

194. In fact, Liberty's contractual obligations were not being impaired or threatened, because Liberty already was providing service, albeit by unauthorized OFS facilities. At that time, there had been no order or request that such facilities be turned off. Price, Tr. 1448.

195. Mr. Barr agreed that the fact that service obligations were already being met at some of the buildings was relevant, and that the Surreply did not disclose the date that service had commenced at each location in the Reply. Id. at 1925; TWCV Ex. 19.

F. Liberty included misrepresentations and omitted material facts in its June 16, 1995 letter.

196. On June 16, 1995, Mr. Barr submitted Liberty's response to the Commission's Section 308(b) request. TWCV Ex. 21. The letter was drafted by Mr. Barr and attorneys from Ginsburg, Feldman and Bress and Constantine & Partners. Barr, Tr. 1904-05; TWCV Ex. 21.

197. In the declaration accompanying the letter, Mr. Nourain stated: "I had no knowledge that TWCNYC was filing oppositions against all of Liberty's applications for microwave authorizations, including the applications to provide service to the locations Liberty was serving without authority, until April of 1995, as I stated in the Surreply." TWVC Ex. 21, at 20. At the hearing, Mr. Nourain testified that he still believed that his declaration was correct. Nourain, Tr. 870-71.

198. Mr. Lehmkuhl testified that Mr. Nourain was aware of petitions to deny against all of Liberty's applications. Lehmkuhl, Tr. 1096-97, 1188-90. Mr. Lehmkuhl never told Mr. Nourain that TWCNYC's petitions to deny did not affect all of Liberty's applications. Id. at 1189-90.

199. In his declaration, Mr. Nourain stated: "Rather, at the time the paths were turned on, I was under the assumption that each was covered by a granted request for special temporary authority." TWCV Ex. 21, at 21. Mr. Barr interviewed Mr. Nourain regarding his assumption that STA requests had been filed and granted. Barr, Tr. 1907; TWCV Ex. 21, at 7-8.

200. Liberty's counsel admitted at the hearing that Mr. Nourain's assumptions were unfounded. Spitzer, Tr. 1915. "This -- the assumptions were unfounded I don't think there's anybody in this room here, ... that would disagree with the proposition that these were unfounded propositions." Id.

201. Mr. Nourain knew that STA requests were not being filed for new paths in 1995. Although Mr. Lehmkuhl discussed renewal STAs with Mr. Nourain, he never told Mr. Nourain that STA requests were being filed for new paths.

I may have discussed with him STAs that I was renewing if there were in fact such STAs, one or two may have still been in effect in January. I may have filed them in January. I don't know. But no, I did not have any discussions with him about any STAs for new paths.

Lehmkuhl, Tr. 1191.

202. When Mr. Nourain activated paths in March 1995 he undoubtedly knew that no STAs covered those paths. Mr. Nourain received a memorandum dated February 24, 1995 from Mr. Lehmkuhl. The memorandum unambiguously informed Mr. Nourain that Liberty was not operating under any STAs. Lehmkuhl, Tr. 1191-92; L/B Ex. 1.

203. The June 16, 1995 letter did not indicate Mr. Price's knowledge regarding TWCNYC's petitions to deny. Price, Tr. 1495; TWCV Ex. 21, at 6. On January 11, 1995,

Mr. Price was told that TWCNYC had filed petitions against all Liberty's license applications and that this would delay action on them. Barr, Tr. 1795-96.

G. Liberty omitted the fact that paths were prematurely activated in its July 17, 1995 license applications.

204. Mr. Lehmkuhl prepared Liberty's license applications filed on July 17, 1995. Lehmkuhl, Tr. 1193-94; TWCV Ex. 25. Mr. Nourain and Mr. Barr reviewed the license applications prior to filing. Nourain, Tr. 884-85; Lehmkuhl, Tr. 1193-94; TWCV Ex. 25. The license applications omitted the material fact that Liberty was already operating the microwave paths for which it was requesting licenses. TWCV Ex. 25.

205. Mr. Nourain discovered that Liberty did not have authority to operate four additional paths in June 1995. Nourain, Tr. 872-73. On June 30, 1995 Nourain requested Comsearch to perform a coordination study for the twelve paths, including four that had been previously activated. Nourain, Tr. 871-73; TWCV Ex. 22. The four paths (440 E. 56th St., 39 E. 85th St., 1295 Madison Ave., and 380 Rector Pl.) were discovered during an audit of all paths. Nourain, Tr. 872-73; TWCV Exs. 22, 30.

206. Mr. Nourain learned that these paths were activated, but unauthorized in "[m]id-June, about June 15th, 16th." Nourain, Tr. 873. Mr. Nourain had called Mr. Lehmkuhl to inquire as to whether any applications for those paths had been filed. When Mr. Lehmkuhl called back to say that there were no filed applications, Nourain told him to prepare applications. *Id.* at 875. Mr. Nourain informed Mr. Ontiveros about the unauthorized activated paths and subsequently met with Messrs. Price and E. Milstein on or about June 16, 1995. *Id.* at 874.

207. Mr. Barr knew that the paths were operating as of June 22, 1995. Mr. Barr drafted notes of a telephone conference with Mr. Constantine on June 22, 1995. TWCV Ex. 50; see Order, WT Docket No. 96-41, FCC 97M-19 (rel. Feb. 14, 1997). These notes support the fact that Mr. Barr knew of the premature activations at the time of the application, but failed to include this information in the license application.

208. Mr. Lehmkuhl testified that he learned that paths were activated without authorization from charts received from Mr. Price. Lehmkuhl, Tr. 1197-98, 1200-03; TWCV Ex. 24. Mr. Lehmkuhl testified that he could have received the charts as early as July 3, 1995. Lehmkuhl, Tr. 1211. The charts, in part, listed activated buildings with flawed licenses. TWCV Ex. 24, at 1. One of the charts listed the four microwave facilities for which licenses were requested on July 17, 1995 (440 E. 56th Street, 35 E. 85th St. (38 E. 85th St. on HDO), Hotel Wales (1295 Madison Ave. on HDO), and Liberty Terrace (380 Rector Pl. on HDO)). See TWCV Exs. 24, 30. Mr. Lehmkuhl understood from the chart that the four buildings had already been activated. Lehmkuhl, Tr. 1202-03.

209. Mr. Price knew that the four paths were activated on July 17, 1995, the date the application was filed. On July 17, 1995, Mr. Price executed the signature page of Liberty's request for STA for the four paths. See, e.g., TWCV Ex. 27, at 5. The request for STA, filed on July 24, 1995, disclosed that certain paths "had been activated before the company had filed for or received FCC authorization for the necessary license modifications." TWCV Ex. 27, at 2. Mr. Price reviewed the July 24, 1995 STA request. Lehmkuhl, Tr. 1195-96.

210. Liberty never supplemented its June 16, 1995 Section 308(b) response with information about the four additional facilities that were activated without authorization.

H. Liberty omitted a material fact from its Motion for Summary Decision

211. Liberty and the Bureau filed a joint Motion for Summary Decision ("Motion") in this proceeding on July 15, 1996. Joint Motion by Bartholdi Cable Co., Inc. and Wireless Telecommunications Bureau for Summary Decision.

212. In the Motion, Liberty stated that it filed requests for STA for fourteen microwave facilities on May 4, 1995. *Id.* ¶ 36. However, Liberty omitted the material fact that when it filed the STA requests it did not inform the Commission that the relevant microwave facilities were already in operation, a fact which was known to Liberty at the time the requests were filed. Findings ¶¶ 91, 101, 108, 113.

VII. Liberty Abused The Discovery Process.

A. All significant documents were untimely produced.

1. February 24, 1995 Inventory

213. Mr. Lehmkuhl drafted a memorandum dated February 24, 1995, which included an Inventory of Liberty's licenses and pending applications. The memorandum is significant because it informed Messrs. Price and Nourain that Liberty was not operating under STAs as of February 24, 1995. Lehmkuhl, Tr. 1103-04; L/B Ex. 1. The Inventory listed all addresses that were activated without authorization as of February 24, 1995, as having pending applications. L/B Ex. 1; TWCV Ex. 30.

214. Mr. H. Milstein testified that he expected the recipients of Mr. Lehmkuhl's February 24, 1995 memorandum to compare the Inventory of licenses in the memorandum with a list of activated microwave facilities.

Q: Okay. Now if this document was in fact sent to the people to whom it's addressed, wouldn't you have expected them, at least one of them to compare the inventory of licenses that it contains with a list of Liberty's own addresses that are activated?

A: Yes, I would.

H. Milstein, Tr. 559; L/B Ex. 1.

215. Mr. Lehmkuhl stated that Pepper & Corazzini had a standing practice of sending such inventories to Liberty. Lehmkuhl, Tr. 1059. Liberty produced all such inventories from Pepper & Corazzini's files. See Exs. 3, 4, 6.

216. The memorandum was produced from Pepper & Corazzini's 1808 file, the file for Liberty. Lehmkuhl, Tr. 1292-93; L/B Ex. 1. On its face, the memorandum indicates that it was sent to Comsearch, a third party. Therefore, it could not be withheld under a claim of attorney-client privilege. The memorandum was not produced in unredacted form until June 27, 1996, over two months after Liberty's documents were required to be produced and after all depositions had been taken. See Order, WT Docket No. 96-41, FCC 96-164M (rel. June 27, 1996).

2. April 28, 1995 Lehmkuhl memorandum

217. Mr. Lehmkuhl drafted a memorandum dated April 28, 1995 regarding the status of Liberty's license applications. The memorandum included an Inventory of Liberty's licenses. TWCV Ex. 34. Mr. Nourain requested Mr. Lehmkuhl to draft this memorandum after Mr. Nourain discovered that Liberty had activated microwave facilities without FCC

authorization. Nourain, Tr. 648. The memorandum confirmed to Mr. Nourain that Liberty was operating microwave facilities without licenses. Id. at 749-50. Mr. Price stated that the memorandum verified that petitions delayed the processing of STA requests. Price, Tr. 1386. The memorandum and Mr. Nourain's April 26, 1995 memorandum informed Mr. Price that Liberty was serving sites without authorization. See id. at 1385-86.

218. In the memorandum, Mr. Lehmkuhl stated that, although the Commission would not likely grant STA requests due to TWCNYC's petitions to deny, STA would still be requested due to the "seriousness of the situation." TWCV Ex. 34.

219. The memorandum was produced from Pepper & Corazzini's 1808 file on January 6, 1997, one week before the commencement of this credibility hearing. Letter from E. Spitzer to J. Weber, C. Holt and R. Beckner, January 6, 1997 (Attachment B hereto). It was not identified in any log of privileged documents.

220. Mr. Lehmkuhl testified that he found the memorandum when he was searching for a public notice in preparation for his hearing testimony. Lehmkuhl, Tr. 1292. In April 1996, the 1808 file was reviewed by Pepper & Corazzini in response to the Bureau's request for production of documents. The April 28, 1995 memorandum was in the 1808 file in April 1996. Id. at 1293. The memorandum was found in the appropriate place in a correspondence file that was arranged chronologically. Id. at 1294, 1317.

3. April 26, 1995 Nourain memorandum

221. Mr. Nourain drafted a memorandum dated April 26, 1995, at the request of Mr. E. Milstein. Nourain, Tr. 819; TWCV Ex. 35. Mr. Nourain testified that he wrote the memorandum after a conversation with Messrs. E. Milstein and Price. Nourain, Tr. 821.

222. The memorandum listed sites for which STAs would be filed. Id. at 822; TWCV Ex. 35. When he drafted the memorandum, Mr. Nourain knew that all but two of the microwave facilities listed on the memorandum were receiving service without authorization as of April 26, 1995. Nourain, Tr. 826-29; TWCV Exs. 30, 35.

223. Mr. Price testified that he learned of Liberty's unauthorized operations from the April 26, 1995 memorandum. Price, Tr. 1362-64, 1373.

224. The memorandum was produced on January 13, 1997, the first day of the credibility hearing. Spitzer, Tr. 492-94. It was also not identified in any log of privileged documents.

4. April 30, 1993 Richter letter

225. The Presiding Judge conducted an in camera review of a letter dated April 20, 1993, which was referenced in Mr. Barr's June 22, 1995 handwritten notes. This document was not listed on Liberty's privilege log. On February 4, 1997, in accordance with the Presiding Judge's order, Liberty produced the letter. Order, WT Docket No. 96-41, FCC 97M-14 (rel. Feb. 5, 1997).

226. Jennifer Richter, an attorney at Pepper & Corazzini, sent the letter to Bruce McKinnon. Handwritten notes on the letter indicate that Mr. Nourain and Mr. Price reviewed the letter. In the letter, Ms. Richter informed Mr. Nourain and Mr. Price that FCC authorization was necessary prior to activating new microwave paths. TWCV Ex. 51. The letter states, in part,

Behrooz Nourain and I have had several discussions recently regarding when it is permissible for Liberty to construct and operate new microwave paths and stations, and when it is not. Some things were revealed during these conversations that gave both Behrooz and I pause. In order to ensure that

everything Liberty does is in strict accordance with the rules, and to ensure that your competitors are given no ammunition against you, I am writing this letter to detail the parameters within which construction and operation of new paths and new stations is permissible.

B. After the late production of significant documents, Liberty's witnesses changed their testimony regarding when they learned of Liberty's unauthorized activation of microwave paths.

227. During the deposition phase of this proceeding, Messrs. Price, E. Milstein, and H. Milstein uniformly testified that they first learned that Liberty was operating microwave paths without FCC authorization from a pleading filed by TWCNYC. Findings, ¶¶ 99, 104, 112. TWCNYC filed this pleading, a Reply to Opposition, on May 5, 1995.

228. On January 6, 1997, one week prior to the commencement of the hearing, Liberty produced Mr. Lehmkuhl's April 28, 1995 memorandum. Liberty produced Mr. Nourain's April 26, 1995 memorandum on January 13, 1997, the first day of the hearing. Findings, ¶¶ 219, 224. These two documents indicate that Liberty was in the process of filing requests for STA for facilities that they knew were serving current customers. Findings, ¶¶ 217-18, 222.

229. At the hearing, Messrs. Price, E. Milstein, and H. Milstein could no longer testify that TWCNYC's pleading initiated Liberty's knowledge of premature activations. As of the last week of April, 1995, these three witnesses possessed clear evidence that Liberty was operating unlicensed microwave paths. Despite this knowledge, all testified that they were doubtful that such a situation had in fact occurred.

230. At the hearing, Mr. H. Milstein would only commit to a "concern that it might not be properly licensed." His testimony lacks conviction because he admittedly has no clear

or independent recollection of when he first learned of Liberty's premature activation of microwave paths. Findings, ¶¶ 91, 93, 95.

231. Although Mr. Price testified that he knew from the April 26, 1995 and the April 28, 1995 memoranda that STA requests were being filed for currently operating sites, later testimony showed that he was uncertain about whether these facts were true. Findings, ¶¶ 100-01, 105, 136, 141. Mr. E. Milstein's testimony relies on information he received from Mr. Price. Findings, ¶¶ 108-09.

C. Liberty misrepresented Howard Barr's knowledge regarding Liberty's unauthorized operation of microwave facilities.

232. TWCNYC filed a motion for an order to take the deposition of Howard Barr on July 19, 1996. Motion for Order to Take Deposition, July 19, 1996. TWCNYC argued that Mr. Barr had information regarding when Liberty learned that it had been operating unlicensed microwave paths. *Id.* at 4. TWCNYC further alleged that Mr. Barr had knowledge about whether Liberty misrepresented facts or lacked candor in its statements to the Commission. *Id.* at 1-2.

233. In its opposition to TWCNYC's request to depose Mr. Barr, Liberty claimed that a "deposition of Mr. Barr would add nothing new to the record and is thus unnecessary, duplicative and wasteful, as well as burdensome, harassing and vexatious." Opposition to Motion for Order to Take Deposition, July 24, 1996.

234. Liberty's counsel knew that Mr. Barr had information that was highly relevant to this credibility hearing. During the discovery period of this proceeding, Liberty's counsel was aware that Mr. Barr participated in the April 27, 1995 telephone conference with Mr. Price. At that meeting, Mr. Barr learned that Liberty was operating microwave paths

without authorization. Barr, Tr. 1796-97. Mr. Barr additionally informed Liberty counsel that at that meeting he saw a list of buildings receiving service without FCC authorization.

Q:... When you were relating the April 27th phone call to the Constantine firm, did you also relate the fact that Mr. Price had a list of buildings that he believed there was premature service?

A: I related that I recalled that there was some type of list that had building locations on it.

Id. at 1954.

235. The document Mr. Barr referenced was likely Mr. Nourain's April 26, 1995 memorandum to Mr. E. Milstein. Id. at 1847-48, 1858, 1860, 1943. Liberty did not produce the April 26, 1995 memorandum until January 13, 1997, the first day of the hearing. Spitzer, Tr. 492-94.

236. Mr. Barr knowingly allowed documents containing material omissions to be filed with the Commission. Mr. Barr reviewed the May 4, 1995 STA requests, Liberty's Reply to Opposition, filed May 26, 1995, and the July 17, 1995 license applications. Barr, Tr. 1801; Lehmkuhl, Tr. 1193-94; TWCV Ex. 19. Liberty failed to disclose that it was already operating the paths that were the subject of these papers, although Liberty knew those facts at the time of filing. Barr, Tr. 1801, 1924-25; TWCV Exs. 17, 19, 25, 50; see Findings, ¶¶ 91, 101, 108, 114-15, 133.

CONCLUSIONS OF LAW

I. **Liberty Has Not Met Its Burden Of Proving Its Credibility And Candor In Dealing With The Commission.**

237. Pursuant to 47 U.S.C. § 309(e), 47 C.F.R. § 1.254, and the Commission's Hearing Designation Order, 11 FCC Rcd 14133, ¶ 34 (1996) ("HDO"), Liberty bears the

"burden of proceeding with the introduction of evidence and the burden of proof." In cases, such as the present one, where the matters in issue are solely within the knowledge of the applicant, the burden of proof on such issues is regularly placed on the applicant. See Catoctin Broadcasting Corp. of New York, 4 FCC Rcd 2553, ¶ 8 (1989). Moreover, where the applicant is fully informed of the precise factual questions to be resolved, as Liberty has been,⁸ it is not unfair to require the applicant to bear the burden of proof on the specific issues in the proceeding. Id. Thus, Liberty must present affirmative evidence that it acted forthrightly with the Commission, and did not make material misrepresentations with regard to the above-captioned applications or the hearing proceeding.

238. Under the facts found above, and the legal analysis set forth below, it must be concluded that Liberty has failed to meet its burden of proving its credibility and candor in dealing with the Commission. This conclusion, based on the substantial evidence in the record, warrants denial of the OFS microwave applications that are in issue in this proceeding.

II. The Record Shows That Liberty Lacks The Requisite Character Qualifications To Be A Commission Licensee.

A. Liberty lacked candor in dealing with the Commission, and made knowing and repeated misrepresentations to the Commission both during the application process and the hearing proceeding.

239. "Basic to the functioning of the regulatory process is the ability of the Commission to rely on the representations of those whom it licenses and those who come before it seeking licenses." William M. Rogers, 92 FCC 2d 187, 199 (1982). For this

⁸See HDO, 11 FCC Rcd 14133, ¶ 30; Memorandum Opinion and Order, WT Docket 96-41, FCC 96M-265 (rel. Dec. 10, 1996).

reason, there is a duty of candor that is particularly stringent in the FCC licensing context. See Astroline Communications Co., L.P. v. FCC, 857 F.2d 1556, 1564 (D.C. Cir. 1988) ("applicants before the FCC are held to a high standard of candor and forthrightness") (quoting WHW Enterprises, Inc. v. FCC, 753 F.2d 1132, 1139 (D.C. Cir. 1985)).

240. Character considerations, which are held to an exceptionally high standard with regard to broadcast applicants and licensees, are important in the non-broadcast context, but are not held to quite as high a standard. See, e.g., Arizona Mobile Telephone Co., 93 FCC 2d 1147, ¶ 12 (1983) ("unlike broadcast stations, CARS carriers are not responsible for message content and . . . accordingly, character considerations do not carry the same crucial significance as in broadcast proceedings"); Cablecom General, 87 FCC 2d 784, 788-90 (1981). Nevertheless, the Commission must rely on the truthfulness of its applicants and licensees in their dealings with the Commission, regardless of what type of license they hold, or seek to hold. See Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC Rcd 1179, ¶ 58 (1986) ("Character Policy Statement").⁹

241. The Commission has specifically stated that the "relevant character traits with which it is concerned are those of 'truthfulness' and 'reliability.'" Character Policy Statement, 102 FCC 2d 1179, ¶ 55. Specifically, the Commission is concerned with "whether the licensee will in the future be likely to be forthright in its dealings with the

⁹While the Character Policy Statement was established for broadcast licensees, the Commission has applied the character qualifications expressed therein when evaluating the character of prospective licensees for other services as well. See Time Warner Entertainment Co., L.P., 10 FCC Rcd 9300, ¶ 20 & n.57 (Cable Services Bureau 1995); Tempo Satellite, Inc., 7 FCC Rcd 2728, n.8 (1992) (Commission specifically rejected argument that broadcast character policies are not relevant to the qualifications of applicants for non-broadcast services).

Commission and to operate its [facility] consistent with the requirements of the Communications Act and the Commission's Rules and policies." *Id.* Accordingly, the Commission has held that "[t]he reliability of an applicant and its proclivity to deal truthfully with the Commission is a bedrock prerequisite to a finding of basic character qualification to hold a license." KOED, Inc., 3 FCC Rcd 2821, ¶ 24 (Rev. Bd. 1988).

242. Pursuant to the guidelines set forth in its Character Policy Statement, the Commission requires *all* applicants to be "fully forthcoming as to all facts and information relevant to a matter before the FCC." Swan Creek Communications, Inc. v. FCC, 39 F.3d 1217, 1222 (D.C. Cir. 1994) (quoting Silver Star Communications -- Albany, Inc., 3 FCC Rcd 6342, 6349 (Rev. Bd. 1988)); see also Policy Regarding Character Qualifications in Broadcast Licensing, 5 FCC Rcd 3252, ¶ 10 (1990) (in adding § 1.17 to its Rules, the Commission clarified that the requirement of Commission licensees to tell the truth to the Commission is not limited to broadcast applicants and licensees, but applies to *all* Commission applicants and licensees). Thus, the duty of candor is violated when an applicant fails to disclose relevant information in a timely manner. See Garden State Broadcasting Ltd. Partnership v. FCC, 996 F.2d 386, 393 (D.C. Cir. 1993). "Of necessity, the Commission relies heavily on the truthfulness, accuracy, and completeness of submissions made to it by applicants who, in turn, have an affirmative obligation to provide the Commission with the facts needed to carry out its statutory mandate." KOED, 3 FCC Rcd 2821, ¶ 33.

243. Moreover, applicants have a duty to be fully forthcoming with all relevant facts and information "whether or not such information is particularly elicited." Swan

Creek, 39 F.3d at 1222 (quoting Silver Star, 3 FCC Rcd at 6349); see also WADECO, Inc. v. FCC, 628 F.2d 122, 128 (D.C. Cir. 1980) (responsibility is on applicant to "come forth with all the information needed to keep its file accurate and complete, not on the Commission to infer significant additional information from the less-than-complete information it receives"). Accordingly, an applicant must bring to the Commission's prompt attention any matter of "decisional significance." See RKO General, Inc. v. FCC, 670 F.2d 215, 229 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982). Unlike private parties hailed into court, FCC license applicants have an affirmative obligation to inform the Commission of the facts the Commission needs in order to issue a license. Id. "As a licensing authority, the Commission is not expected to 'play procedural games with those who come before it in order to ascertain the truth.'" RKO General, 670 F.2d at 229 (quoting the Commission's Brief in that case). Thus, the Commission may premise a finding of lack of candor on omissions as well as deliberate misrepresentations. WHW Enterprises, 753 F.2d at 1139.

244. An applicant's duty of candor cannot be satisfied by communicating only partial truths to the Commission. See KOED, 3 FCC Rcd 2821, ¶ 18 (disclosure of one arguably acceptable motivation for conduct while failing to disclose other inappropriate motivation violated the "high standards of punctilio" imposed on licensees). Rather, the Commission's Character Policy Statement and case law interpreting that policy "are at pains to stress that the agency's demand for unalloyed candor is its *sine qua non* for licenseeship, because it is primarily upon a licensee's uninvestigated representations that this agency must routinely rely." Tri-State Broadcasting Co., 5 FCC Rcd 1156, ¶ 114 (Rev. Bd. 1990), aff'd, 6 FCC Rcd 2604 (1991).

245. The duty of candor is also a continuing duty. See 47 C.F.R. § 1.65; WADECO, 628 F.2d at 128; Garden State Broadcasting, 996 F.2d at 393. When any significant information or relevant circumstances change, the applicant must timely notify the Commission of all the changed information. 47 C.F.R. § 1.65; see also WADECO, 628 F.2d at 128.

246. Violations of the duty of candor may occur during FCC hearings and investigations, as well as in conjunction with the application process. In the hearing context, self-serving lapses of memory and inconsistencies in testimony are evidence of a lack of candor. See Garden State Broadcasting, 996 F.2d at 393-94.

247. In addition to its intolerance for violations of the duty of candor, the Commission specifically abhors any misrepresentation to the Commission, because it "not only violates the Commission's Rules; it also raises immediate concerns over the licensee's ability to be truthful in any future dealings with the Commission. Other types of FCC-related violations . . . are not as proximately relevant to the core concern of truthfulness as is the act of willful misrepresentation." Character Policy Statement, 102 FCC 2d 1179, ¶ 57. Misrepresentation "involves false statements of fact," while lack of candor "involves concealment, evasion and other failures to be fully informative, . . . both misrepresentation and lack of candor represent deceit." Fox River Broadcasting, Inc., 93 FCC 2d 127, ¶ 6 (1983). Both are considered to be serious breaches of trust, and, "[a]s such, even the most insignificant misrepresentations may be treated as disqualifying." KOED, 3 FCC Rcd 2821, ¶ 25; Character Policy Statement, 102 FCC 2d 1179, ¶¶ 60, 61.

248. The Commission has determined that denial of an application, disqualification of an applicant, or revocation or non-renewal of a license is an appropriate sanction for violations of the duty of candor, or making misrepresentations to the Commission. See, e.g., FCC v. WOKO, Inc., 329 U.S. 223 (1946) (Commission has authority to deny a license for an intentional misrepresentation); KOED, 3 FCC Rcd 2821, ¶ 25 ("even the most insignificant misrepresentations may be treated as disqualifying"); Mid-Ohio Communications, Inc., 5 FCC Rcd 940, ¶ 5 (1990) (where licensee concealed station manager's extensive involvement with another business, Commission held that "the disqualification of [the licensee] on the facts of this case appropriately reflects the seriousness with which we view dishonest conduct by licensees"); WWOR-TV, Inc., 7 FCC Rcd 636 (1992) (deliberate concealment of relevant, critical evidence is inherently deceptive, and a basis to deny an application), aff'd, 996 F.2d 386 (D.C. Cir. 1993); Standard Broadcasting, Inc., 7 FCC Rcd 8571, ¶ 11 (Rev. Bd. 1992) (when inaccurate information results from an intent to deceive, the remedy may be total disqualification, even if the fact concealed does not appear to be particularly significant). In fact, "applicants' or licensees' intentional deceptions of the Commission by providing either false information (misrepresentation) or incomplete and misleading information (lack of candor) are viewed as 'serious breaches of trust' for which the Commission has broad discretion in choosing remedies and sanctions." Standard Broadcasting, 7 FCC Rcd 8571, ¶ 11; Character Policy Statement, 102 FCC 2d 1179, ¶ 103; KOED, 3 FCC Rcd 2821, ¶ 33; see also FCC v. WOKO, 329 U.S. at 227 ("fact of concealment may be more significant than the facts concealed"). When "trust is

ruptured, all else falls asunder, and privileges may be lost if the deceit is substantial." Tri-State Broadcasting, 5 FCC Rcd 1156, ¶ 114 (citing FCC v. WOKO, 329 U.S. 223)).

249. The Commission, however, will not disqualify an applicant for a negligent omission or misrepresentation. Swan Creek, 39 F.3d at 1222; Garden State Broadcasting, 996 F.2d at 393. The intent to deceive is an essential element of a finding of misrepresentation or lack of candor. Swan Creek, 39 F.3d at 1222; Capitol City Broadcasting, 8 FCC Rcd 1726, ¶ 29 (Rev. Bd. 1993). Once such intent to deceive is found, a direct misrepresentation or omission, by itself, can result in disqualification by the Commission. Swan Creek, 39 F.3d at 1222.

250. The Commission has applied its character policy stringently, and has not hesitated to deny, disqualify, dismiss, not renew, or revoke licenses or applications on the basis of misrepresentation and/or lack of candor. The following cases demonstrate the Commission's intolerance of lack of candor and misrepresentation by applicants and licensees, and provide a measuring stick against which Liberty's actions can be evaluated in the present case.

251. In a renewal case involving KQED, Inc., the licensee (KQED) held licenses for two public television stations in San Francisco -- KQED-TV, the larger station, and KQEC-TV, a smaller station broadcast on channel 32. For some months prior to its renewal proceeding for channel 32, KQED darkened that station. KQED told the Commission that it darkened channel 32 because new switcher equipment was being installed, and it would be too costly to operate the channel while the equipment was being installed. KQED, 3 FCC Rcd 2821, ¶¶ 5, 6 (Rev. Bd. 1988). The evidence showed, however, that KQED had a

budget deficit, and its Chief Executive Officer ordered the staff to study ways to reduce the deficit, including eliminating service on channel 32. Id. at ¶ 7. All staff memos on the subject dealt with savings to be achieved by darkening channel 32; there was no mention of installing new equipment. The Review Board found that the decision by KQED to darken channel 32 was made prior to KQED's letter to the Commission stating that new equipment was being installed which would cause KQED to darken channel 32 temporarily. Id. at ¶ 20. The equipment situation was simply a convenient smokescreen for an otherwise unacceptable reason for darkening a channel. Id. at ¶ 21. The Review Board found that KQED engaged in misrepresentations to the Commission that disqualified it from further licenseeship of channel 32. Id. at ¶ 2. On appeal, the full Commission determined that the denial of renewal of KQED's license to operate channel 32 was proper. KQED, Inc., 5 FCC Rcd 1784 (1990). Specifically, the Commission stated:

even if engineering problems did exist, it does not excuse KQED's failure to be honest with the Commission about the nature of its actions. Having made a decision to deactivate the station for budgetary reasons, KQED may not rely on the circumstance that it might fortuitously have been able to justify deactivating the station on the basis of engineering considerations.

Id. at ¶ 5. Later, the Commission also stated that the appropriate sanction for misrepresentation and lack of candor is to deny renewal of KQED's license for channel 32. KQED, Inc., 6 FCC Rcd 625 (1991).

252. In WWOR-TV, 7 FCC Rcd 636, the Commission denied the application of a VHF applicant for concealing evidence that was responsive to a continuing discovery request. Of critical importance in this case was the date of the initial meeting of the principals of applicant Garden State Broadcasting. Garden State deliberately avoided producing documents

responsive to a request regarding the date of formation of Garden State even though it was on notice that the documents requested were material, and had further been reminded that such documents could presumably be found in Garden State's attorney's files. *Id.* at ¶ 54. Garden State finally produced "highly reliable evidence" within six days of the Commission's remand order in which the Commission approved a \$2 million settlement between Garden State and the incumbent licensee, WWOR-TV, Inc. *Id.* at ¶ 45. On remand, the ALJ found that Garden State deliberately ignored repeated requests to produce information regarding the date of its principals' initial meeting, "despite recognizing their significance, because Garden State did not want to risk uncovering any new evidence that might jeopardize approval of the settlement." *Id.* at ¶ 46. The ALJ concluded that Garden State "lacked candor by seeking to insure that significant evidence would remain concealed, until that course was no longer expedient." *Id.* On review, the Commission agreed with the ALJ, stating that "[w]e cannot condone an applicant's decision to conceal such evidence. We find this conduct inherently deceptive and a further basis to deny Garden State's application." *Id.* at ¶ 55 (citation and footnote omitted).

253. Tri-State Broadcasting, 5 FCC Rcd 1156, involved a situation where the Commission had permitted Tri-State to acquire certain broadcast stations only on condition that the incumbent general manager, to whom multiple Commission rule violations were attributable, relinquish all managerial and administrative duties, and have no ownership interest in the stations. Tri-State subsequently represented to the Commission that the general manager had been reassigned to the sales staff. The evidence showed, however, that the alleged former general manager was still the *de facto* general manager, and that Tri-State

repeatedly and deliberately concealed this information from the Commission. Moreover, the alleged former general manager had never been responsible for any sales accounts, nor had he attended or participated in any sales staff meetings, even though Tri-State told the Commission that he had been assigned to the sales staff. *Id.* at ¶¶ 33, 34. Tri-State's deceptive conduct warranted its non-renewal of the AM station that was the subject of these misrepresentations.

254. In one of the many cases involving RKO, three competing applicants for the license were disqualified on grounds of misrepresentation and lack of candor. RKO General, Inc. (WAXY-FM), 4 FCC Rcd 4679 (Rev. Bd. 1989).¹⁰ One applicant promised that he and his wife would divest themselves of all the stock they owned in a closely held cable TV company. However, the record showed that this was never their intent. Rather, they were planning to put the stock in a trust and divest themselves only of voting rights in the stock. *Id.* at ¶ 21. This lack of candor resulted in the disqualification of their application.

255. A second applicant was disqualified on a finding that her certification of financial qualifications constituted a deliberate false statement. Her financial certification stated that she had sufficient net liquid assets on hand or available from committed sources to construct and operate the requested facilities for three months. *Id.* at ¶ 44. However, the record revealed that at the time of the certification, the applicant did not know what it would cost to build and operate the station, had made no arrangements to borrow the necessary funds, had taken no steps to learn about the station's facilities, had never worked at a radio

¹⁰While this case was ultimately vacated as moot, 5 FCC Rcd 642 (1990), when the Commission approved a massive settlement involving RKO, the findings with regard to particular applicants that the Commission disqualified are still valid.

station, did not even know the station's frequency, and did not live in Ft. Lauderdale (where the station was located), nor had she visited the area prior to filing her application. *Id.* at ¶ 33.

256. A third applicant, Cozzin, was disqualified for forging the signatures of his family members on 46 LPTV applications and attempting to conceal the forgery; misrepresenting his status as the real party in interest behind the 46 applications; and filing multiple applications in several markets in violation of the Commission's Rules. *Id.* at ¶ 73. Cozzin's application for a license in another market was also denied for the same reasons. See RKO General, Inc. (KFRC), 5 FCC Rcd 3222, ¶ 27 (1990).

257. In Mid-Ohio Communications, 5 FCC Rcd 940, the Commission denied renewal of an FM license to Mid-Ohio on grounds of misrepresentation and lack of candor, because Mid-Ohio concealed facts regarding the station manager's extensive outside responsibilities in connection with a family-owned business. In fact, he was so involved with his other business that his duties at the broadcast station were not even those of a station manager. The Commission held that "the disqualification of [Mid-Ohio] on the facts of this case appropriately reflects the seriousness with which we view dishonest conduct by licensees." *Id.* at ¶ 5.

258. In Capitol City Broadcasting, 8 FCC Rcd 1726, an FM applicant failed to disclose his position as vice president of the licensee of a nearby AM station that he managed. The FM applicant knew of the falsity of the facts that it represented to the Commission, and had a motive to deceive the Commission. Upon being confronted with the true facts, the applicant denied being an officer of the AM station, claiming that he did not

think a vice president was an officer! Id. at ¶¶ 28-29. The evidence, however, showed that the applicant knew he was an officer, and testified to the contrary. Id. at ¶ 29.

259. In Catoctin Broadcasting, 4 FCC Rcd 2553, the Commission denied renewal of an AM radio licensee on the grounds of misrepresentation to the Commission regarding employment discrimination issues, ascertainment of needs and presentation of responsive programming, and the prizes involved in a contest held by the station. Specifically, the Commission held that the licensee had the burden of proving that it had not engaged in any misconduct, and that it failed to meet this burden. Id. at ¶¶ 7, 8.

260. In Standard Broadcasting, 7 FCC Rcd 8571, an applicant was disqualified for making repeated misrepresentations with regard to preparation of its quarterly program lists. The Review Board determined that any intentional deceptions to the Commission may result in total disqualification from the application process, even if the fact concealed does not appear to be very significant. Id. at ¶ 11.

261. Applications have been denied for even seemingly minor instances of lack of candor. For example, an FM applicant's application was denied because an inconsistency between the applicant's hearing testimony and an earlier statement "reflect a predisposition on [the applicant's] part to be less than candid in giving testimony in this case." Bomberger, 7 FCC Rcd 1849, ¶ 32 (ALJ Sippel 1992).

262. The record in the present case shows irrefutably that Liberty lacked candor in dealing with the Commission, and made material misrepresentations of fact during the application process and hearing proceeding. Liberty's actions were repeated, intentional, and far more egregious than many of the showings of lack of candor and misrepresentation

discussed above that have given the Commission sufficient reason to deny applications.

Liberty has demonstrated that it lacks the requisite basic character qualifications of truthfulness and reliability to be a Commission licensee. Accordingly, all of Liberty's OFS applications in issue in this proceeding should be denied.

1. Liberty lacked candor in the application process.

263. The record shows that Liberty made a series of materially false and misleading statements to the Commission regarding its unauthorized OFS microwave operations, starting with its May 4, 1995 STA requests. See Proposed Findings of Fact, ¶¶ 145-212. ("Findings"); TWCV Exs. 17, 18, 19, 21, 25. In asking the Commission for grants of STA on May 4, 1995 to operate 14 OFS microwave paths for which licenses had not yet been granted, Liberty never told the Commission that those 14 paths were already in operation. Findings, ¶¶ 154-162; TWCV Ex. 17. Not only did these STA requests fail to reveal to the Commission that the paths were already activated, but they were intended to mislead the Commission into thinking that the paths had not been activated. Furthermore, the STA requests were signed by Mr. Nourain, the Liberty official who had already activated the 14 unlicensed paths, and therefore, knew that the paths were operational prior to May 4. Findings, ¶¶ 68, 155; TWCV Ex. 17.

264. Specifically, Liberty affirmatively represented to the Commission that "any delay in the institution of temporary operation would seriously prejudice the public interest." TWCV Ex. 17. However, since Liberty was already providing such service, albeit illegally, the public interest could not be prejudiced by any delay in the grant of STA. Liberty further stated in its requests for STA that any delay in the consideration of its STA requests would

"seriously undermine[] Liberty's ability to deliver service." TWCV Ex. 17. Again, this statement would lead the Commission to believe that Liberty was not providing service over the paths for which STA was sought when, in fact, it was. Findings, ¶¶ 155-57. These, and other similar statements contained in the May 4 STA requests, demonstrate that Liberty omitted material facts from the Commission, and made deliberate false statements regarding the operation of its microwave facilities.

265. The record further shows that Liberty, contrary to its earlier claim that it did not know it was operating any facilities without authority to do so until TWCNYC filed a May 5, 1995 pleading with the Commission,¹¹ knew that it was operating several microwave paths without licenses at least as of April 27 or 28, 1995. Findings, ¶ 155; TWCV Exs. 50, 34. Whether the exact date was April 27 or 28 does not matter; both are prior to Liberty's May 4 STA requests, which do not disclose the fact that 14 paths for which STAs were sought were already operational. Liberty indisputably knew that these 14 paths were operational prior to filing the May 4 STA requests, and deliberately concealed this information from the Commission. Findings, ¶¶ 155-162.

266. Liberty's witnesses also testified that its attorneys did not know that Liberty was operating the 14 paths in issue when those attorneys wrote and filed the May 4 STA requests. Findings, ¶ 127. The record shows, however, that several of Liberty's attorneys had a conference call on April 27, 1995 to discuss Liberty's unauthorized operations, and that those attorneys had in their possession a memo from Mr. Nourain dated April 26, 1995

¹¹See, e.g., Liberty Ex. 9 (Price Deposition, 5/28/96), at 207-09.