

57. Mr. Price, in his candor hearing testimony, conceded that some of his answers were not precisely the same as his answers during the depositions. (Tr. at 1400) He explains the change in testimony as follows:

At the proceeding today, I was specifically -- at least as I read the Judge's instructions -- asked to focus on exactly when we discovered the service -- premature service was occurring and what we did in response to it. My -- at the earlier depositions, the focus -- at least I gathered the focus was more on how did this all come about and where did it end up in terms of, you know, how was it resolved; what did you do about it, not on the interim step of when did you find out and what happened at that very moment.

When I was first asked about when we first learned that, you know, we may have a problem or -- or -- or licenses were in jeopardy, my first instinct was to note the Time Warner petition to deny which I believe was the first direct attack of, you know, any magnitude on our licenses. And that I recall came at the beginning of January and Time Warner -- '95 when Time Warner was saying that we were a -- providing unlawful cable -- we were an unlawful cable operator and, therefore, if we were an unlawful cable operator, we shouldn't be allowed to operate with FCC licenses. So that was the first moment of time I attach to.

As I read some of the documents during the deposition, it became clearer to me that -- or at least the back and forth in refreshing my memory during that period led me to believe it was probably later in the spring that what I had first remembered was the Time Warner reference to our licenses. But that was really part of the hardware proceeding, the cable franchise or lack of cable franchise proceeding.

I then connected to the second Time Warner eruption which I believe was in May, which was one of the more visible landmarks, where Time Warner said here are examples of unlawful service that you're providing. In this preparation, I saw some documents including that May 28th memo which I didn't recall -- the April 28th memo -- which defined precisely that it was slightly before Time Warner challenged our licenses that we ourselves had found out about it.

(Tr. at 1400-02)

### **3. Behrooz Nourain**

58. On April 20, 1993, Jennifer Richter, then an attorney with Pepper & Corazzini, wrote a letter to Bruce McKinnon, then the Executive Vice President and Chief Operating Officer for

Liberty (Richter Letter).<sup>11</sup> Mr. Nourain was copied with the letter. Additionally, the version of the Richter Letter admitted as TW/CV 51 had handwriting on it indicating that Mr. Nourain sent a copy of the Richter Letter to Mr. Price.<sup>12</sup> (TW/CV Ex. 51) In the letter, Ms. Richter explained to Mr. McKinnon that she had had discussions with Mr. Nourain regarding when it is permissible to activate a microwave path. (TW/CV Ex. 51 at pg. 1) Ms. Richter provided detailed information in the letter of how long various types of applications take to be processed. (TW/CV Ex. 51 at pp. 1-2) She additionally stated in the letter that if Liberty needed to commence operation sooner than the standard time necessary for processing an application, she would apply for an STA upon Liberty's request. (TW/CV Ex. 51 at pg. 2)

59. Mr. McKinnon, in his deposition,<sup>13</sup> stated that he had conversations with Mr. Nourain concerning the need to have Commission authorization prior to commencing operation and that Mr. Nourain was clear on that need. (Dep Tr. at 11-12, 29-30)

60. During the candor hearing, Mr. Nourain testified that he learned about the unauthorized activation of microwave paths in late April 1995 when an internal document was sent to him by facsimile.<sup>14</sup> (Tr. at 645-46) Mr. Nourain stated that he believes that this internal document came from Liberty's corporate headquarters at 575 Madison Avenue. (Tr. at 762)

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<sup>11</sup> The Richter Letter has been admitted into evidence as TW/CV Ex. 51. *See Order*, 97M-19 (released February 14, 1997).

<sup>12</sup> The Richter Letter was produced *after* the conclusion of testimony; therefore, no testimony was solicited concerning this document.

<sup>13</sup> Mr. McKinnon was deposed on June 5, 1996. A copy of the transcript of Mr. McKinnon's testimony has been admitted as TW/CV Ex. 41.

<sup>14</sup> In a letter to the Presiding Judge, dated February 6, 1997, Liberty stated that it does not rely on the testimony given by Mr. Nourain in this proceeding with respect to when he initially learned of the unauthorized provision of service.

Upon receiving this fax, Mr. Nourain stated he spoke to Mr. Ontiveros who recommended that they speak to Mr. Price and Edward Milstein. (Tr. at 646) A meeting was held and Mr. Nourain testified that he told Messrs. Price and Edward Milstein what he had found out about the unauthorized operation of the OFS paths. (Tr. at 745-46) Mr. Nourain stated that he believes that they were just as surprised at learning about the unauthorized activations as he was. (Tr. at 650) Mr. Nourain stated that he did not regularly meet with Messrs. Price and Edward Milstein. (Tr. st 747)

61. Mr. Nourain also testified that he called Mr. Lehmkuhl about why he had not done his job at getting STAs for those paths. (Tr. at 646-47) Mr. Nourain stated he asked Mr. Lehmkuhl to give some kind of report on what was going on. (Tr. at 648) TW/CV Ex. 34 (April 28 Lehmkuhl Memorandum) is the report that Mr. Nourain had asked Mr. Lehmkuhl to prepare. (Tr. at 742)

62. After speaking to Mr. Lehmkuhl, Mr. Nourain prepared TW/CV Ex. 35 (Nourain Memorandum). (Tr. at 822) The handwriting on TW/CV Ex. 35 is Mr. Nourain's. (Tr. at 820, 821) The handwriting with the notation "Lic" means that the path has been licensed. (Tr. at 822-23, 824) At the time Mr. Nourain prepared the Nourain Memorandum, he stated he knew that Liberty was operating certain paths without proper authorization. (Tr. at 836)

63. Mr. Nourain stated that he believes that a copy of the Nourain Memorandum was sent to the people named as recipients. (Tr. at 819, 831-32)

64. Mr. Nourain received the April 28 Lehmkuhl Memorandum on April 28, 1995. (Tr. at 740) The facsimile transmission number indicating where the document was sent is the telephone number for the fax machine in Mr. Nourain's office. (Tr. at 740-41)

65. Mr. Nourain testified that he did review the STA requests before they were filed on May 4, 1995. (Tr. at 811-12)

#### **4. Michael Lehmkuhl**

66. Mr. Lehmkuhl testified during the candor hearing that he prepared the April 28 Lehmkuhl Memorandum. (Tr. at 1041) Mr. Lehmkuhl stated that he prepared the April 28 Lehmkuhl Memorandum after a telephone call from Mr. Nourain in which Mr. Nourain seemed "rather agitated about the time frame for STAs and some of the -- some of the other issues that were -- that were going on with Liberty's licenses." (Tr. at 1041-42) The telephone call with Mr. Nourain, to the best of Mr. Lehmkuhl's recollection was one or two days prior to the April 28th date of the memorandum. (Tr. at 1048)

67. Mr. Lehmkuhl stated that during the telephone conversation with Mr. Nourain, Mr. Nourain identified a number of paths for which he needed to have STAs. (Tr. at 1051)

68. The purpose of pages 2-3 of the April 28 Lehmkuhl Memorandum (TW/CV Ex. 34) was to identify all the pending applications. (Tr. at 1052)

69. Mr. Lehmkuhl testified that on April 28, 1995, when he prepared the memorandum, he was unaware that there were unauthorized operations by Liberty. (Tr. at 1053-54)

70. During the conversation with Mr. Nourain which prompted the creation of the April 28 Lehmkuhl Memorandum, Mr. Lehmkuhl stated that Mr. Nourain instructed him to file STA requests. (Tr. at 1142) Mr. Lehmkuhl stated that he felt that the STA requests would not get granted because of the Time Warner petitions, but after discussions with Mr. Barr he went ahead and filed them anyway. (Tr. at 1153-54) TW/CV Ex. 17 are copies of the STA requests filed on May 4, 1995. (Tr. at 1175) Mr. Lehmkuhl sent the entire STA request to Mr. Nourain to

review and sign. (Tr. at 1176) Mr. Barr also reviewed the STA requests before they were filed. (Tr. at 1178-79) Additionally, Mr. Lehmkuhl testified that he believes others, including attorneys at either Ginsburg, Feldman & Bress, or Constantine & Partners, may have reviewed the STAs before they were filed. (Tr. at 1181)

#### **5. Edward Milstein**

71. During his testimony in the candor hearing, Mr. Edward Milstein stated that he first became aware at the end of April 1995 of the possibility that Liberty might be operating paths without licenses. (Tr. at 1623-24) Mr. Edward Milstein stated that it was Mr. Price who informed him of this possibility. (Tr. at 1624-25) He testified that he is sure he discussed this matter with his brother, Howard Milstein. (Tr. at 1625)

72. Mr. Edward Milstein stated he did not recall seeing the Nourain Memorandum (TW/CV Ex. 35) previously. (Tr. at 1630-31) He stated he does remember Mr. Ontiveros raising with him the emissions designator problem and he believes that the Nourain Memorandum is a follow-up to conversations regarding the emissions designator problem. (Tr. at 1631) Mr. Edward Milstein testified that he does not remember Messrs. Nourain and Ontiveros coming to his office to discuss the Nourain Memorandum. (Tr. at 1631) However, he stated that he would only speak with Mr. Nourain twice a year. (Tr. at 1646) Mr. Edward Milstein stated that the period of time from the first time he heard that there may be a problem of Liberty operating without licenses until the time he received confirmation of that fact was within a week. (Tr. at 1640)

#### **6. Anthony Ontiveros**

73. During his testimony in the candor hearing, Mr. Ontiveros stated that he learned that

Liberty had operated some microwave paths without authorization in late April 1995. (Tr. at 1701) Mr. Ontiveros testified that he learned in a meeting with Messrs. Edward Milstein, Price, and Nourain. (Tr. at 1701-02) The meeting was held in Mr. Price's office. (Tr. at 1706-07) Mr. Ontiveros stated his opinion was that everyone in the meeting was shocked to learn of the unauthorized provision of service. (Tr. at 1708)

#### **7. Howard Barr**

74. Mr. Barr was the billing partner on the Liberty account at Pepper & Corazzini. (Tr. at 1810) During his testimony in the candor hearing, Mr. Barr stated that he learned about the unauthorized provision of service on April 27, 1995. (Tr. at 1796)<sup>15</sup> Mr. Barr testified that he learned on April 27 during a conference call taking place at the office of Henry Rivera, of Ginsburg, Feldman & Bress. (Tr. at 1796) Also present in Mr. Rivera's office were Messrs. Barr, Rivera, and Constantine, and on the other end of the telephone was Mr. Price. (Tr. at 1796-97) The call had been scheduled to discuss the Time Warner petitions. (Tr. at 1797) Mr. Barr stated he believed that this was the first time that attorneys from all three law firms were on the same conference call with someone from Liberty. (Tr. at 1942)

75. Mr. Barr stated that during the conference call, Mr. Price stated that Liberty was operating at several locations without authorization and that this information shocked him. (Tr. at 1798) Mr. Barr testified that he then explained to Mr. Price that this information, if true, then it was a serious violation and that Mr. Price was somewhat taken aback by this comment. (Tr.

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<sup>15</sup> The current transcript reveals Mr. Barr's answer as being that he learned on April 22. On February 22, 1997, pursuant to a request by the Presiding Judge, Liberty filed a Motion to Correct Hearing Transcript in which it seeks to correct the answer to be that Mr. Barr learned on April 27. *See Order*, 97M-24 (released February 26, 1997) .

at 1798) Thereafter, Mr. Barr stated that Mr. Price said he would check to see if Liberty was in fact providing service to those sites. (Tr. at 1837)

76. Mr. Barr stated that he believes that he was looking at the Nourain Memorandum (TW/CV Ex. 35) during the conference call. (Tr. at 1859-60) He testified that he believes he used the Nourain Memorandum to go over the specific paths mentioned by Mr. Price as currently operating without authorization. (Tr. at 1948) Mr. Barr also believes that the subject of filing STA requests came up in the April 27th conference call. (Tr. at 1860)

77. Mr. Barr testified that he cannot recall if, when he went back to his office, he told Mr. Lehmkuhl about what he learned during the conference call. (Tr. at 1943)

78. Mr. Barr stated that he was aware that STA requests were filed on behalf of Liberty on May 4, 1995. (Tr. at 1801, 1862-63) However, Mr. Barr knew that there is no deadline by which an STA request must be filed. (Tr. at 1863) Mr. Barr further stated that Mr. Lehmkuhl drafted the STA requests which were then reviewed by himself, Henry Rivera, Lloyd Constantine, and Peter Price. (Tr. at 1801) According to Mr. Barr, the STAs did not reveal to the Commission that Liberty was already operating the paths because he did not think that the "sum and substance of the commencement of service was fully fleshed out" yet. (Tr. at 1801) Moreover, Mr. Barr stated that it was "Liberty's intent at the time was . . . not to not divulge the information on a piecemeal basis. It wanted to find out what happened, and then go forward with the information." (Tr. at 1946)

#### **IV. CONCLUSIONS OF LAW**

##### **A. Testimony About When Witnesses Learned of Violations**

79. The Bureau joined Liberty in the Motion for Summary Decision based upon the

evidence adduced through discovery -- including the depositions of witnesses. The testimony of several witnesses during the candor hearing changed, however, from the testimony given by the same witnesses during the depositions. Howard Milstein, in his deposition, stated that he learned about the unauthorized activation of service by Liberty from the Time Warner petition that brought the violations to the Commission's attention. In the candor hearing, however, he changed his story to state that he actually learned in late April 1995 -- *prior* to the Time Warner petition which was filed May 5, 1995. When questioned about this change in his testimony, Mr. Howard Milstein disputed that he had changed stories, and stated instead, that he believed that unauthorized service was discovered when dealing with one of the several petitions filed by Time Warner. Therefore, in other words, it was not from Time Warner's May 5, 1995, petition that he learned that Liberty was operating some paths without proper authorization, rather, it was from the action being taken by Liberty in light of Time Warner's other petitions concerning Liberty's hardwiring non-commonly owned buildings, that they discovered the problem.

80. Mr. Howard Milstein's explanation, however, is insufficient to fully explain his change in testimony. His prior testimony in his deposition is clear that he learned when Time Warner made the *direct* allegation that Liberty was operating without authorization. For instance, during Mr. Howard Milstein's deposition, the following colloquy took place between Mr. Howard Milstein and Mr. Bruce Beckner, Time Warner's trial counsel:

**Mr. Beckner:** Do you remember who brought this [that Liberty was or might be operating microwave paths without FCC licenses] to your attention or how it was brought to your attention the first time?

**Mr. Milstein:** I think it was brought to our attention because Time Warner made a complaint to some regulatory agency.

**Mr. Beckner:** And you were informed about that complaint, I take it?

**Mr. Milstein:** Yes.

**Mr. Beckner:** So it would be correct to say that whenever that complaint had been filed at the agency, that your knowledge of the fact that Liberty was operating microwave paths, some microwave paths, without a license, would have come after that complaint had been filed with the agency?

**Mr. Milstein:** That's correct.

**Mr. Beckner:** Upon learning of the allegations by Time Warner, what action, if any, did you take?

**Mr. Milstein:** Well, I was, of course very concerned. Time Warner is a difficult competitor, with all due respect to counsel, and I was concerned that *what they were saying might be true*, and what they would do if it were true.

It didn't make sense to me that it was true because I know *that we had gone to great lengths to comply with all the rules and regulations*, but I immediately called in our lead outside counsel and the senior partner of the firm, Lloyd Constantine, and asked them to fully investigate the facts as alleged to find out if, in fact, there was a problem, if what the scope of the problem was, whether it was more or less than what was alleged.

And as that process continued, when we found out shortly thereafter there was a real problem, we knew in two or three days, then I told them we have to get all the facts, get them all on the table, take them to the regulator and explain to them how it occurred, and we would have to develop a compliance program that would have belts, suspenders and safety nets and every other gadget possible, because we couldn't afford to have this kind of thing happen. This was not the way we wanted to run our business.

(Dep. Tr. 28-30) (Emphasis added.) It is clear from this set of questions and answers, that Mr. Howard Milstein is stating that he first heard of a possibility that Liberty was providing service without authorization from Time Warner's petition which raises that allegation. He was specifically asked, "Upon hearing of the *allegation by Time Warner . . . ?*" In his deposition, he made no disclaimer that he did not learn about the unauthorized provision of service when Liberty was reacting to the earlier Time Warner petitions. More significantly, in his deposition, Mr. Howard Milstein utterly fails to mention any of the highly significant late April meetings

which were discussed at length by him and other witnesses during the candor testimony.

81. Likewise, Mr. Price also stated in his deposition that he learned about the unauthorized activation of OFS paths from the May 5, 1995, Time Warner petition. And, like Mr. Howard Milstein, Mr. Price also changed his story during the candor hearing. In his deposition, Mr. Price stated that he received his information about unauthorized activation of service from counsel who received it from a Time Warner pleading. In his testimony in the hearing, however, Mr. Price stated that he obtained the information about the illegal service from the Nourain Memorandum, and that it was *he* who conveyed that information to counsel in a conference call.

82. Mr. Price's explanation as to the reason for this change in his earlier testimony is insufficient to fully explain such a dramatic change. Mr. Price's explanation appears to be that between the time he was deposed and the time he testified at the candor hearing, there was a change in focus -- whereas the depositions were more concerned with *how* the problem occurred, the hearing was more concerned with *when* he learned about the problem. Therefore, when he looked over some documents in preparation for the candor hearing, he realized the answer he gave in his depositions that he learned of the unauthorized activations in January was wrong, and that January was when the first Time Warner petitions on the issue of illegal hardwire connections were filed.

83. Mr. Price's explanation *does* adequately explain why during his first deposition he initially answered January 1995 as being when he learned of the problem, but it does not explain why he never mentioned at anytime during his depositions the highly significant meetings held with the other Liberty personnel and counsel in late April 1995 concerning the issues of when

and how the problems arose. Nor does it explain why in his depositions he did not mention that he really learned of the unauthorized provision of service from the Nourain Memorandum and the April 28 Lehmkuhl Memorandum.

84. Although Liberty has disavowed Mr. Nourain's testimony about when he learned about the unauthorized provision of service, to his credit, Mr. Nourain in fact seems the most consistent Liberty witness on this particular issue. His deposition testimony, like his hearing testimony, is convoluted and somewhat difficult to follow, but he did state that he learned in late April 1995. But he does also state in his deposition that he learned from information that came from Time Warner.<sup>16</sup>

85. Mr. Nourain is clearer in his hearing testimony that he learned in late April. Although the Bureau has never seen the mysterious document received on his fax machine that purportedly showed Mr. Nourain that Liberty was operating some paths without an authorization, Mr. Nourain is certain in his testimony that by at least April 26, 1995, the day he created the Nourain Memorandum (TW/CV Ex. 35), he knew about Liberty's unauthorized provision of service.

86. Mr. Nourain, however, offers no explanation as to why he made no reference at all to either the Nourain Memorandum or the April 28 Lehmkuhl Memorandum (TW/CV Ex. 34) during his deposition.

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<sup>16</sup> Because of his insistence that he learned from Time Warner, the Bureau, after Mr. Nourain's deposition, was not confident that Mr. Nourain actually learned in April 1995. It appeared at the deposition as though Mr. Nourain was confused about the dates and instead, actually learned in early May 1995, when Time Warner filed its petition. In light of his hearing testimony, the Bureau now believes that Mr. Nourain was correct in his deposition in stating that he learned in April, but incorrect in stating that the information came from Time Warner.

87. Mr. Lehmkuhl testified in both his first deposition and in the candor hearing that he did not learn of Liberty's unauthorized service until after Time Warner's petition. No witness directly contradicts this point. The Bureau, however, is skeptical at best. It is certain that Mr. Barr knew about Liberty's illegal operations on April 27, 1995. At that time, Mr. Lehmkuhl was a junior associate with Pepper & Corazzini who was responsible for handling the filing of applications for Liberty, and Mr. Barr had primary responsibility for handling matters for the client. Mr. Barr stated that he was shocked to hear that Liberty was operating some paths without a license. It is unconscionable that upon arriving back at his office, he would not speak to the attorney handling the applications to try to get more information about what was happening. Considering that Mr. Lehmkuhl was the attorney who was handling Liberty's applications, working under Mr. Barr's direction, and that Mr. Barr had just learned there was a serious problem of Liberty potentially operating without licenses, it would only follow that he would want to consult with the person responsible for processing the applications.

88. Additionally, when Mr. Nourain made his "agitated" telephone call to Mr. Lehmkuhl on April 26, 1995, to find out why STA requests had not been filed, it is not logical to think that Mr. Nourain did not mention in the course of that conversation, that paths had already been activated.

89. Mr. Edward Milstein's deposition testimony was clear that neither he, nor anyone else at Liberty, knew about the unauthorized provision of service until after Time Warner's petition shed light on Liberty's violations. His hearing testimony, however, shows that he did learn, as did others at Liberty, prior to Time Warner's May 5 petition. Mr. Milstein offers no explanation for why he changed his testimony.

90. The testimony of Messrs. Ontiveros and Barr also fully substantiate the fact that Liberty was aware of the unauthorized provision of microwave service prior the time to Time Warner raised the issue on May 5, 1995.

91. The Bureau appreciates that a certain amount of time had passed between the discovery of the unauthorized provision of service and the time of the depositions. Moreover, the Bureau is aware that memories fade over time. However, the events which led to the discovery of the illegal operations should not have been minor events to any of the witnesses. Liberty was a small company attempting to compete with a large company and the fact that it learned that it had committed serious violations of the Commission's Rules should remain a significant event in the lives of these witnesses and not an event which is easily forgotten. Mr. Barr testified that he told Mr. Price that the violation was serious.

92. Moreover, the events surrounding the witnesses' discovery of the violations were not standard or ordinary occurrences in Liberty's operations. For instance, it was testified to that the conference call between Messrs. Price, Barr, Constantine, and Rivera was the first time that lawyers from three different firms were on a telephone call with Mr. Price together. Accordingly, with that fact, and considering the information conveyed in the call, it is inexplicable that Mr. Price had no recollection of this telephone call when deposed. Additionally, Mr. Edward Milstein testified that he spoke with Mr. Nourain only twice a year. Given that fact and the information Mr. Nourain communicated to Mr. Edward Milstein in the Nourain Memorandum and subsequent meeting, it is difficult to understand how he had no memory of those events during his deposition.

93. The question then becomes, whether these changes in the key witnesses' testimonies

oblige the Bureau to withdraw its support of the Joint Motion. Although the Bureau is very troubled and puzzled by the deviations in testimony, we do not believe that it necessitates a departure from the position taken by the Bureau in the Joint Motion.

94. The Joint Motion is based upon the facts and circumstances as to *how* the situation of microwave paths being activated without prior authorization occurred. Nothing in the witnesses', albeit inconsistent, testimony alters those facts. As detailed in the Joint Motion, one of the primary factors which led up to Liberty's commencement of service on various OFS paths without first obtaining Commission authorization was the fact that Mr. Nourain had certain assumptions of how long it took to have an OFS application processed at the Commission. The Richter Letter (TW/CV Ex. 51) provides documentation that Mr. Nourain was in fact told by his counsel of the various time frames involved in an OFS application process.

95. Whether Liberty learned of the violations in late April 1995 or in early May 1995 is not a factor in *how* the illegal operations began. Nevertheless, the marked deviation in testimony is troubling. But the Bureau stops short, however, of concluding that any of the witnesses were actually lying because the Bureau can conceive of no purpose the witnesses would have in making such misrepresentations in their deposition testimony.

96. Of particular importance is the fact that on September 20, 1995, Lloyd Constantine swore in an affidavit filed with the Commission that Liberty became aware of the unauthorized service in late April 1995. (TW/CV Ex. 29 at p. 1) Because this affidavit was prepared and submitted long before the witnesses' testimony, they would have had no reason to fabricate or dissemble.

97. More importantly, we believe that Mr. Price's testimony in his direct examination on

Time Warner's scrutiny of Liberty's actions best shows that Liberty has no reason to misrepresent to the Commission as to when they learned of the unauthorized operations:

**Mr. Spitzer:** Was it considered possible or plausible that Time Warner would not figure out that there was premature service?

**Mr. Price:** No, we -- Time Warner in fact scrutinized us by site by day. Their trucks were always parked outside buildings we were installing either because they were observing what we were doing which they did on many occasions just to see out procedures and there's no law against that; or because they were disconnecting customers of theirs as we were connecting our customers.

So Time Warner was present at every one of our installations while we were installing, during the course of the installation and even as we were later hooking up individual customers because it was required by Time Warner to have those cable boxes returned. And Time Warner made quite a to-do about what the Department of Information Technologies developed as a "protocol" to -- to govern the return of Time Warner equipment which they complained was getting lost or stolen.

So we were being not only scrutinized by several public agencies, but closely scrutinized by our competitor. So we assumed they would be keenly aware of everything we were doing. And if we were doing something wrong and hid it, *we certainly wouldn't hide it from them for long.*

**Mr. Spitzer:** Did you in fact advertise the fact that particular buildings were being serviced by Liberty Cable?

**Mr. Price:** Every day. In today's *New York Times*, you'll see an ad on page 1 indicating that we've liberated another building by -- by the address of the building. And in fact I -- yesterday having familiarized myself with some of these memoranda and specifically addressing the Judge's concern that we focus on what was going on; when we learned and what we did, I looked at that week. And that same week, we were advertising at least one of those buildings in the HDO designation list on the front page of the *New York Times*.

So we certainly lacked oversight and had lousy procedures, if not, you know, terribly flawed procedures in place. But there was absolutely no intent to hide what we were doing. In fact, we advertised what we were doing.

(Tr. at 1397-99) Although Mr. Price's responses are largely self-serving, they do make sense.

Because Liberty had to return cable boxes to Time Warner when it installed service in a building,

and because Liberty advertised its service to buildings on the front page of the *New York Times*, Time Warner was aware when Liberty commenced operations in a new building. Liberty had no reason to misrepresent facts about that issue.

98. In short, while the Bureau believes that the witnesses changed their testimony on an important issue -- when they learned of the illegal operations -- the Bureau does not believe that the changes are of decisional significance. The time difference between when the witnesses initially testified they learned and when they eventually testified they learned is only slightly greater than a week.<sup>17</sup> Because the time frame is so insignificant, the Bureau does not believe that the variations in testimony alter the facts and circumstances surrounding the unauthorized operations in the Joint Motion.

#### **B. Character Policy Statement**

99. At the end of the candor hearing (Tr. at 1979) and in an Order, the Presiding Judge requested an analysis of the candor hearing in light of the Commission's *Character Policy Statement*, 102 FCC 2d 1079 (1986) (*Policy Statement*), including the Commission's standard on "flagrant disregard of Commission rules and policy." *Id.* at 1229. *See Order*, 97M-12 (released January 31, 1997)

100. The two traits discussed in the *Policy Statement* which the Commission regards as crucial to a character determination are truthfulness and reliability. *Id.* at 1179, 1189-90, 1228. "[W]e have questioned whether the licensee will in the future be likely to be *forthright* in its dealings with the Commission and to operate its station *consistent* with the requirements of the

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<sup>17</sup> All of the witnesses (with the exception of Mr. Lehmkuhl) testified in the candor hearing that they learned somewhere between April 26-28, 1995. The initial testimony all pointed to learning from Time Warner's petition filed on May 5, 1995.

Communications Act and the Commission's Rules and policies. *Id.* at 1209 (Emphasis added).

101. The *Policy Statement* adds that the Commission "recognized that there may be circumstances in which an applicant has engaged in repeated, willful violation of law amounting to a *flagrant disregard* for complying with the law. Such adjudicated misconduct might, of its own nature, provide sufficient evidence that the applicant lacks the traits of reliability and/or truthfulness necessary to be a licensee." *Id.* at n.61 (Emphasis added).

102. In assessing the testimony of Liberty's principals and employees at the candor hearing, and looking to its admitted, repeated violations of the law, it nonetheless, appears that Liberty is qualified to remain a Commission licensee. The testimony did not reveal an intent to deceive the Commission, nor was there a plan to purposely conceal its actions. No one at Liberty disputes that their actions were careless and regrettable, but the testimony does not point to lack of candor. The Commission has denied applications when it believed that an applicant's general integrity and future reliability were in doubt, due to its past misrepresentations or lack of candor, observing that "misrepresentation 'involves false statements of fact,' while lack of candor 'involves concealment, evasion and other failures to be fully informative'. . . '[and] both misrepresentation and lack of candor represent deceit'" *Id.* at 1195-96 (citations omitted).

103. The testimony of the Liberty witnesses cannot be deemed deceitful, and thus it cannot be said to lack candor in that respect. Liberty officials were unaware that Liberty was violating the law; they did not knowingly violate the Commission's Rules. We do not believe that the violations, although willful and repeated, amount to a flagrant disregard of the

Commission's Rules.<sup>18</sup> Furthermore, due to the compliance program they have set up, Liberty can be trusted to fully comply with the Commission's Rules in the future. The compliance program follows the Commission rules closely. It requires signoff by the (legal) compliance officer before service to a building can begin. To disqualify Liberty from being a licensee upon character grounds for its actions that do not represent untruthfulness or unreliability would be counter to the *Policy Statement*.

### **C. Incomplete Information and Misstatements in STA Requests**

104. After the depositions, the Bureau was left with the impression that it was Mr. Constantine who was incorrect in his September 20, 1995, affidavit as to the date when Liberty learned of the provision of service without authorization. After all, the testimony from all the witnesses who had had much more day-to-day involvement in Liberty's operations than Mr. Constantine was that they learned from the Time Warner petition. Moreover, because the Time Warner petition was filed in early May, the Bureau made the determination that Mr. Constantine was merely off by a week in the timing of Liberty's realization of the violation.

105. The reason that the Bureau believes that this change in testimony, even if not based on any lack of candor by the witnesses, is now significant, is because of the numerous STA requests filed by Liberty on May 4, 1995. Liberty makes absolutely no mention in any of those applications that the paths for which STAs were being requested are in fact already in operation.

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<sup>18</sup> See *Las Americas Communications, Inc.*, 1 FCC Rcd 786 (1986) (In determining whether violations amount to a flagrant disregard of the Commission's Rules, consideration must be given to the circumstances surrounding the violations) In this regard, we believe the record fully demonstrates that the circumstances surrounding Liberty's violations demonstrate that the violations occurred because of failure to adequately supervise and mistaken assumptions made by Liberty personnel. There is nothing which should suffice to make a finding of flagrant disregard of the Rules.

106. To the contrary, the precise language in the STA requests is prospective in nature. For instance, the STA requests all state that, "[g]iven the extraordinary circumstances regarding the *need for service*, any delay in the institution of temporary operation would seriously prejudice the public interest." (TW/CV Ex. 17 at pg. 003) (emphasis added.) Additionally, all the STA requests state that "[t]he equipment *will be used* to distribute applicant's own products or services, including video entertainment programming, to private cable buildings on frequencies in the 18,142-18,580 MHz band." (TW/CV Ex. 17 at pg. 005) (Emphasis added.) The STA requests also state "Liberty *will operate* the station in conformance with the technical specifications outlined in the referenced application(s)." (TW/CV Ex. 17 at pg. 006) (emphasis added.) The language used in these requests -- *need for service, will be used, will operate* -- is certainly language which denotes that service *has not* commenced, but instead, will commence sometime in the future.

107. The Bureau, however, now knows, that when Liberty filed these STA requests, all of its principals were indeed acutely aware of the fact that those paths were already activated, and Liberty's customers were already receiving service. Yet, no mention of that premature activation is made in the requests. Mr. Barr's testimony that "the sum and substance of the commencement of service [was not] fully fleshed out," (Tr. at 1801) does not suffice to explain Liberty's failure to disclose the unauthorized activation in the STA requests which it filed with the Commission. It is clear that there was no doubt in the minds of the various Liberty officials by May 4, 1995, that Liberty was operating certain paths without authorization. The April 28 Lehmkuhl Memorandum listed the paths for which applications were still pending. It certainly would not take more than a week to determine whether any of those paths on the list had in fact been

activated. Mr. Price testified that he knew from personal knowledge that some of the paths were already active. Therefore, what had not been "fleshed out" was *how* the problem occurred, not whether there was a problem.

108. The Bureau believes that at that point, Liberty had two acceptable options available to it in order to maintain candor with the Commission: 1) disclose in its STA requests that the paths were already activated; or 2) delay the filing of the STA requests until Liberty had concluded its internal investigation into how the problem arose. As Mr. Barr himself noted, there was no need for the STA requests to be filed on May 4, 1995; the STA requests could have been filed at a later time. But Liberty chose neither of the two acceptable options, and instead, filed the STA requests without disclosing highly pertinent and relevant information to the Commission concerning these paths.

109. The Bureau believes that the seriousness of this offense is compounded by the fact that so many responsible individuals reviewed the STA requests on behalf of Liberty before they were filed. According to Mr. Barr, both he and Mr. Lehmkuhl reviewed the requests, as did Messrs. Price, Nourain, and Rivera. Liberty, in its haste to get the STA requests on file, neglected to include all necessary and relevant information required by the Commission in order for the Commission to process the requests. The Commission must rely on its licensees to provide full and candid representations of all facts,<sup>19</sup> and it is now clear that Liberty failed to do so.

110. Section 1.913(d) of the Commission's Rules states: "Applications, amendments, and

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<sup>19</sup> See, e.g., *RKO General, Inc. v. FCC*, 670 F.2d 215, 232 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 and 457 U.S. 1119 (1982).

related statements of fact need not be signed under oath. Willful false statements made therein, however, are punishable by fine and imprisonment, U.S. Code Title 18, Section 1001, and by appropriate administrative sanctions, including revocation of station license pursuant to Section 312(a)(1) of the Communications Act of 1934, as amended." 47 C.F.R. § 1.913(d). Additionally, Section 1.914 of the Commission's Rules states: "Each application shall contain *full and complete disclosures* with regard to the real party or parties in interest and as to all matters and things required to be disclosed by the application forms." 47 C.F.R. § 1.914. (emphasis added).

111. The Bureau believes that Liberty made willful misstatements in the STA requests and failed to give full and complete disclosures as to all the relevant facts and circumstances surrounding the paths being applied for. Liberty filed fourteen STA requests on May 4, 1995, and an additional STA request on May 19, 1995. None of these requests made the disclosures required by Sections 1.913(d) and 1.914 of the Commission's Rules.<sup>20</sup> Although this transgression is serious, the Bureau does not believe that the discovery of these additional violations requires a denial of the Joint Motion. As will be discussed later herein, the Bureau has confidence that Liberty can be trusted in the future on an ongoing basis. Therefore, the Bureau believes that Liberty should receive an additional forfeiture for this violation.

112. Accordingly, the Bureau requests that a forfeiture be assessed against Liberty, in addition to the \$790,000 already requested in the Joint Motion, in the amount of \$20,000 per

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<sup>20</sup> The STA request filed on May 19, 1995, was for the path to 2727 Palisades Ave. On May 17, 1995, Liberty filed with the Commission its Surreply in which it disclosed that it had commenced service to 2727 Palisades Ave. (TW/CV Ex. 18 at pg. 2) The disclosure in a pleading filed with the Commission does not absolve Liberty of its obligation to put full and complete information in its applications. Accordingly, the Bureau is nonetheless treating the STA request for 2727 Palisades as an additional STA request in which Liberty knowingly filed with insufficient information.

violation for a total of \$300,000.

#### **IV. INTERNAL AUDIT REPORT**

113. In his Order, the Presiding Judge ordered the parties to address in their proposed findings of facts and conclusions of law, "the question of how summary decision can be granted to Liberty without production of the Internal Audit Report." *Order*, FCC 96M-265 at n.7 (released December 10, 1996). In a subsequent Order, the Presiding Judge ordered as follows:

the parties shall brief as a separate legal issue under the APA and the Commissions hearing practices and procedures, the legal authority and/or the legal propriety to grant the licenses in issue without considering the highly relevant and substantial evidence that is contained in the Internal Audit Report . . . being withheld from the proceeding by Liberty on a claim of privilege.

*Order*, FCC 97M-12 at 2 (released January 31, 1997). For the following reasons, the Bureau submits that the record developed in this proceeding, even in the absence of the internal audit report (Report), is sufficient for the Presiding Judge to render his decision on the pending Joint Motion. As stated by Bureau's trial counsel on the record at the candor hearing, however, the Bureau advises that the following discussions are limited, as appropriate, because the Bureau trial staff has read the Report and may not disclose its contents pending Liberty's appeal of the Commission's Order to disclose the report. (Tr. 1982-83)

##### **A. Background**

114. To start, the Bureau agrees with the Presiding Judge's characterization that the information contained in the Report is "relevant and substantial evidence" for the instant proceeding, because of the very purpose underlying the creation of that document by Liberty.

115. While Liberty had been a Commission licensee since 1991, the Bureau first became aware of Liberty's possible unauthorized OFS transmission violations on May 5, 1995, when

Time Warner filed a Reply to Opposition, stating:

One additional matter requires serious Commission attention. Time Warner understands that OFS receive sites have been installed at two additional buildings where Liberty has provided video service to subscribers since early 1995. . . . The comprehensive list of Liberty OFS sites prepared by Time Warner does not include either location as a receive site. . . . Thus, Time Warner, by counsel, commissioned the Comsearch firm to provide it with comprehensive data including all of the 18 GHz OFS applications and authorizations for which Liberty has obtained frequency coordinations. The Comsearch data does not include either of these addressees as part of an OFS facility licensed to Liberty or pending OFS application filed by Liberty. . . . Time Warner respectfully requests that Liberty be required to demonstrate that these two locations have in fact been licensed.

Time Warner Reply to Opposition at 7-8 (May 5, 1995).

116. Liberty's Surreply filed in response admitted that "Liberty, in fact, did construct those sites and has been providing service as alleged" by Time Warner. Liberty Surreply at 1 (May 17, 1995). In addition, Liberty admitted that "service is presently being provided to" thirteen other buildings. *Id.* at 2.

117. Liberty offered a quick explanation for how this unlawful situation occurred by stating that "based upon its experiences with Commission's Part 94 licensing process, Liberty has assumed a certain lead and lag time" in its business practices. However, due to a technical problem which caused a delay in obtaining authorizations for these particular paths, Liberty's Director of Engineering, Behrooz Nourain, "perhaps inadvisably, assumed grant of the STA requests . . . [and] to compound the situation, the administration department failed to notify Mr. Nourain that grant of Liberty's applications was being held up indefinitely as a result of the Time Warner petitions." *Id.* at 3.

118. Time Warner, on June 1, 1995, filed a Response to Liberty's Surreply, arguing that Liberty's problems were rooted deeper than "simple miscommunications and faulty assumptions."

Response to Surreply at 4. Time Warner argued that Liberty's simple explanation was not credible, and raised further questions. This filing was followed by a letter from Time Warner's counsel to the Bureau Chief, urging the Commission to "commence a hearing or other investigation to impose appropriate sanctions based on Liberty's lack of candor and other illegal activities." *See* Letter from A. Harding, Esq., to R. Keeney (dated June 6, 1995) at 3.

119. In response to these filings, the Bureau issued a letter to Liberty on June 9, 1995, requesting information pursuant to Section 308(b) of the Communications Act. Letter from M. Hayden, Chief, Microwave Branch, Wireless Telecommunications Bureau, to H. Barr, Esq., & H. Rivera, Esq. (dated June 9, 1995). On June 16, 1995, Liberty submitted its response, advising the Commission that a "complete investigation of this administrative foul-up is currently being conducted by outside counsel who have extensive government backgrounds. Steps have been implemented to assure that these errors will not occur again." *See* Letter from P. Price to M. Hayden (dated June 16, 1995) at 2.

120. On June 23, 1995, Time Warner filed a reply to Liberty's response to the Bureau, arguing that Liberty has yet to fully and satisfactorily explain the circumstances surrounding its unlawful activities. Time Warner asserted that Liberty's explanations "have only raised more issues," and again urged further inquiry from the Commission. *Time Warner Reply to Letter Response* (June 23, 1995) at 2.

121. On August 4, 1995, the Bureau issued a second letter to Liberty pursuant to Section 308(b) of the Communications Act, stating:

During the pendency of our review of this matter, Liberty has disclosed four additional instances in which it activated microwave OFS paths prior to filing for or receiving proper authorization . . . . This unauthorized construction and operation appears to be in addition to the 15 OFS paths Liberty [already] admitted

to constructing and operating without authority. . . . Liberty states that it has nearly completed a thorough review of its internal licensing procedures and regulatory compliance.

This letter directs Liberty to submit to the Commission the results of its recently conducted internal audit. Specifically, this report shall list *all* of the OFS paths which Liberty has constructed and/or operated without authority. This list shall indicate which of these unauthorized paths were not disclosed to the Commission in response to its letter of June 12, 1995. Liberty is also directed to provide the date each unauthorized path was constructed and placed in operation and the number of subscribers currently being served by each new path. Finally, Liberty shall indicate whether it is charging subscribers for service received via these unauthorized paths. Liberty's response should be in the form of a further written statement of fact attested to in accordance with 47 C.F.R. § 1.17.

Letter from H. Davenport to H. Barr, Esq, (dated August 4, 1995) (emphasis in original).

122. On August 14, 1995, Liberty filed two documents in response to the Bureau's letter. The first was a cover letter to the Bureau Chief, signed by counsel from three of the law firms representing Liberty before the Commission. The second was the Report prepared by the law firm of Constantine & Partners which conducted the internal investigation into the facts and circumstances surrounding Liberty's premature activation of OFS service. In the cover letter, Liberty requested confidential treatment of the Report pursuant to Sections 0.457 and 0.459 of the Commission's Rules, 47 C.F.R. §§ 0.457, 0.459, on the basis that the information contained therein is commercial or financial, covered by both attorney-client and work product privileges, and disclosure of this information could constitute invasion of privacy. *See* Letter from H. Rivera, Esq., R. Pettit, Esq., & L. Constantine, Esq., to R. Keeney (dated August 14, 1995) at 2-4.

123. Time Warner responded to Liberty's submission on August 21, 1995, by arguing that as a party to the licensing proceeding, Time Warner was entitled to a copy of the Report which Liberty did not provide. *See* Letter from A. Harding, Esq. to R. Keeney (dated August