

the May 5, 1995 Reply.<sup>212</sup> Thus, before the discovery of the April 26 Nourain Memorandum, the approximate time frame of Liberty's discovery was late April or early May.

92. The testimony elicited at the mini-hearing, far from contradicting this initial conclusion, lent further support to the late April date. Furthermore, since the discovery of premature activations was made at a meeting to discuss the response to Time Warner's petitions to deny, in this sense, the prior testimony was literally correct that certain of Liberty's witnesses learned about this significant event as a result of Time Warner's petitions. Without the benefit of the April 26 Nourain Memorandum, the deposition record was vague on the precise date, but the availability of this document at the mini-hearing established firmly the date of discovery to be April 27, 1995.

93. The record developed at the mini-hearing unfortunately did not shed light on what specific event triggered Mr. Nourain to send Mr. Edward Milstein the April 26 memorandum. The testimony is ambiguous as to whether Mr. Nourain was told to submit his memorandum as a result of a conversation between Mr. Edward Milstein and Mr. Ontiveros about the emission designator error.<sup>213</sup> Mr. Nourain indicated in his testimony at the mini-hearing that he received a "mystery fax" from Liberty's headquarters which prompted him to investigate the status of licenses. There is no evidence to support Mr. Nourain's recollection. However, since the April 26 Nourain Memorandum dealt with the emission designator error issue, there is evidence to suggest that the delay engendered by that problem led Mr. Nourain

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<sup>212</sup> E. Milstein Dep. 41:10-19 [TW/CV 46]; H. Milstein Dep. 41:10-19 [L/B 4]; Price Dep. 187:3-188:15 [L/B 9].

<sup>213</sup> T. 1631:7-12 [E. Milstein], 1713:16-1714:5 [Ontiveros].

to draft his April 26 memorandum.

94. The emergence of the April 26 Nourain Memorandum has put to rest the notion that the February 24 Inventory triggered Liberty's realization of premature activations. At no time, either during the continued depositions or at the mini-hearing, has any witness pointed to the February 24 Inventory as the "trigger document." Mr. Price and Mr. Nourain, the recipients of the document, never denied receiving the document; they maintained only that they did not focus on it or do anything in response to it. The testimony at the mini-hearing further confirmed that Mr. Lehmkuhl did not have sufficient information based on the February 24 Inventory alone to determine that Liberty was engaged in unauthorized operation of microwave paths.<sup>214</sup> Indeed, the testimony at the mini-hearing again confirmed the disjointed licensing process in which the poor flow of information between Mr. Nourain and Pepper & Corazzini ensured that Mr. Lehmkuhl could not know that Liberty activated buildings prematurely based just on the February 24 Inventory. In addition, Mr. Price already conceded at his continued deposition that had the appropriate reconciliation been done between the February 24 Inventory and the Weekly Reports, Liberty could have found out about the premature activations sooner; yet no evidence was presented at the depositions or at the mini-hearing to show that such a reconciliation was ever done.

95. Based on the foregoing, the witnesses provided credible and candid testimony that they did not discover the premature activation of microwave paths until April 27, 1995. While there is evidence to suggest that the witnesses could have or even should have discovered sooner, the actual facts, supported by credible and candid testimony, revealed that

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<sup>214</sup> Tr. 1062:14-24 [Lehmkuhl].

the discovery was not made earlier than April 27, 1995.

**I. The witnesses presented credible and candid testimony that Liberty openly and forthrightly disclosed the facts and circumstances of the premature activations to the Commission as soon as Liberty had gathered and verified pertinent information**

96. The witnesses maintained before and during the mini-hearing that once Liberty confirmed the fact and scope of the premature activations, Liberty would disclose fully to the Commission the facts and circumstances of the premature activations. As Mr. Price stated, Liberty wanted to avoid piecemeal disclosure.<sup>215</sup> The testimony adduced at the mini-hearing confirmed that Liberty's uniform reaction to the discovery was shock and disbelief. Under these circumstances, investigation was necessary to ensure that Liberty's disclosure would be as complete and as accurate as possible.

97. Liberty did not disclose the fact of the premature activations in the May 4, 1995 requests for STA. However, the witnesses testified credibly that the intention was always to disclose to the Commission, once the relevant facts were obtained and verified. Indeed, there is no dispute that Liberty forthrightly disclosed another thirteen instances of unlawful operation in the May 17 Surreply, shortly after Time Warner revealed only two. At the mini-hearing, Mr. Price, Mr. Lehmkuhl and Mr. Barr were questioned about the accuracy and completeness of statements made in the Surreply as well as subsequent submissions to the Commission to provide additional facts and disclosures. These witnesses testified openly and credibly that at the time they made their statements, they believed the statements to be true,

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<sup>215</sup> Tr. 1367:6-1368:23 [Price]; 1801:20-25 [Barr].

based on the available information at the time.<sup>216</sup> While these facts may have shown that Liberty could have better phrased its explanations to the Commission, the consistent and credible testimony of the witnesses do not display any lack of candor or intent to deceive the Commission.

#### IV. CONCLUSIONS OF LAW

98. In his Supplemental Order, the Presiding Judge determined that this mini-hearing was needed to shed light on a discrete issue: the credibility and candor of Howard Milstein, Peter Price, Michael Lehmkuhl, and Behrooz Nourain “on the factual issue of actual date(s) that knowledge was first obtained by Liberty of the premature activations.”<sup>217</sup> As demonstrated below, based on the applicable legal standard and the facts developed during this proceeding, it is clear that the principals of Liberty Cable were at all times truthful and candid with the Commission. Moreover, the information adduced in the mini-hearing fully supports the pending Joint Motion. The Presiding Judge therefore should find that Liberty neither misrepresented facts nor lacked candor before the Commission.

##### A. Legal Standard

99. It is well-settled that all licensees have a fundamental duty to be truthful and candid with the Commission.<sup>218</sup> Indeed, the Commission has identified this “trait of truthfulness” as one of the key elements of the character qualification contained in Section

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<sup>216</sup> Tr. 1500:17-1502:9 [Price]; 1178:10-16 [Lehmkuhl]; 1923:13-18 [Barr].

<sup>217</sup> Supplemental Order ¶ 4. In addition, other witnesses were called during the course of the hearing, including notably Liberty’s 33 per cent owner, Edward Milstein.

<sup>218</sup> See *Swan Creek Communications, Inc. v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994) (“*Swan Creek*”); *Fox River Broadcasting, Inc. et al.*, 88 FCC 2d 1132, 1133-1137 (Rev. Bd. 1982) (“*Fox River*”).

308 of the Communications Act and has indicated that it will “view misrepresentation and lack of candor in an applicant’s dealings with the Commission as serious breaches of trust.”<sup>219</sup> The Commission has found that this emphasis on licensee truthfulness is necessary not only to maintain the “integrity of the Commission’s processes,”<sup>220</sup> but also because it is predictive of a licensee’s future honesty in dealing with the Commission.<sup>221</sup>

100. In order to disqualify a licensee, both misrepresentation and lack of candor require the presence of an intent to deceive. As the Commission stated in *Fox River*:

[T]he administrative remedy of total disqualification will occur only if a willful intent to deceive is discerned. Conduct which may be characterized as carelessness . . . and exaggeration, puffing and slipshoddiness or faulty shading of recollection falls short of the degree of *scienter* historically required by the Commission for disqualifying. Moreover, and most importantly with respect to lack of candor . . . , every finding of failure to inform as completely as Commission standards of punctillo demand are not necessarily disqualifying . . . .<sup>222</sup>

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<sup>219</sup> *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1210-11 (1986) (“*Character Policy Statement*”), *modified*, 5 FCC Rcd 836 (1990).

<sup>220</sup> *Id.* at 1211.

<sup>221</sup> *Id.* at 1189.

<sup>222</sup> 88 FCC 2d at 1137-38 (citations and quotations omitted); *Accord Swan Creek*, 39 F.3d at 1221-22 (citations omitted):

The FCC generally views misrepresentation and lack of candor in an applicant’s dealings with the Commission as serious breaches of trust. The Commission defines misrepresentation as an intentional misrepresentation of fact intended to deceive. Lack of candor, on the other hand, exists when an applicant breaches its duty to be fully forthcoming as to all facts and information relevant to a matter before the FCC, whether or not such information is particularly elicited. . . . [I]ntent to deceive is an essential element of a misrepresentation or lack of candor showing.

*See also Telephone and Data Systems, Inc.*, 10 FCC Rcd 10518, 10520 (1995) (Initial Decision) (“*Telephone Data Systems*”) (“[T]he Commission recognizes that omissions or inconsistencies that are unaccompanied by an intent to deceive will not be sufficient to warrant a finding of misrepresentation or lack of candor.”) (citation omitted).

Accordingly, failure to provide information without the requisite intent to deceive, does not constitute lack of candor. Moreover, submission of incorrect information to the Commission, if done through carelessness, inadvertence or even gross negligence, does not constitute misrepresentation.<sup>223</sup>

101. "Intent" is similarly required in order to find a lack of candor in testimonial evidence.<sup>224</sup> The faulty recollection of a witness alone is insufficient to warrant a finding of lack of candor:

In assessing candor, the Commission also has recognized that inconsistencies in testimony that reflect the varying perceptions of witnesses do not necessarily demonstrate intentionally false testimony. Witnesses commonly recall the details of conversations differently, particularly when the conversations took place several years before the testimony. Adverse conclusions need not be drawn from the fact that an individual witness's testimony is inconsistent because of the difficulty of remembering fully conversations that occurred years before the testimony.<sup>225</sup>

Additionally, intent is a *factual* question that may be found only upon a reasonable inference from the evidence in the proceeding's record.<sup>226</sup> Commission precedent demonstrates that the

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<sup>223</sup> See *Pinelands, Inc.*, 7 FCC Rcd 6058, 6065 (1992); see also *Abacus Broadcasting Corp.*, 8 FCC Rcd 5110, 5112 (Rev. Bd. 1993) ("*Abacus Broadcasting*") (finding no lack of candor where filing was misleading, but made without intent to deceive); *Fox River*, 88 FCC 2d at 1137-38; *Broadcast Associates of Colorado*, 104 FCC 2d 16, 19 (holding that isolated acts of misconduct and misjudgment, without an intent to deceive, do not demonstrate a proclivity to dissemble).

<sup>224</sup> See, e.g., *Old Time Religion Hour, Inc.*, 95 FCC 2d 713, 719 (Rev. Bd. 1983); *Maria M. Ochoa et al.*, 7 FCC Rcd 6569, 6571 (Rev. Bd. 1992); *Grengo, Inc.* 39 FCC 2d 732, 737 (1973).

<sup>225</sup> *Telephone And Data Systems, Inc.*, 10 FCC Rcd at 10520-21 (citations omitted); see also *Grengo, Inc.*, 39 FCC 2d at 737; *Daytona Broadcasting Co., Inc. et al.*, 97 FCC 2d 212, 233-34 (Rev. Bd. 1984) *modified*, 101 FCC 2d 1010 (1985) ("Whether [a hearing witness] should have remembered or not is not relevant: the operative question is whether [it has been demonstrated that the witness] . . . misrepresented or lacked candor.").

<sup>226</sup> See *Capitol City Broadcasting Co., et al.*, 8 FCC Rcd 1726, 1734 (Rev. Bd. 1993) (citing *California Public Broadcasting Forum v. FCC*, 752 F.2d 670, 679 (D.C. Cir. 1985), *modified* 8 (Continued...))

ultimate sanction of disqualification requires “*substantial* evidence of an intent to deceive”<sup>227</sup> and is not “triggered unless substantial evidence *clearly reveals serious and deliberate falsehoods*.”<sup>228</sup>

102. Likewise, whether intent may be discerned from the actions of the licensee’s principals and owners (as opposed to other employees) is also a relevant consideration in this factual and legal analysis.<sup>229</sup> Indeed, the Commission has been reluctant to impute a disqualifying lack of candor to an licensee where the record demonstrates that principals relied in good faith on counsel or employees.<sup>230</sup> Rather, misrepresentation or lack of candor is generally found when there is evidence that the applicant or licensee had knowledge of the circumstances in question.<sup>231</sup>

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FCC Rcd 8478 (1993). Although intent may be inferred from a motive to deceive, such a motive must still be adequately demonstrated by the facts; baseless speculation or innuendo is insufficient. *See, e.g., Joseph Bahr et al.*, 10 FCC Rcd 32, 33 (Rev. Bd. 1994).

<sup>227</sup> *See, e.g., Capitol City Broadcasting Co.*, 8 FCC Rcd at 1734 (citation omitted) (emphasis added) *modified*, 8 FCC Rcd 8478 (1993).

<sup>228</sup> *Cannon Communications Corp.*, 5 FCC Rcd 2695, 2700 (Rev. Bd. 1990) (emphasis added). Liberty, moreover, has been entirely candid about the shortcomings of its licensing procedure and is willing to pay a substantial fine as a result, a position that has the Wireless Bureau’s full support. *See David A. Bayer*, 7 FCC Rcd 5054, 5057 (1992) (imposing \$505,000 forfeiture on licensee).

<sup>229</sup> *See, e.g., David A. Bayer*, 7 FCC Rcd at 5054.

<sup>230</sup> *See WEBR, Inc. v. FCC*, 420 F.2d 158, 167-68 (D.C. Cir. 1969); *David A. Bayer*, 7 FCC Rcd at 5056; *Abacus Broadcasting Corp.*, 8 FCC Rcd at 5113; *see also Professional Radio, Inc.*, 2 FCC Rcd 6666, 6667 (1987) (declining to penalize an applicant where the applicant inappropriately amended the application on advice of counsel).

<sup>231</sup> *See, e.g., WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1142 (D.C. Cir.) (1985) (rejecting a reliance on counsel argument as the counsel in question was in fact also an officer of the company); *Wadeco Inc. v. FCC*, 628 F.2d 122, 129 (D.C. Cir. 1980) (dismissing a reliance on counsel argument because the licensee knew of the misrepresentation when it was made and allowed it to go uncorrected).

103. As detailed below, under these legal standards and in light of the evidence, it is clear that none of Liberty's principals lacked candor or misrepresented facts to the Commission either generally or on the specific "factual issue of actual date(s) that knowledge was first obtained by Liberty of the premature activation."<sup>232</sup> As summarized below, each of their statements has been consistent in all material respects throughout this proceeding. Moreover, nothing adduced at the hearing contradicts the substance of what Liberty has maintained throughout this proceeding: that none of Liberty's principals knew of the unauthorized operations before late April 1995.<sup>233</sup> No material discrepancy in their statements exists to demonstrate that any of them intended to deceive the Commission. The same is true of the facts presented in Liberty's Joint Motion.

**B. The Testimony of the Witnesses Demonstrate the Candor of Liberty's Principals Regarding Their First Discovery of Premature Activations**

104. The testimony at the mini-hearing firmly establishes April 27, 1995 as the earliest date that Liberty's principals first learned about the possibility of premature activation of buildings. The testimony further shows that Liberty intended at all times to disclose fully to the Commission, once Liberty had determined the scope and the cause of the premature activations. This uncontroverted evidence reveals that Liberty was candid and forthright at

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<sup>232</sup> Supplemental Order ¶ 4. The Commission has found forfeiture, rather than disqualification, to be the suitable sanction when a licensee has acted inappropriately and where the principals relied on counsel or engineers in good faith. For example, in *Triad Broadcasting Co.*, 96 FCC 2d 1235 (1984), the Commission stated: "[W]e do not believe that the licensee had been aware that its counsel's/engineer's advice and claims were inaccurate. Thus, the licensee's candor is not in issue . . . . The information developed in our investigation persuades us that the licensee failed to remain diligent in assuring that its operation was at all times in compliance with critical technical requirements." *Id.* at 1243 (emphasis added).

<sup>233</sup> (TW/CV 29). *Supra*, ¶ 59; Affidavit of Lloyd Constantine (Sept. 20, 1995), ¶ 3.

all times in its dealings with the Commission, and no finding of misrepresentation or lack of candor can be supported by the evidence developed in the record.

105. Liberty's President, Peter Price, testified that he did not learn about the problem until he participated in the April 27 conference call with counsel to discuss Time Warner's latest round of petitions to deny Liberty's licenses. Only when Mr. Price raised the issue of the April 26 Mr. Nourain Memorandum concerning buildings affected by the emission designator error did the parties on the call realize that Liberty had possibly engaged in unlicensed activity.<sup>234</sup>

106. Until that point, Mr. Price had no cause to doubt that the licensing procedure he established in February 1992 was not being implemented. While Mr. Price, as Liberty's President, was in charge of the company's overall operations, including licensing, he did not and could not oversee the day-to-day responsibilities of securing necessary Commission authorization. Mr. Price delegated that function to Liberty's engineer, Mr. Nourain, whom he expected to interact and work closely with Pepper & Corazzini, Liberty's licensing counsel. Unfortunately, Mr. Price did not monitor the process he had established nor did he verify that the licensing function had been performed in the way he had envisioned.<sup>235</sup> The weighty consequences of this failure were not first revealed until the afternoon of April 27.

107. Mr. Price received a copy of Mr. Lehmkuhl's February 24 Inventory. However, that document could not by itself alert Mr. Price to the possibility that Liberty was engaging in unauthorized service. Mr. Price's testimony, as well as those of others,

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<sup>234</sup> See *supra*, ¶ 59.

<sup>235</sup> *Supra*, ¶¶ 29, 39, 46.

confirmed that, in order to figure out whether a building was prematurely activated, a reconciliation had to be done between the February 24 Inventory and Liberty's Weekly Reports on the status of building installations. While in theory Mr. Price could have or should have learned about the premature activations if he had undertaken this process, there is no evidence that such a reconciliation was ever done.<sup>236</sup>

108. While the evidence suggests that Mr. Price could have or should have supervised Mr. Nourain more closely and generally paid closer attention to the details of the licensing process, such *post hoc* ruminations do not alter the fundamental fact that Mr. Price did not know that a potential problem existed any earlier than April 27, 1995. More importantly, the testimony shows that once Liberty confirmed the fact and scope of the unauthorized operations, Liberty intended to disclose fully to the Commission. Liberty in fact made these disclosures and cooperated with the Commission's efforts to obtain more information. Liberty took other immediate action, such as suspending billing to the affected buildings and developing an effective compliance program, to remedy the effects of its violations. These facts, as supported by Mr. Price's testimony, do not display any intent to deceive the Commission. To the contrary, Liberty's conduct reveals that its principals took the allegations of unauthorized operation very seriously and responded accordingly with due haste.

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<sup>236</sup> No such reconciliation could have been done before February 24, 1995 because, as Mr. Lehmkuhl testified, his February 24 Inventory indicated for the first time whether a particular license application had been granted or was still pending. This information was not included in prior inventories sent by Pepper & Corazzini to Mr. Price and Mr. Nourain, *supra*, ¶ 48.

109. The testimony of Howard Milstein, one of Liberty's owners and the company's Chairman, supports the conclusion that Liberty's owners were "in the dark" prior to the April 27 call. He stated at the mini-hearing that he did not become aware of possible problems with unauthorized operation before late April 1995.<sup>237</sup> Given Mr. Milstein's credible and uncontroverted testimony that he devoted only a small portion of his time to managing Liberty, the evidence shows that Mr. Milstein's knowledge of and involvement in the licensing process was limited and remote. Moreover, at the weekly Thursday meetings that Mr. Milstein attended, licensing issues were not discussed.<sup>238</sup> Therefore, prior to Mr. Price's learning about the possibility of premature activations for the first time on April 27, 1995, Mr. Milstein had no reason or cause to believe that any breakdown had occurred in the licensing process.

110. Mr. Milstein testified unequivocally that when the issue was brought to his attention he determined that the first priority was to ascertain, with counsel's assistance, whether Liberty had broken the law, and then Liberty would disclose the violations to the Commission upon verifying the fact, extent and cause of the premature activations. Far from intending to deceive or misrepresent information to the Commission, Liberty decided that it was best to provide a full rather than piecemeal disclosure to the Commission. As Mr. Milstein stated: "[W]hat we didn't want to have is to go to the FCC today and say there's three paths and tomorrow and say there's two more paths and then there's five paths."<sup>239</sup>

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<sup>237</sup> Tr. 517:2-7 [H. Milstein].

<sup>238</sup> *Supra*, ¶ 44.

<sup>239</sup> Tr. 586: 4-6 [H. Milstein].

111. Mr. Milstein further testified that, based on his other primary business activities, banking and real estate, he was familiar with operating in a highly regulated environment. Thus, Mr. Milstein did not and would not encourage or approve the unauthorized activation of microwave paths.<sup>240</sup> Mr. Milstein's immediate response and intent to disclose fully to the Commission reflect the seriousness with which Mr. Milstein held the obligation to operate Liberty in compliance with all legal and regulatory requirements. This evidence demonstrates candor and forthrightness, not any intent to deceive or failure to disclose.

112. Mr. Milstein's brother Edward, who also was an owner of Liberty and was its Co-Chairman, testified that he too did not learn of premature activations before the end of April 1995. Mr. Edward Milstein learned about the potential unlawful operation of paths from Mr. Price, within a couple of days after Mr. Edward Milstein was informed about the emission designator problem.<sup>241</sup>

113. Mr. Edward Milstein did not learn about the possibility of premature activations from the April 26 Nourain Memorandum concerning the emission designator issue; rather, due to the proximity of these events to each other, Mr. Edward Milstein associated his discovery of potential unauthorized operations with his first awareness of the emission designator error.<sup>242</sup> Mr. Edward Milstein, similar to his brother, testified that he did not believe anyone at Liberty would do something as "stupid" as to turn on buildings without a license, and relayed Mr. Price's information to Howard Milstein who then commenced an

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<sup>240</sup> *Supra*, ¶ 26.

<sup>241</sup> Tr. 1624: 2-19 [E. Milstein].

<sup>242</sup> Tr. 1623: 23-1640:4. [E. Milstein].

investigation into the matter.<sup>243</sup> Mr. Edward Milstein's testimony thus corroborates the testimony of Liberty's other principals both as to the timing of the discovery as well as the immediate response to confirm the facts first. Indeed, the facts are undisputed that after Time Warner disclosed only two instances of premature activation, Liberty came forward within two weeks with the disclosure of an additional thirteen instances of unauthorized operations. Moreover, the record is clear that Liberty supplemented this disclosure in July after four more instances of premature activation were discovered toward the end of June 1995.

114. The testimony of the other witnesses further support the conclusion that Liberty's principals did not know about unauthorized operation of paths before April 27, 1995. Mr. Lehmkuhl testified that he did not learn about the allegation of Liberty's premature activations until he saw the May 5, 1995 Time Warner reply.<sup>244</sup> Mr. Nourain testified that he certainly knew of unauthorized activity by April 28, 1995.<sup>245</sup> However, as previously stated, Liberty does not rely on Mr. Nourain's testimony regarding when he first learned of the activations. Even without Mr. Nourain's testimony, the record now leaves little doubt that Liberty's principals did not discover before April 27, 1995 that Liberty may have engaged in unlawful operation of microwave paths.

115. Furthermore, Howard Barr, who was at the April 27, 1995 conference call, provided clear testimony that he, Mr. Price and the other participants in the conference call realized for the first time that afternoon that Liberty may have activated certain paths without

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<sup>243</sup> Tr. 1623: 23-1624:1, 1660: 1-10 [E. Milstein].

<sup>244</sup> Tr. 1056: 25-1057:13 [Lehmkuhl]; 1158:15-1159:3 [Lehmkuhl].

<sup>245</sup> Tr. 648:21-24 [Nourain].

the requisite Commission authorization. Mr. Barr further testified that the decision was made at the conference call to make full disclosure to the Commission once Liberty had confirmed the fact and extent of its unlawful activity.

116. Therefore, the uncontroverted evidence shows that Liberty's principals were candid, truthful and forthright in their testimony concerning "the actual date(s) that knowledge was first obtained by Liberty of the premature activations."<sup>246</sup> The credible and candid testimony of Liberty's principals and other witnesses further confirmed the intent to disclose once the relevant facts were gathered and verified. Based on the evidence, Liberty did not lack candor either at the mini-hearing or in Liberty's dealings with the Commission heretofore.

**C. The Principles of Liberty Were Truthful and Candid With the Commission Regarding All Other Issues**

**1. The Evidence Does Not Show that Liberty's Principals Intentionally Misled the Commission**

117. The evidentiary record demonstrates not only that Liberty's principals were forthright regarding when they learned about the premature activations, but were also forthright on all other matters.<sup>247</sup> While neither the discovery process nor the Joint Motion was aimed at establishing a precise date that Liberty officials came to know of premature activations, the record, as detailed above, of the mini-hearing now clearly establishes that the principals of Liberty first learned of the possibility of premature activations no earlier than

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<sup>246</sup> Supplemental Order, ¶ 4.

<sup>247</sup> See, e.g., *David A. Bayer*, 7 FCC Rcd at 5056 (involving "[e]xplicit statements, under oath and subject to criminal prosecution if false, disavowing" knowledge of wrongdoing).

April 27, 1995. Unlike other situations in which the Commission has found an applicant disqualified for misrepresentation or lack of candor, there is no contrary testimony in this case.<sup>248</sup> Likewise, there are no documents that contradict testimony or the lack of prior knowledge on the part of Liberty's principals.<sup>249</sup> And no other facts have been offered to controvert the witnesses' statements.<sup>250</sup> Any inconsistencies in the evidence were not central to the issues in this case and were not intended to deceive the Commission. Thus, the evidence supports the conclusions of the Joint Motion that Liberty acted with candor towards the Commission. On this basis, the Joint Motion should be granted.

118. Rather, these inconsistencies underscore the disjointed nature of Liberty's licensing procedure prior to May 1995 and, in hindsight, demonstrate Liberty's over-reliance on its employees and agents in carrying out its licensing responsibilities.

119. For example, the existence of the February 24 Inventory does not undermine the conclusion that Liberty's principals learned of the premature operations on or after April 27, 1995. The evidence has shown that the February 24 Inventory alone does not indicate that premature activations occurred. Instead, Liberty personnel would have had to compare the

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<sup>248</sup> Cf. *Ochoa v. FCC*, 1996 U.S. App. LEXIS 30562 (D.C. Cir. 1996) (involving witness whose testimony was refuted); *Richardson Broadcast Group*, 7 FCC Rcd 1583, 1585 (1992) (involving witness who admitted giving false testimony).

<sup>249</sup> In *Richardson Broadcast Group*, 7 FCC Rcd at 1583, on the other hand, the Commission found misrepresentation based on documents that contradicted a licensee's statements.

<sup>250</sup> See, e.g., *Center for Study and Application of Black Economic Development*, 10 FCC Rcd 2836, 2837 (1995) (involving evidence of prior felony convictions submitted to show intentional deception in license application).

February 24 Inventory with the Weekly Reports. There is no evidence that anyone ever focused on the memo, much less made this comparison.

120. The Commission has held that the mere receipt of a document does not necessarily indicate that the recipient reviewed it or recognized its import. In *Nancy Naleszkiewicz*, the Commission held that the Applicant's mere receipt of a document "does not necessarily establish, . . . that the applicant read the [operative] paragraph and appreciated its import."<sup>251</sup> The Commission, in that case, found that "it is not inherently incredible that [the applicant] left it to her . . . counsel to comply with [a Commission] requirement without ascertaining for herself precisely what compliance would entail, as she indicated by her statements."<sup>252</sup> Here, too, Liberty's principals relied on its counsel and engineer to determine "what compliance would entail" and Liberty personnel simply assumed that FCC counsel and Mr. Nourain had licensing issues under control. There is simply no evidence that anyone took the necessary steps to turn the February 24 memo into discovery of premature activation.

121. Moreover, the events surrounding the May 4, 1995 filing of STA requests do not support a finding that Liberty intended to be less than candid to the Commission. Although Liberty's principals first learned of the possibility of premature activations on April 27, 1995, the draft STA requests did not disclose the possibility of premature service.<sup>253</sup> However, requests were prepared by FCC licensing counsel. They were reviewed by

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<sup>251</sup> 7 FCC Rcd 1797, 1799 (1992).

<sup>252</sup> *Id.*

<sup>253</sup> 1057; 20-25 [Lehmkuhl].

experienced FCC attorneys from two law firms.<sup>254</sup> They did not advise Liberty to modify or delay filing the May 4, 1995 STA requests. Pepper & Corazzini then filed these STA request on May 4.<sup>255</sup>

122. Liberty relied on its experts to ensure compliance with Commission rules and regulations. Such good faith reliance on counsel has consistently been held by the Commission to warrant a forfeiture (as proposed by Liberty and the Bureau), rather than disqualification, as Liberty's reliance negates inferences of intentional deceit.<sup>256</sup> For example, in *WEBR, Inc. v. FCC*, a principal of an applicant company failed to disclose that, while its application was pending, two of the company's owner/managers had withdrawn their investments.<sup>257</sup> Although the principal had notified counsel immediately of the development, the principal, upon the attorney's advice, did not disclose this information until after the company had been granted the license.<sup>258</sup> The Review Board found that disqualification was not merited because the principal had acted in good faith in both notifying the attorney and in

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<sup>254</sup> 1801: 9-14 [Barr].

<sup>255</sup> See H. Milstein Dep. 40:12-16 [L/B 4]; Price 74:9-14 [L/B 9].

<sup>256</sup> *WEBR, Inc. v. FCC*, 420 F.2d at 167-168 (good faith reliance on counsel is relevant in determining who is acting with candor); *Abacus Broadcasting Corp.*, 8 FCC Rcd at 5113 (Commission reluctant to impute a disqualifying lack of candor to an applicant where the record shows good faith reliance on counsel); *Professional Radio, Inc.*, 2 FCC Rcd at 6667 (applicant not penalized for acting on advice of counsel); *Broadcast Associates of Colorado*, 104 FCC 2d at 19 (applicant who improperly certified application on advice of counsel not disqualified).

<sup>257</sup> 420 F.2d at 167.

<sup>258</sup> *Id.*

relying on his advice.<sup>259</sup> The actions of Liberty's principals after April 27, 1995 was in all relevant respects identical: they discovered the possibility of a problem (in contrast to *WEBR*, where there was a clear problem), informed their experienced communications lawyers, and, wanting to do the right thing, relied on their advice in good faith.

123. In a case dealing with circumstances similar to Liberty's, the Review Board in *Abacus Broadcasting Corp.* declined to find deceptive intent where, without the licensee's review and certification, the licensee's attorney wrote and filed a pleading that was untrue.<sup>260</sup> As is the case with Liberty, the facts of *Abacus* involved an unfortunate, but nevertheless otherwise innocent, failure of communication between the licensee and counsel. The Board based its decision in *Abacus* largely on the fact that the record did not demonstrate any collusive behavior between the licensee and the attorney; it concluded that both individuals simply failed to focus on the filing.<sup>261</sup> Similarly, before April 27, 1995, Liberty's principals were not sufficiently focused on the operations details to know that service was prematurely being provided. Also like *Abacus*, a finding of deceptive intent on Liberty's part would require the showing of a tacit conspiracy that has no basis in the record whatsoever.<sup>262</sup>

124. Nor can lack of candor be reasonably inferred from the facts of this case – either with regard to the date on which Liberty's principals became aware or any other actions or

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<sup>259</sup> *Id.*

<sup>260</sup> 8 FCC Rcd at 5113.

<sup>261</sup> *Id.*

<sup>262</sup> *See also Broadcast Associates of Colorado*, 104 FCC 2d at 19 (declining to find deceptive intent where a principal, in reliance upon counsel's advice, certified the accuracy of an application despite the fact that she did not review or approve an entire section).

events. The record shows that there would have been absolutely no practical or reasonable incentive to try to deceive the Commission. In fact, given the public nature of Liberty's operations as well as Time Warner's extraordinarily antagonistic and litigious posture against Liberty's competitive incursions, there was no way of sweeping unauthorized operations under the rug.<sup>263</sup> FCC licenses are a matter of public record, and Liberty and Time Warner were engaged in a literal building-by-building battle for customers. Indeed, the record reflects that Liberty advertised its "liberation" of buildings from Time Warner service on the front page of *The New York Times*.<sup>264</sup> Moreover, Time Warner had begun a campaign of using the Commission's petition to deny process to slow down Liberty's operations by flyspecking Liberty's operations and bringing alleged infractions to the Commission's attention. All of these facts were well known to Liberty and Time Warner in the spring of 1995 and would simply have rendered any notion of withholding information from Commission a practical impossibility. Indeed, such a cover-up would necessarily have involved a broad conspiracy of numerous parties – including substantial and respected businessmen, several employees, and attorneys from three different law firms (including a former Commissioner of this agency). Thus Liberty, in order to successfully cover up these violations, would have had to keep its aggressive competitor Time Warner ignorant of numerous public documents, make sure all its employees and agents remained silent on the issue, and convince respected counsel that such a tactic was viable. There is simply no evidence to support this unlikely scenario.

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<sup>263</sup> *Supra* Tr. 1397:10-1398:12 [Price].

<sup>264</sup> *Supra*, Tr. 1398:13-1399:2 [Price].

## 2. The Evidence Shows That Liberty's Carelessness Does Not Warrant Disqualification

125. Liberty's communications with the Commission both prior to and during this proceeding were not so "wanton, gross, callous, and in total disregard of its obligations to the Commission" as to be equivalent of an affirmative and deliberate intent to deceive. Disqualification is generally inappropriate where inaccurate communication with the Commission results not "from an intent to deceive," but from "carelessness, exaggeration, faulty recollection, or merely falling short of the punctillo normally required by the Commission."<sup>265</sup> Only where "[t]he degree of carelessness demonstrated on the record" is so "wanton, gross, and callous, and in total disregard of [the licensee's] obligations to the Commission, as to be equivalent to an affirmative and deliberate intent," is such conduct disqualifying.<sup>266</sup>

126. In *Valley Broadcasting Company*,<sup>267</sup> for example, the Review Board upheld an ALJ's ruling that "disqualification for ineptitude [was] not in order"<sup>268</sup> despite evidence of

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<sup>265</sup> *Standard Broadcasting*, 7 FCC Rcd 8571, 8574 n.8 (1992); see also *Eunice Wilder*, 4 FCC Rcd 5310, 5336 (stating that a licensee's "callous disregard for the integrity of the Commission's processes requires its disqualification"); *California Broadcasting Corporation*, 98 FCC 2d 1003, 1042 ("A 'wanton gross and callous disregard for the truth is equivalent to an affirmative and deliberate intent.'") (quoting *RKO General, Inc. v. FCC*, 670 F.2d 215, 225 (1981)).

<sup>266</sup> *Golden Broadcasting Systems, Inc.*, 68 FCC 2d 1099, 1106 (1978) (Misrepresentations continued over several years); *Tri-State Broadcasting, Co. Inc.*, 5 FCC Rcd 1156, 1173 (1990) (Defense that oversights were infrequent is rejected "based on evidence of a pattern of neglect so strong as to appear nearly willful (e.g., the licensee failed to file, from 1980-1983, the very renewal term under regular review, its critically important local issues and problems lists ...").

<sup>267</sup> 4 FCC Rcd 2611 (Rev. Bd. 1989).

careless communications with the Commission such as unreported ownership changes and reporting disparities, which were due in part to the fact that various counsel did not coordinate their actions.<sup>269</sup> In fact, the Review Board agreed with the ALJ that “[e]ven where ineptitude concerned decisionally significant matters and ‘carried with it the repugnant odor of misrepresentation and lack of candor,’” disqualification was not appropriate.<sup>270</sup>

127. In this case, Liberty’s principals acted as responsible and forthright businessmen. As the record shows, Liberty, based on the recommendation of an expert in the field, Joseph Stern, hired Mr. Nourain, a well-qualified engineer with substantial experience. Liberty also sought counsel from two well-regarded Washington, D.C. FCC law firms, to ensure that Liberty obeyed applicable regulations and dealt with the Commission appropriately. Liberty clearly relied upon its expert to its detriment. However, such reliance certainly does not evidence a degree of carelessness that is so “wanton, gross and callous, and in total disregard of [its obligations] to the Commission”<sup>271</sup> as to be the equivalent to an affirmative and deliberate intent to deceive.<sup>272</sup>

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(...Continued)

<sup>268</sup> *Id.* at 2618.

<sup>269</sup> *Id.* at 2617-18.

<sup>270</sup> *Id.* at 2618.

<sup>271</sup> *Standard Broadcasting*, 7 FCC Rcd at 8574 n.8 (1992).

<sup>272</sup> Liberty is mindful that a corporate licensee “must be responsible for the FCC-related misconduct occasioned by the actions of its employees.” *Character Policy Statement*, 102 FCC 2d at 1218. However, this is not a case in which Liberty merely “[stood] back and wait[ed] for disaster to strike.” *Id.* To the contrary, as detailed above, the record reflects that Liberty’s principals, who were not intimately familiar with FCC processes, secured and relied on the services of an expert engineer as well as two expert firms of FCC counsel.

(Continued...)

**3. The Evidence Further Shows That Liberty's Actions and Communications Did Not Reflect a Flagrant Disregard for Compliance With the Law**

128. In "rare instances"<sup>273</sup> the Commission has found "circumstances in which [a license] applicant has engaged in repeated, willful violations of law amounting to a flagrant disregard for complying with the law . . . [that] might, of its own nature, provide sufficient evidence that the applicant lacks the traits of reliability and/or truthfulness necessary to be a licensee."<sup>274</sup> To determine that a licensee acted with such "flagrant disregard," it must be demonstrated that there has been: (1) "a pattern of adjudicated violations;" (2) that "the violations . . . reflect a significant departure from established legal authority;" and (3) that a licensee had "actual knowledge that the conduct constitutes a clear violation of existing law" or that "the nature of the violation itself . . . give[s] rise to a[n] irrefutable inference that the applicant knew it was violating the law."<sup>275</sup> In making this determination the Presiding Judge should give "consideration . . . to the circumstances surrounding the violations," and "it may be appropriate to consider whether the violation resulted from an innocent legal

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(...Continued)

Moreover, it should be noted that Liberty and the Bureau have proposed the payment of what would be one of the largest forfeitures ever levied against a Commission licensee for licensing-related wrongdoing.

<sup>273</sup> *Character Policy Statement*, 102 FCC 2d at n.61.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

interpretation or whether the violation represented a knowing decision to ignore legal authority.”<sup>276</sup>

129. The threshold to meet this standard is high. The Commission does not find “flagrant disregard” for even serious violations of its regulations.<sup>277</sup> Liberty’s actions simply do not rise to the level of the “rare instances” in which the Commission has found “flagrant disregard.” For example, in *Pass Word, Inc.* the Commission found “flagrant, unmitigated disregard for licensee responsibility” where a licensee “[o]ver a three year period (1974-1979), and in forms, correspondence and pleadings filed to the Commission, . . . repeatedly and deliberately misrepresented and concealed [relevant] facts.”<sup>278</sup> Liberty simply did not have “actual knowledge” that it was violating the law, and the “nature of the violation” does not give rise to an “irrefutable inference that the applicant knew it was violating the law.” Liberty’s principals have consistently testified that they did not learn of violations before late

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<sup>276</sup> *Id.*

<sup>277</sup> See *Stockholders of Viacom International Inc.*, 2 FCC Rcd 6713, 6713 (1987) (without evidence of “egregious or flagrant” actions, and without evidence of “similar repeated misconduct in the past” actions were not “a flagrant disregard for complying with the law”); *George E. Cameron Jr. Communications*, 93 FCC 2d 789, 801, 823-24 (Rev. Bd. 1983) (even repeated reporting problems do not rise to the level of “flagrant disregard,” but “flagrant disregard” found for consistently ignoring fundamental reporting problems over a period of years after notice of faulty reporting); *WABZ, Inc.*, 90 FCC 2d 818, 827 (1982) (numerous, but inadvertent violations do not rise to level of “flagrant disregard” for reporting requirements).

<sup>278</sup> 76 FCC 2d 465 (1980), *recon. denied*, 86 FCC 2d 437 (1981), *aff’d sub. nom. Pass Word, Inc. v. FCC*, 673 F.2d 1363 (D.C. Cir. 1982); see also *Las Americas Communications, Inc.* 1 FCC Rcd 786, n.4 (1986) (blatant, repeated violation of federal tax laws over period of years “amounted to a flagrant disregard for complying with the law.”), *aff’d* 6 FCC Rcd 1507 (1991); *Lewel Broadcasting, Inc.*, 86 FCC 2d 896, 915 (1981) (unattended operation, log falsification, commercial logging practices, misrepresentation, and lack of candor over a period of years after Commission warnings).

April, 1995, and acted promptly to investigate and disclose violations after that time.

Therefore, Liberty's conduct does not support a lack of candor finding on this basis.

130. In sum, Liberty's actions should not disqualify it from obtaining the subject licenses. The record unambiguously shows that Liberty's principals did not participate in the activation of unauthorized microwave paths.<sup>279</sup> In fact, Liberty's principals have testified under oath that they were unaware of even the possibility of unauthorized operations before April 27, 1995, and no contradictory evidence has suggested otherwise.<sup>280</sup> When apprised of the possibility of unauthorized operations, Liberty's principals immediately initiated a process to verify the operations, discover the extent of such operations, understand how such operations occurred, and take corrective action. Moreover, the intent of Liberty at all times was to disclose this information to the Commission. While it is possible that these steps could have occurred sooner or could have been accomplished in a different manner, these "corrective and remedial actions"<sup>281</sup> do not evidence an intent to deceive the Commission. To the contrary, they fully demonstrate that Liberty has "the ability to operate in the public interest with no likelihood of future misconduct."<sup>282</sup>

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<sup>279</sup> See *David A. Bayer*, 7 FCC Rcd at 5056; *Character Policy Statement*, 102 FCC 2d at 1218.

<sup>280</sup> See *David A. Bayer*, 7 FCC Rcd at 5056 (even though there are allegations "that certain conversations suggest the possibility of scienter by principals, there are explicitly statements, under oath and subject to criminal prosecution if false, disavowing any such knowledge").

<sup>281</sup> *Id.*

<sup>282</sup> *Character Policy Statement*, 102 FCC 2d at 1229.

**V. IT IS PROPER TO GRANT THE MOTION AT ISSUE WITHOUT REFERENCE TO THE CONTENTS OF THE INTERNAL AUDIT REPORT**

131. In his Supplemental Order, the Presiding Judge requested that proposed findings and conclusions “must address the question of how summary decision can be granted to Liberty without production of the Internal Audit Report.”<sup>283</sup> Liberty urges that the subject case may be decided – and, in fact, is ripe for decision – without reference to the Internal Audit Report (the “Report”).

132. It is well settled that both administrative law judges and administrative agencies must make determinations based on the record before them, and not on the possibility of additional record evidence (i.e. the Report). Indeed, this precept is embodied in the Administrative Procedure Act and consistent judicial precedent. For example, Section 556(e) of the APA states that in on-the-record adjudications “[t]he transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the *exclusive record for decision* in accordance with section 557 of this title.”<sup>284</sup> Similarly, Section 557(c) instructs fact finders that initial decisions must include a statement of “findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion *presented on the record*.”<sup>285</sup> Indeed, the Supreme Court has held that an

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<sup>283</sup> Supplemental Order at n. 7.

<sup>284</sup> 5 U.S.C. § 556(d).

<sup>285</sup> 5 U.S.C. § 557(c).