River* is the ALJ's decision to disqualify an applicant for misrepresentation.¹⁶⁴ Taking the case on exceptions, the Board was concerned that the hearing had been an "undisciplined, adversarial romp in pursuit of some elusive 'smoking gun,' " and that the FCC's misrepresentation cases in general lacked "lucidity."¹⁶⁵ Citing the

misrepresented, been less than candid, or had failed to report as required by § 1.65 of the Commission's rules." Millard Orick, Jr., 89 F.C.C.2d 571, 572, 51 R.R.2d 166, 167 (Rev. Bd. 1982).

161. *Fox River Broadcasting, Inc.*, 88 F.C.C.2d at 1139 n.15, 50 R.R.2d at 1376 n.15.

162. *RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981).

163. This speculation was suggested by KRASNOW, LONGLEY, TERRY, *The Politics of Broadcast Regulation* 235-36 n.66 (1982), where the authors refer to a Washington Post story of May 20, 1981, headlined "Reconstituted FCC Votes to Restudy RKO Ruling." As Krasnow, Longley and Terry state: "[The Post] reported that a five-member FCC, under Chairman Robert E. Lee, voted to ask the U.S. Court of Appeals for the District of Columbia Circuit, to which RKO had appealed, to return the case to the FCC. The strategy had been suggested by RKO's lawyers, obviously hopeful of a different outcome under the Republican-led FCC of 1981. A few weeks later, however, the new general counsel of that FCC notified RKO that the Commission would not, after all, ask the case to be returned; court review continued, and the FCC started an inquiry into whether character was relevant to licensing. See Gen. Docket 81-500, Policy Regarding Character Qualifications in Broadcasting Licensing, 46 Fed. Reg. 40899 (1981). In December 1981, the court affirmed the FCC's decision in the WNAC-TV (Boston proceedings [in *RKO*]). . . ."

164. 88 F.C.C.2d 1145 (ALJ 1981).

165. 88 F.C.C.2d at 1139, 1134, 50 R.R.2d at 1326, 1323 (Rev. Bd. 1982).

agency's need to "return to precision," the Board first acknowledged the "generic concept of accuracy," and ventured that two quite distinct offenses exist under that rubric—misrepresentation and lack of candor.¹⁶⁶ Each offense, in this view, has a separate definition and underlying policy; in most cases, the Board indicated, the offenses should trigger different sanctions as well.¹⁶⁷

The Board defined misrepresentation as "a false statement of an objective fact intentionally made to deceive."¹⁶⁸ Abandoning the *WOKO* language that materiality is unimportant so long as there is a "willingness to deceive," the Board maintained that the elements should be those of misrepresentation made to the federal government under the Criminal Code: a statement, falsity, materiality, intent, and agency jurisdiction. The underlying policy was said to be the government's interest in condemning intentionally false submissions; the sanction, "total disqualification."¹⁶⁹

But the Board's far more interesting discussion centered on "lack of candor"—the term used by the Court of Appeals less than two months before in describing RKO's misconduct.¹⁷⁰ In the Board's schema, lack of candor was a lesser offense, "not stigmatizing" and "scarcely criminal."¹⁷¹ The Board suggested that a wholly different policy informed this offense—the FCC's interest in licensing worthy trustees of a scarce public resource.¹⁷² Finally, according to the Board, the sanction for lack of candor would not be disqualification unless there was intent to deceive.¹⁷³

At this point, the Board's discussion becomes particularly intriguing. For in its non-disqualifying "lack of candor" category, the Board placed the "harder" cases—those dealing with "shading of recollection," evasiveness, exaggeration, puffing, and "technically true" but unedifying statements.¹⁷⁴ In those cases, the FCC had declined to disqualify because intent had not been

166. *Id.* at 1134, 50 R.R.2d at 1323.

167. *Id.*

168. *Id.* at 1135, 50 R.R.2d at 1324.

169. *Id.* at 1136-37, 50 R.R.2d at 1324-25.

170. 670 F.2d at 228.

171. 88 F.C.C.2d at 1136-37, 50 R.R.2d at 1325.

172. *Id.*

173. *Id.* at 1137, 50 R.R.2d at 1325.

174. *Id.*

proven. But what the Board in *Fox River* did not acknowledge was that the FCC had never referred to the conduct in those cases as “lack of candor.” The Board’s purpose in *Fox River*, then, begins to become clear: to recast those “harder” cases as “lack of candor” cases not involving intent to deceive, and thus to create a category on the order of “unintentional lack of candor.” The Board betrayed no awareness of a probable contradiction in terms: if one lacks candor, presumably one *intends* to lack candor. But the Board seemed willing to sacrifice plain meaning for its apparent goal of establishing a saving category for parties who clearly lack candor but whom the FCC does not wish to disqualify, for whatever reason.

But why go to such lengths? Perhaps the new category was designed for a case such as *RKO*. For the Board in *Fox River* next pronounced the startling view that the Court of Appeals had “fully exonerated” *RKO* on charges of misrepresentation, and that there had been a “lack of evidence to show intent to mislead” in that case.¹⁷⁵ If the characterization of the court’s opinion in *RKO* were true, then under the Board’s *Fox River* analysis, *RKO* deserved to keep its licenses. Thus, the Board’s convoluted message in *Fox River* may have simply been that *RKO*’s disqualification for “lack of candor” was wrong—or at least that the reconstituted Commission could find a way to avoid that outcome in the future. The Board’s new category would be available to save the next *RKO*.

The Board’s opinion can thus be seen as an effort to hammer “misrepresentation” and “lack of candor” into two distinct offenses, as a prelude to splitting “lack of candor” into two types of its own—thus clearing the way for a saving category of unintentional (and hence non-disqualifying) lack of candor. It is this puzzling—and, on its face, unintelligible—category which I have already remarked upon in discussing *West Jersey Broadcasting* and *Superior Broadcasting*, two Review Board cases which follow *Fox River*.¹⁷⁶ The category becomes somewhat less puzzling—but hardly reassuring—if one reads the Board’s conclusions in *West Jersey* and *Superior*, as I do, as finding lack of candor which is indeed deliberate but which, in the Board’s

175. 88 F.C.C.2d at 1135, n.4, 50 R.R.2d at 1323, n.4.

176. See *supra* Section II(b).

view, is insufficiently grave to merit disqualification. Thus, the Board's enterprise in *Fox River* may have been to lay the groundwork for sparing applicants who intend to deceive but whose lies are not considered material. Since such an enterprise would, however, conflict with the *WOKO*'s condemnation of any "willingness to deceive," great or small, the Board couched its new category as unintended (rather than immaterial) lack of candor.

Aside from its central problem—the paradoxical category of "unintended lack of candor"—the Board's *Fox River* opinion is unpersuasive in its effort to make two distinct offenses of misrepresentation and lack of candor. For example, the Board badly strains in indentifying separate policy premises for the two. In fact, both the agency and the courts have frequently cited both policies as underlying its concern for deceit of any kind.¹⁷⁷

The full Commission's opinion in *Fox River*¹⁷⁸ disagreed with the Review Board's in all but the result. According to the FCC, the Board "overstate[d] the distinction" between misrepresentation and lack of candor; since both are based on deceit, "they differ only in form."¹⁷⁹ Without elaboration, the FCC also disavowed the "suggestion that lack of candor may involve failures to provide information in the absence of any deceptive intent."¹⁸⁰ The Board's new category was thus rejected, as was the Board's interpretation of *RKO*: "Our reading of the court's opinion indicates that the court recognized the element of deception present there."¹⁸¹ Thus, the FCC affirmed the primacy of intent as the central element of both misrepresentation or lack of candor.

And yet, for all this, the Board and the FCC differed only in their paths to the same result: in effect, the Board would reserve the right to decline to disqualify an individual by holding that his lack of candor was unintentional; the FCC would achieve the

177. See, e.g., *Leflore Broadcasting Co., Inc. v. FCC*, 636 F.2d 454, 461 (D.C. Cir. 1980); *RKO General, Inc. v. FCC*, *supra* note 4, 670 F.2d at 232.

178. 93 F.C.C.2d 127, 53 R.R.2d 44 (1983).

179. *Id.* at 129, 53 R.R.2d at 46.

180. *Id.*

181. *Id.* at 129, n.10, 53 R.R.2d at 46, n.10.

same result by holding that the individual never lacked candor in the first place.

This distinction is borne out in the Board's and the Commission's respective discussions of the facts in *Fox River*. The Board's portrayal, geared to reflect its new category, was awesomely convoluted and unconvincing. The statements at issue were found to lack candor, as too "categorical," as "neglecting" to be precise, and as going beyond "exaggeration," "puffing" or "mired memory."¹⁸² And yet, the statements were also found to be based on the applicant's "reasonable belief" in what he said, and to follow "a coherent, plausible scenario."¹⁸³ The applicant thus passed a subjective fault test (no intent to deceive), but failed an objective fault test (negligence) although he did have a "reasonable belief" in his statement. All in all, we have a most curious finding of something like reasonably unreasonable behavior! Disqualification was, of course, avoided, but a comparative demerit was assessed.

The Commission's performance was not much better. While the ALJ and the Review Board had focused on misstatements made in an application amendment, the Commission inexplicably concentrated on deposition testimony.¹⁸⁴ According to its opinion, a misstatement in that testimony amounted merely to a "spontaneous misjudgment" made "under the pressure of cross-examination;" moreover, the misstatement was later "rectified when called to [the speaker's] attention" by a "subsequent pleading."¹⁸⁵ The Commission was therefore able to combine the *Grengo* approach ("spontaneous misjudgment") and the "human frailty" approach ("pressure of cross-examination") to conclude that the applicant exhibited no trace of intent to deceive, and thus engaged in neither misrepresentation nor lack of candor. The FCC was thus true to its formulation in *Fox River*: it avoided disqualifying the applicant not by using the "unintended lack of candor" category, but by finding no lack of candor in the first place. But the FCC retained the Board's penalty of a slight demerit, on the ground that the applicant's state-

182. 88 F.C.C.2d at 1142-43, 50 R.R.2d at 1329.

183. *Id.* at 1141-43, 50 R.R.2d at 1328-29.

184. 88 F.C.C.2d at 1156; 88 F.C.C.2d at 1138, 50 R.R.2d at 1326; 93 F.C.C.2d at 128, 53 R.R.2d at 45-46.

185. 93 F.C.C.2d at 129, 53 R.R.2d at 46.

ments were careless.¹⁸⁶

The occasion in *Fox River* to bring order and sense to this area of FCC adjudications was therefore lost. Instead, both the Board and the FCC, in their own ways, sought to keep maximum discretion in the hands of the agency; the Board, with its new category; the FCC, with its affirmance of the pliable intent standard. Finally, it is essential to note that the Board, for all its confused verbiage on intent, made one clear statement in *Fox River*—that the misstatements at issue there were not “material.”¹⁸⁷ The FCC, too, concluded its discussion of the case with this: “. . . We are convinced that the record does not support a finding of significant misconduct.”¹⁸⁸ Arguably the bottom line in both was nothing other than materiality.

V. AFTER *FOX RIVER*: *RIVERSIDE* AND THE DESIGNATION PROBLEM

Most FCC misrepresentation cases begin with petitions to deny—pleadings filed by “[a]ny party in interest” opposing the grant of a license.¹⁸⁹ Under Section 309(d) of the Communications Act, the petition “shall contain specific allegations of fact” showing that the petitioner is a party in interest and that a grant of the application would be “*prima facie* inconsistent” with the public interest.¹⁹⁰ The petitioner must also supply an affidavit “of a person or persons with personal knowledge” of the allegations.¹⁹¹ Section 309(e) provides that if “a substantial and material question of fact is presented,” or if the agency “for any reason” is unable to make a finding as to whether the public interest would be served by granting the application, the Commission shall designate the application for hearing.¹⁹²

In requiring that petitions contain “specific allegations of fact” and that hearings be designated on the basis of “substantial and material questions” of fact, Congress indicated that “allegation[s] of ultimate, conclusionary facts or more general allega-

186. *Id.*

187. 88 F.C.C.2d at 1142, 50 R.R.2d at 1329.

188. 93 F.C.C.2d at 129, 53 R.R.2d at 46.

189. 47 U.S.C. § 309(d) (1962).

190. *Id.*

191. *Id.*

192. 47 U.S.C. § 309(e) (1983).

tions on information and belief . . . [would not be] sufficient.”¹⁹³ Thus, petitions to deny must raise “substantial and specific allegations of fact, if true, would indicate that a grant of the application would be *prima facie* inconsistent with the public interest.”¹⁹⁴

Because of the seriousness of the charge, the FCC properly declines to designate misrepresentation issues on a casual basis. Petitioners’ duty “to come forward with a *prima facie* showing of deception” is thus “particularly strong where a misrepresentation issue is sought.”¹⁹⁵ Such petitions must contain not only an affidavit of personal knowledge, but “sufficient concrete facts, free of surmise.”¹⁹⁶ The Review Board has added that “[t]he petitioner must also make a demonstration of a desire, motive, or logical reason to mislead in order to have an issue added,” and that the Commission “will not infer actual or attempted deceptions or improper motives from an enumeration of alleged application errors, omissions, or inconsistencies, accompanied by speculation and surmise but lacking factual support.”¹⁹⁷

In a 1983 case, *Riverside Broadcasting Co., Inc.*,¹⁹⁸ a citizens group filed a petition to deny, urging that the Commission designate a renewal application for hearing on a misrepresentation issue. The renewal applicant had recently purchased an existing FM station; in seeking FCC authorization for the transfer, the purchaser had stated that it would continue the station’s jazz format. Soon after the FCC approved the transfer, the new licensee changed the format to country-western. When the new licensee sought license renewal, a pro-jazz citizens group argued that the representations in the transfer application had been intentionally false—that the purchaser even then had decided to change the format. Accompanying the petition to deny was an affidavit of a former station employee who asserted personal

193. S. REP. NO. 590, 86th Cong., 1st Sess. 3 (1959), *quoted in* Stone v. FCC, 466 F.2d 316, 322 (D.C. Cir. 1972).

194. Stone v. FCC, 466 F.2d at 322.

195. Scott and Davis Enterprises, Inc., 88 F.C.C.2d 1090, 1099, 50 R.R.2d 1251, 1258 (Rev. Bd. 1982).

196. Garrett, Andrews & Letizia, Inc., 86 F.C.C.2d 1172, 1176, 49 R.R.2d 1001, 1004 (Rev. Bd. 1981), *modified on other grounds*, 88 F.C.C.2d 620, 50 R.R.2d 802 (1981).

197. Scott & Davis Enterprises, Inc., *supra* n.194.

198. 53 R.R.2d 1154 (1983), *aff’d*, 56 R.R.2d 618 (1984).

knowledge that the format change was decided in advance of the filing of the transfer application, and other evidence related to the alleged misrepresentation.¹⁹⁹

In declining to designate the issue, the FCC provided the customary justification for such action—that the petition failed to raise the requisite “substantial and material question of fact.”²⁰⁰ But the Commission went a considerable step further, and gave content to that requirement, stating explicitly what a petition to deny must establish in its pleading:

The burden of proof to show misrepresentation is on the accuser and the evidence of such must be “clear, precise and indubitable.” *Overmyer Communications Co., Inc., et al.*, 56 F.C.C.2d 918, 925 (1974), quoting *Mammoth Oil Co. v. United States*, 275 U.S. 13, 52 (1927). The burden has not been met here. The bulk of petitioners’ “evidence” consists of speculation based on the actions of the licensee which the petitioners believe shows a plan to deceive the Commission and the public. However, the petitioners’ speculation is unsupported by external evidence necessary to show intent to deceive.²⁰¹

This formulation is problematic for a number of reasons. First, its source is an Administrative Law Judge’s decision in *Overmyer*, where the ALJ himself qualified the “clear, precise, indubitable” standard by calling it a “legal catchword,” which “demands more verbally than in fact.”²⁰² The ALJ added: “. . . it means no more than the evidence must be reasonably convincing.”²⁰³ Second, on review of the ALJ’s decision in *Overmyer*, the Review Board *reversed* the ALJ on the standard of proof: “A finding of fraudulent misrepresentation may be founded upon a less stringent standard, namely, the preponderance of the evidence.”²⁰⁴ Third, regardless of the ALJ’s fuzzy explanation of the standard, and the fact that it was reversed, the ALJ in *Overmyer* applied it to the evidence adduced at a *hearing*—not to the allegations set forth at the prehearing stage of a

199. 53 R.R.2d at 1156-57.

200. 53 R.R.2d at 1158.

201. 53 R.R.2d at 1157.

202. *Overmyer Communications Co., Inc.*, 56 F.C.C.2d 918, 920 n.4 (1974) (Supplemental Initial Decision of Administrative Law Judge).

203. *Id.*

204. *Overmyer Communications Co., Inc.*, 54 F.C.C.2d 1045, 1060, 34 R.R.2d 1317, 1357 (1975).

petition to deny.²⁰⁵

Aside from these considerable problems with *Overmyer* as a precedent, the *Riverside* formulation has other infirmities. It requires not simply that a petitioner make a "prima facie" showing that designation of a misrepresentation issue is warranted, but that the petitioner essentially *prove* the allegations in the pleading. If the Communications Act—which itself refers to a "prima facie" showing²⁰⁶—had contemplated such a role for petitions to deny, it would hardly have provided for the designation of issues for hearing.

Moreover, not only must the petitioner effectively prove its allegations, it must do so by "external evidence."²⁰⁷ This is a clear reference to the ALJ's requirement in *Overmyer* that misrepresentation be established by "affirmative evidence of malicious intent."²⁰⁸ It is highly doubtful that, at the stage of a petition to deny, a petitioner would have access to "external evidence" amounting to "clear, precise and indubitable" proof of misrepresentation, in any but the rarest of cases. This requirement of a "smoking pistol" to be proffered in a petition to deny, while perhaps meant to screen out frivolous claims, may do away with meritorious claims as well.

A final problem, related to the discussion of *Overmyer* above, is that the *Riverside* formulation illogically puts a burden on petitioners which exceeds that of litigants at hearing. As discussed earlier,²⁰⁹ in *Steadman v. SEC*, a case which the FCC itself has found to be applicable to its adjudications, the Supreme Court established the burden of proof in hearings under the Administrative Procedure Act as "preponderance of the evidence."²¹⁰ The "clear, precise, indubitable" formula is traditionally synonymous with a standard of "clear and compelling proof,"²¹¹ which requires a stronger measure of belief on the part of the trier of fact than "preponderance of the evidence."

205. 56 F.C.C.2d 918.

206. 47 U.S.C. § 309(d) (1982).

207. 53 R.R.2d at 1157.

208. 56 F.C.C.2d at 925.

209. See *supra* Section III at 33.

210. 450 U.S. 91 (1981).

211. McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242, 253 (1944) ("Many phrases have been coined to express this amount of persuasion, or degree of belief, e.g., 'clear cogent and convincing,' 'clear satisfactory and convincing,'

Perhaps the Commission's message in *Riverside* was that its evidentiary standard in misrepresentation cases, all along, has been the "clear, precise, indubitable" standard. While that may well have been the guiding standard in the minds of agency decision-makers, the "preponderance of the evidence" standard has been invoked as the rule.²¹² Moreover, regardless of the standard for hearings, it makes little sense to impose that same burden on a petition to deny.

The *Riverside* formulation, if taken seriously by the Commission, may well relegate misrepresentation claims to the unenviable status of claims of news distortion, slanting, or staging. In the latter cases, "extrinsic evidence" of intentional news distortion is required before the FCC will take any action,²¹³ with few exceptions, such "extrinsic evidence"—inside memoranda admitting distortion—is completely unavailable to petitioners.²¹⁴ With the discredited *Overmyer* standard now resurrected, with its "external evidence" requirement, and its insistence on "clear, precise, indubitable" proof for petitioners to deny, the FCC may well have fashioned the ultimate "mode" for evading misrepresentation charges.

VI. CONCLUSION AND A PROPOSAL

The history of misrepresentation before the FCC is a complex story of the exercise of administrative discretion. Seeking to deter the submission of erroneous information, the FCC announced early in its history that a finding of intentional deception would trigger disqualification. This approach emerged despite indications in cases such as *WSAL* and *WOKO* that the policies of ensuring accuracy in the administrative process, and

'clear precise and indubitable,' 'clear and irresistible,' 'convincing beyond reasonable controversy,' etc.'").

212. See *Lewel Broadcasting Co.*, 86 F.C.C.2d 896, 914, 49 R.R.2d 871, 886 (1981).

213. See, e.g., Letter to Hon. Harley O. Staggers, 25 R.R.2d 413 (1972); CBS ("Hunger in America"), 20 F.C.C.2d 143, 17 R.R.2d 674 (1969).

214. It is a rare phenomenon indeed for outsiders to obtain internal memoranda of the kind seemingly required by the FCC. Although it *can* happen, e.g., *Gross Telecasting, Inc.*, 92 F.C.C.2d 209, 223-26, 52 R.R.2d 851, 865-67 (Rev. Bd. 1982) (citizen group obtains internal station memorandum requiring cessation of certain coverage), Professor Keeton's remark in the context of the *tort* of misrepresentation is highly applicable: ". . . it would be monstrous to require direct proof or something in the nature of an admission of bad faith." Keeton, *supra* note 51, at 584.

the licensing of responsible individuals, could also warrant sanctions for unintended falsity. In the following decades, it seems that the agency recognized that its linkage of intentional deception with disqualification was too rigid and severe—essentially, that some lies should not disqualify. At any time, the Commission could have made this understandable viewpoint explicit. Instead, it chose another path: to retain the framework of intent and the policy that intent to deceive of any kind would trigger disqualification, all the while developing ways to resist a finding of such mental state and thus imposition of the “death penalty.”²¹⁵

With no definition of factors to be considered in each case, the decision-maker applying the intent test had discretion to imbue the inquiry with whatever considerations seemed useful or convenient at the time. To be sure, some applicants and licensees, egregious in their behavior, were disqualified. But others were not, likely raising doubts among the regulated as to the seriousness of the regulators. Moreover, the test led to general unpredictability of result and at least an impression of arbitrariness from case to case—or from agency level to agency level in the same case. The acknowledgement that some misstatements may be “unconscious” was a perceptive insight, but the agency offered no guidance for making such distinctions, if indeed they can ever be reliably made, particularly within the limitations of a licensing bureaucracy. Finally, the latest development—the agency’s strict requirements for petitions under Section 309—may well have the effect of discouraging meritorious claims which cannot be verified by “external evidence” of mental state in the absence of discovery and a hearing. The result: continuing submission of inaccurate information to the agency which has not struck upon a way to discourage such conduct.

Can a solution be found? Clearly yes, if the agency agrees to create a new standard of liability, and then establish an appropriate new set of sanctions. First, “misrepresentation” should be redefined, dispensing with “intent to deceive” as the cornerstone

215. This history should sound a cautionary note to other agencies. *But see* Lavery, *To Reach the Unreachable: Recent Interpretations of the Phrase “Material False Statement” in the Atomic Energy Act*, 36 AD. L. REV. 171 (1983) (proposing, *inter alia*, a scienter requirement for revocation proceedings involving false statements submitted to the Nuclear Regulatory Commission).

of the agency's analysis. Not only is the intent test saddled with a history of far too subjective applications, but, more importantly, it underserves the policies—first enunciated in *Mayflower* over forty years ago—of promoting accuracy in the administrative process and licensing reliable individuals to the airwaves. In a revamped approach, the FCC would affirm those goals by stating a duty of accuracy²¹⁶ on the part of all who appear before it. The focus would completely shift—from the mind of the individual to the content of the individual's submissions. If the submissions are accurate, there is nothing to fear; if materially inaccurate, the agency would take appropriate steps, regardless of the individual's mental state.

In probing charges of misinformation, the agency would first determine whether a submission is inaccurate. "Inaccuracy" would embrace both statements which are affirmatively erroneous, and those which are erroneous by omission. The agency would then consider whether the inaccuracy was material. Definitions of materiality are abundant in administrative law; a workable definition for the FCC would be that the inaccurate information is material: (1) if its effect was to impede or prevent agency awareness of an infringement of FCC rule or policy; (2) if its effect was to obtain an advantage or avoid a disadvantage in the initial licensing processes of the FCC or in the renewal context, or (3) if, in the event the misinformation had gone undetected, it *would have* had the effects of (1) or (2). Gone would be the mystifying discussions of mental state—the "incipient lack of candor," the "faulty shading of recollection," the "element of hocus pocus"—which have too long cluttered the F.C.C. Reports.

This brings us to the second step of the suggested new approach—the sanction. On a finding of materially inaccurate information, the agency would impose an established sanction. A single materially inaccurate statement made in response to an agency inquiry, not in a hearing context, would automatically

216. Cf. Green, *The Duty to Give Accurate Information*, 12 UCLA L. REV. 464 (1965) (professionals should be held to a standard of accuracy rather than duty of care). Although Section 312(a) of the Communications Act includes a scienter requirement, 47 U.S.C. § 312(a) (1982), that section applies to revocations and does not bind the agency to a scienter test for misinformation in other contexts. In fact, Section 312(a) is virtually never cited as authority for FCC action in misrepresentation cases outside the revocation context.

trigger a substantial fine (say, \$20,000). For the same offense, committed during a hearing, the offender would pay the established fine to the agency, as well as attorneys' fees of the hearing parties incurred as a result of the misinformation. A series or pattern of materially inaccurate statements, in either a hearing or non-hearing context, would subject one to fines and disqualification.

The effect of such an approach would be to liberate the Commission from the problem of a vague standard connected to a mostly unthinkable sanction. An approach based on imposing a heavy fine for supplying materially inaccurate information—instead of disqualification, which is always threatened but rarely imposed—would not reduce industry's incentive to be truthful, but rather signal the agency's readiness to take definite measures based on an objective assessment of the information provided. Moreover, the threat of disqualification would remain for those whose materially inaccurate statements became a recognizable pattern. Through such an approach, the FCC would be truer to its underlying interests. It would put a premium on accuracy, regardless of mental state. And it would make the point that "character" involves the broad notion of responsibility rather than state of mind.

Allegations of materially inaccurate statements would be presented in a petition to deny in the context of an application, or a Notice of Violation if otherwise. On a showing of a "substantial and material fact" as to whether the misinformation is materially inaccurate, the Commission would designate an issue for hearing. The ALJ would find facts and make conclusions of law, based on the preponderance of the evidence, as to both inaccuracy and materiality. Ideally, the Review Board's standard of review would be the "substantial evidence" standard of the Administrative Procedure Act,²¹⁷ not the *de novo* review of the past; but even with *de novo* review, the Board would be subject to the same objective standard as the ALJ and results would not vary

217. See *Central Texas Broadcasting Co., Ltd.*, 90 F.C.C.2d 583, 597, 51 R.R.2d 1478, 1488 (Rev. Bd. 1982) (sep. statement of Member Jacobs) (when the Review Board reviews an ALJ decision, "affirmance is mandated so long as the resolution of an issue is not 'arbitrary, capricious, [or] an abuse of discretion . . . [or] unsupported by substantial evidence,'" citing 5 U.S.C. § 706).

significantly. The full FCC would become involved only upon grant of an application for review, as under current practice.

As the FCC continues its agenda of deregulation into the mid-1980s, it will still require information from its licensees. Thus, it must find a way to foster the submission of current information, so that correct decisions can be made. With the new approach suggested here, the FCC, in an era of bold and assertive deregulatory measures, can be equally bold and assertive in demanding that its licensees be accurate in the remaining areas where they are accountable to government.