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BEFORE THE  
**Federal Communications Commission**

WASHINGTON, D.C. 20554

MAR 10 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In Re Requests Of	) WT DOCKET 96-41
	) File Nos./Call Signs
	)
LIBERTY CABLE CO., INC.	) 708777 (WNTT370)
	) 708778, 713298 (WNTM210)
For Special Temporary Authority	) 708779 (WNTM385)
For Private Operational Fixed	) 708780 (WNTY375)
Microwave Radio Service	) 708781, 709426, 711937 (WNTM212)
	) 709332 (WNTY371)
New York, New York	) 712203 (WNTW782)
	) 712218 (WNTY584)
	) 712219 (WNTY605)
	) 713295 (WNTX889)
	) 713297 (WNTL307)
	) 713300 (WNTY372)
	) New/WPJB384
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FEDERAL COMMUNICATIONS COMMISSION  
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To: Hon. Richard L. Sippel, Administrative Law Judge

**TIME WARNER CABLE OF NEW YORK CITY AND PARAGON  
COMMUNICATIONS' REPLY TO PROPOSED FINDINGS OF FACT AND  
CONCLUSIONS OF LAW OF BARTHOLDI CABLE COMPANY, INC.**

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## SUMMARY

Liberty's Proposed Findings of Fact describe a completely implausible scenario for its illegal microwave operations and its ever-changing story regarding how those illegal operations came to be. The record evidence simply does not support Liberty's description of events that it would like the Presiding Judge to believe actually occurred.

Contrary to Liberty's assertions, the record shows that, even though Mr. Price knew in early January 1995 that Liberty's OFS microwave applications would be delayed because TWCNYC petitioned to deny such applications, Mr. Price never shared this information with anyone at Liberty, nor were any discussions held regarding a revised business strategy to deal with the problems associated with a delay in authorizations from the FCC.

The record further shows that, even though Liberty's senior management saw weekly operations and installation reports in early 1995, Mr. Price never asked Mr. Nourain or Mr. Ontiveros how it was possible for Liberty to activate new facilities while its applications were delayed at the FCC. Mr. Price simply assumed that Mr. Nourain was doing his job, even though he had received a copy of a letter from Liberty's FCC attorney in 1993 regarding the FCC licensing process stating that some things in a conversation with Mr. Nourain "gave her pause" and would give ammunition to Liberty's competitor.

The record further shows that all of Liberty's principal witnesses testified in depositions that they did not know of Liberty's unlicensed operations until they received a copy of TWCNYC's May 5, 1995 pleading to the FCC. However, at the hearing, this testimony changed, and all admitted to knowing about the unlicensed operations the last week of April, 1995. The source of Liberty's knowledge of this major event remains a mystery. Even though Liberty and its attorneys knew it was operating illegally at the end of April 1995, Liberty filed requests for STA on May 4, 1995 and did not inform the FCC that it was already operating the facilities for which it sought STA.

Liberty's claim that it had no motive to violate the law is groundless. Liberty was involved in a competitive struggle to win customers and install new customers quickly. Once Liberty was advised that TWCNYC's petitions to deny would delay the processing of its applications, Liberty had motive to activate facilities illegally in order to keep its contractual commitments. Liberty's claim that its openness about commencing service to new buildings demonstrates that it did not intend to violate the law is groundless as well. The fact of whether Liberty had licenses to provide service to new buildings is not readily available. In fact, Liberty got away with activating 19 facilities illegally before TWCNYC discovered two of the unlicensed facilities.

Liberty's argument that it is pure coincidence that TWCNYC happened to reveal Liberty's unlicensed operations before Liberty did so on its own is entirely self-serving, and is contradicted by the evidence. Even when it knew it was operating illegally, Liberty filed STA requests with the FCC in which it did not disclose its illegal operations.

In its Conclusions of Law, Liberty claims that, because it lacked an intent to deceive the FCC, disqualification is too harsh a sanction. However, the record shows that Liberty did intend to deceive the FCC by filing false statements with knowledge of their falsity. Moreover, the evidence shows a pervasive, knowing lack of candor on Liberty's part. Liberty's witnesses' testimony uniformly changed from deposition to hearing, and this change could not be sufficiently explained by any of the witnesses. Even if Liberty ultimately intended to disclose its illegal operations to the FCC, this does not negate its intent to deceive the FCC in the May 4 STA requests. Liberty's obligation to be truthful could not simply be suspended while it conducted its internal investigation.

Finally, Liberty's alleged reliance on counsel does not exonerate it from its deceptive behavior. Given the circumstances of Liberty's material omissions and misleading statements in the May 4 STA requests, disqualification is not too harsh a sanction.

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Time Warner Cable of New York City and Paragon Communications (collectively "TWCNYC") hereby submit their Reply to the Proposed Findings of Fact and Conclusions of Law of Bartholdi Cable Co., Inc. (hereinafter "Liberty Findings" or "Liberty Conclusions").

## PROPOSED FINDINGS OF FACT

### I. The Implausibility Of The Scenario That Liberty Describes Both For Its Illegal Operations And For Its Ever-Changing Story As To How Those Illegal Operations Came To Be.

A leading writer once wrote that, to properly experience literature, it was necessary for the reader to have a "willing suspension of disbelief."<sup>1</sup> Liberty's Findings and KConclusions make similar demands on its readers. The world that Liberty describes is one that is foreign to most persons who have been a part of any organization, whether it be a private business, a government agency, a university or even a family. In the world Liberty describes, people with common goals and common problems do not communicate with each other; information is received, but not acted upon; significant events happen, but people forget when they happened or how they first learned of the events; letters from legal counsel are received and forwarded to others, but there is no follow-up to see what action was taken by the ultimate recipients; individuals have "assumptions" about important matters that are seriously in error and that have disastrous consequences for the organization, but no one else knows about these assumptions until it is too late.<sup>2</sup>

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<sup>1</sup>"That willing suspension of disbelief for the moment, which constitutes poetic faith." Coleridge, Biographia Literaria ch. 14 (1817).

<sup>2</sup>Indeed the world that Liberty describes -- one in which its officers do not communicate with each other -- is not the one which its Chairman, Howard Milstein describes:

[M]y form of management style is to operate by consensus; for him [Peter Price] to keep me informed of what he was doing. He would not make any strategic decisions without first discussing them with me. And I think he was aware of my business philosophy which is that it's fine to do anything on your own without asking about it, but you[ve] got to be right about it. Otherwise, there might be a problem. So . . . if you think you might not be right or want

(continued...)

Liberty has made all these arguments in an effort to show that its nine-month pattern of activating unlicensed microwave facilities was not the result of an "intent to violate the law or the Commission's Rules."<sup>3</sup> For example:

\* Although Peter Price, Liberty's President, knew as early as January 11, 1995, that processing of Liberty's OFS license applications was going to be delayed as a result of TWCNYC having petitioned to deny those applications on January 9, he never told anyone about that, including his microwave engineer who was responsible for initiating the process that led to the filing of microwave applications and who was responsible for installing and activating new microwave facilities. TWCNYC Findings, ¶¶ 14, 38, 68, 174, 178-79.

\* Although Behrooz Nourain, Liberty's microwave engineer, talked many times during the first four months of 1995 with Michael Lehmkuhl, the company's lawyer who was in charge of filing applications for new microwave facilities and STA requests for those facilities, and although the two of them discussed the fact that TWCNYC had petitioned against Liberty's applications, Mr. Nourain assumed that those petitions were limited to the applications Liberty had filed for microwave paths to replace hardwire interconnections between non commonly-owned buildings. *Id.* at ¶¶ 11, 40, 175; Liberty Findings, ¶ 52.

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<sup>2</sup>(...continued)

additional input, then you come in and talk about it.

L/B Ex. 4 (H. Milstein Deposition, 5/30/96), at 9-10.

<sup>3</sup>TWCNYC leaves aside, for the moment, the evidence that raises a substantial question of fact as to whether Liberty operated unlicensed facilities before July 1994 and knew that it had done so. See Motion by Time Warner Cable of New York City and Paragon Cable Manhattan for Limited Discovery and the Taking of Additional Hearing Testimony, or in the Alternative, to Enlarge Issues, ("Motion to Enlarge") filed March 3, 1997. Of course, this information was never revealed to the Commission in any public filing.

Mr. Nourain said he had never seen the petitions even though Mr. Lehmkuhl said the company was routinely copied on all FCC filings. TWCNYC Findings, ¶ 40. He did say that, when he had executed an affidavit that was filed in a federal court case in February, 1995 that mentioned the TWCNYC petitions, he had just been told about them by another of the company's lawyers. Nourain, Tr. 985-86, 995-97.

\* Similarly, although Mr. Nourain frequently spoke with Mr. Lehmkuhl, although he received as-filed copies of all microwave applications and STA requests (TWCNYC Findings, ¶ 57; Liberty Findings, ¶ 39), and although he was the one who signed license applications and STA requests on behalf of the company in 1994 and the first half of 1995 (TWCNYC Findings, ¶¶ 57, 155; TWCV Ex. 17), Mr. Nourain assumed that Mr. Lehmkuhl was routinely filing STA requests in conjunction with Liberty's microwave applications during that same period. TWCNYC Findings, ¶ 59. Of course, that was not the understanding that Messrs. Lehmkuhl and Barr had (Id.); and, in any event, had he not repeatedly violated the Commission's Rules by signing forms in blank (Id. at ¶¶ 57, 88), Mr. Nourain might have remembered that he had not signed any STA requests during that six month period in 1994 and 1995 when Liberty was filing applications for new microwave facilities. Id. at ¶ 164.

\* The company was in serious negotiations for the sale of a total or partial ownership interest during the fall of 1994 and the spring of 1995. H. Milstein, Tr. 537-38. There was always "pressure" to fulfill new customers' expectations promptly. See id. at 593-94; Price, Tr. 1586-87; Ontiveros, Tr. 1708-09. Nevertheless, even though Peter Price learned on January 11 that his company's growth was going to be at an indefinite standstill

(TWCNYC Findings, ¶ 178), there is no indication that it was anything other than "business as usual" at Liberty, regardless of whether FCC licenses were granted. There was no discussion between Mr. Price and anyone about revising the business strategy to deal with disappointed customers whose service would not begin on the date promised, about modifying the sales pitch to new customers to deal with the uncertainties of licensing, about modifying the 120 day lead time for commencement of service provided for in the standard form of agreement with building owners, or about otherwise adjusting to the new reality the company faced as a result of these licensing delays. See TWCNYC Conclusions, ¶ 307.

\* Every week after January 11, 1995, Peter Price and the rest of Liberty senior management would see the weekly operations and installation reports reflecting customer installations in new buildings served by microwave. TWCNYC Findings, ¶ 45. Yet Mr. Price and any others who knew of the delay of processing of FCC licenses never asked Mr. Nourain or the operations manager, Mr. Ontiveros, how it was possible that Liberty was continuing to activate new microwave facilities if its applications were being held up at the FCC. See, e.g., TWCNYC Findings, ¶¶ 76, 174.

\* For no apparent reason other than his desire to try out a new computer program, Liberty's FCC lawyer, Michael Lehmkuhl, compiled an inventory of Liberty's FCC licenses on February 24, 1995 and sent it to Messrs. Price and Nourain. TWCNYC Findings, ¶ 44; Lehmkuhl, Tr. 1061. This kind of report had been prepared for Liberty before at irregular intervals by Mr. Lehmkuhl's predecessor. TWCV Exs. 3, 4, 6. However, for the first time -- and also for no apparent reason -- Mr. Lehmkuhl's inventory included a list of *pending* applications as well. TWCNYC Findings, ¶ 44; L/B Ex. 1.

Certainly, in view of the knowledge that TWCNYC's petitions to deny were delaying Liberty's applications at the FCC, the company might have wanted to know the extent of the problem. However, Mr. Lehmkuhl's decision to add this information to the format of the Inventory was, he testified, something entirely of his doing. L/B Ex. 6 (Lehmkuhl Deposition, 8/7/96), 111.

\* Mr. Price and Mr. H. Milstein said they expected the lawyers and Mr. Nourain to work out a system to ensure compliance with the FCC's licensing requirements. TWCNYC Findings, ¶¶ 69, 81. Mr. Price points to a 1992 memo he sent to his then executive vice president, Bruce McKinnon, as evidence of that fact. Id. at ¶ 82; L/B Ex. 2. However, Mr. McKinnon said he did not understand the memo to have that purpose at all. TWCNYC Findings, ¶ 83.

\* In the same vein, Mr. Price admits that a comparison of the February 24, 1995 Inventory's list of "pending" applications with Liberty's list of "installed" buildings would have identified all of the "prematurely" activated paths as of the first of March, 1995. Yet, when Mr. Price received the Inventory (an event that he does not remember) he did not perform such a comparison, nor did he ask anyone else to. Mr. Nourain does not remember receiving the inventory either. Id. at ¶ 46. Moreover, neither Mr. Price nor Mr. Nourain recall receiving any of the other license inventories their lawyers sent them in previous years. L/B Ex. 8 (Nourain Deposition, 8/1/96), 5-8, 13-4; L/B Ex. 11 (Price Deposition, 8/1/96), 147-49.

\* Mr. Price says that he assumed Mr. Nourain was doing his job with respect to licensing microwave facilities before turning them on and had no idea that Mr. Nourain was

activating facilities without receiving confirmation that the company had FCC authority to do so. TWCNYC Findings, ¶ 79. Yet, in 1993, Mr. Price received a copy of a letter from the company's lawyer reciting the fact that, in a telephone conversation she had with Mr. Nourain, he said some things that "gave her pause" and that would give ammunition to Liberty's competitor. TWCV Ex. 51. The letter went on to describe what the FCC's licensing requirements were and how long to expect the FCC's application process to take. Mr. Nourain forwarded a copy of the letter to Mr. Price with the written question, "How do you wish to proceed?" Id.

\* All of Liberty's principal witnesses (Price, H. Milstein, E. Milstein) testified in depositions taken in May, 1996 that TWCNYC's May 5, 1995 FCC filing accusing Liberty of unlicensed operation was the first they knew of the company's unlicensed activity. TWCNYC Findings, ¶¶ 99, 103-04, 112. After they testified at trial that they had learned of Liberty's unlicensed operations during the last week in April, they said an April 26, 1995 memo from Mr. Nourain to them, which only recently had been produced, had "refreshed their recollection and consequently changed their testimony." Id. at ¶¶ 91, 100-02, 105, 107-08. Yet, in September 1995, their lawyer, Lloyd Constantine, whose firm entered an appearance on Liberty's behalf in this case, filed an affidavit in support of Liberty's Application for Review of the Bureau's decision ordering the Internal Audit Report to be made public, which said that the company had discovered its unlicensed operations "in late April" 1995. TWCV Ex. 29. Notwithstanding this significant discrepancy between Mr. Constantine's affidavit and their deposition testimony, no effort was made by any of the Liberty witnesses to correct their misstatements in their deposition testimony, even after the

"Combined Opposition" of TWCNYC and Cablevision to Liberty's Motion for Summary Decision pointed out the discrepancy between their lawyer's statement and their own accounts. To the contrary, based on that subsequently recanted testimony, Liberty moved for summary decision in this case, saying there was no evidence that Liberty had, at any time, lacked candor with the Commission or that Liberty intended to violate the law or the Commission's rules. See generally Joint Motion by Bartholdi Cable Co., Inc. and Wireless Telecommunications Bureau for Summary Decision, July 15, 1996. However, as a result of these witnesses' changed testimony, it is now established beyond a reasonable dispute that Liberty filed STA requests on May 4, 1995 for paths that the company knew were operational, but did not tell this information to the Commission, and implied to the contrary in the requests. TWCNYC Findings, ¶¶ 154-64; TWCV Ex. 17.

\* With respect to Liberty's decision to file STA requests on May 4 for microwave facilities that already were operating without revealing that fact to the Commission in the requests, Liberty claims that it wanted to complete its investigation before revealing its unlicensed operations to the Commission in order to avoid piecemeal disclosure. TWCNYC Findings, ¶¶ 46-49, 162-63. Yet, all the information Liberty needed was available on two computer databases: the one in which Mr. Lehmkuhl maintained the status of Liberty's licenses and applications (which was used to generate the February 24 Inventory) and the one that Mr. Ontiveros maintained that listed the operational status of each of the buildings that Liberty served (that was used to generate the weekly operations and installation report). Id. at ¶¶ 44-45, 137; TWCV Ex. 14, L/B Ex. 1. However, neither Mr. Ontiveros nor Mr. Lehmkuhl were included in the discussion on April 27, 1995, about filing STA

requests. TWCNYC Findings, ¶¶ 131, 137. Mr. Lehmkuhl, on April 28, 1995, faxed to Liberty a list of currently pending applications, but somehow, before May 4, even that list could not be matched up against Liberty's billing records or its installation progress reports to derive a definitive list of buildings that were served by unlicensed microwave paths. Id. at ¶¶ 129, 217; TWCV Ex. 34.

\* Likewise, even though it was Mr. Lehmkuhl who prepared the May 4 STA requests, of the many people involved in reviewing those requests (Messrs. Price and Nourain; lawyers Barr, Rivera and Constantine), he was the only one who did not know that the requests were for paths that had been activated illegally. TWCNYC Findings, ¶¶ 127, 154-55. Apparently, neither Mr. Nourain, whom he worked with, nor Mr. Barr, to whom he reported, told him.

\* Even though the discovery that Liberty was operating unlicensed was a major event in the company's life, Mr. Nourain's account of receiving a fax "from headquarters," given during his direct testimony, is one that the company, through its lawyers, "does not rely on." Id. at ¶¶ 116-21. All of the senior people at headquarters (Messrs. E. Milstein, H. Milstein and Price) identify Mr. Nourain as the source of their information that Liberty was operating unlicensed. See id. at ¶¶ 101-02, 105, 107-08. No fax has been produced. Id. at ¶ 121.

\* Although Mr. Nourain says he does not recall receiving Mr. Lehmkuhl's February 24, 1995 Inventory of Liberty's licenses and pending applications, he has never explained how he was able to produce his April 26 memorandum, listing addresses where STAs were needed to "serve current customers," without his lawyers' assistance. Id. at

¶¶ 46, 114-16; TWCV Ex. 35. The source of his knowledge -- if it was not the February 24, 1995 Inventory -- is a mystery.

\* Mr. Barr says he prepared the "Surreply" in which Liberty sought to explain how it came to activate 15 microwave unlicensed facilities. TWCNYC Findings, ¶ 165; TWCV Ex. 18. The Surreply claims, in part, that Mr. Nourain assumed that STA requests had been filed for all of the facilities in question and furthermore, that he assumed that these requests had been granted within about 40 days. TWCV Ex. 18. Mr. Barr, however when he was drafting these arguments, never talked to his associate who was responsible for filing applications and STA requests for Liberty, Mr. Lehmkuhl, to find out whether Mr. Nourain's "assumptions" had any reasonable basis in fact. TWCNYC Findings, ¶ 166.

In its "Proposed Findings and Conclusions," TWCNYC sets out in detail the evidence that Liberty was not candid with the Commission. They do not need to be repeated here. However, TWCNYC believes it appropriate to set out the principal "assumptions" and coincidences that form Liberty's explanation for what happened. In aggregate, there are far too many of these to be plausible.

## II. Certain Other Insupportable Factual Conclusions Advanced By Liberty.

### A. Liberty had no motive to violate the law.<sup>4</sup>

Liberty had ample motive to violate the law. As it acknowledged, it was involved in a competitive struggle to win customers, and its operations director admitted that there was pressure to install new customers quickly. Liberty Findings, ¶ 75; Ontiveros, Tr. 1708-09. Once it had been advised that the effect of TWCNYC's petitions to deny was to delay,

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<sup>4</sup>Liberty Findings, ¶¶ 74-78.

indefinitely, the processing of any of its applications for new microwave facilities, Liberty was in what even its lawyers called a "serious" situation. TWCNYC Findings, ¶ 218; TWCV Ex. 34. Moreover, in seeking STAs for the paths at issue, Liberty repeatedly stressed to the Commission the serious consequences that it would face if it failed to meet its contractual commitments. TWCV Ex. 17. The fact that Liberty did not lose a single account for failing to meet its contractual obligations does not tend to prove that Liberty complied with its regulatory obligations. Liberty Findings, ¶ 75. If anything, this fact tends to prove the opposite. Indeed, Liberty has failed to come forward to identify any location where it did lose a customer or was forced to renegotiate a contract as a result of the delays in its microwave application processing. Liberty's motive to violate the law was its need, which it expressed repeatedly in its STA requests, to meet its service commitments and continue the growth of its business.

- B. Liberty would not have been so brazen as to knowingly operate unlicensed while simultaneously broadcasting the fact that it had commenced service to a new building.

Liberty claims that the fact that it was open about commencing service to a new building demonstrates that it did not intend to violate the law and the Commission's rules regarding microwave licensing. *Id.* at 78. This does not follow. While Liberty made no secret of when it began service to a new building, the fact of whether or not it had a microwave license to provide service to that building is not so readily available. Even though Liberty had been operating 19 unlicensed facilities dating back to July 1994, it was not until nine months later (May 1995) that TWCNYC found even two of these unlicensed facilities. Even then, TWCNYC's "Reply" paper was very tentative in its allegation that

Liberty was operating unlicensed. See Reply to Opposition to Petitions to Deny, May 5, 1995. Moreover, the microwave facility that Liberty activated in 1993 (during the same month that an application for that facility had been filed) was never discovered. See TWCNYC Motion to Enlarge, March 3, 1997. If Liberty had "prematurely activated" some microwave facilities in 1993 without having been caught (as now seems to be the case), it could confidently expect to do the same in 1995, at least for a number of months. The actual facts show that confidence to have been justified. Indeed, the "seriousness of the situation" to which Liberty's FCC lawyers referred could well have been the number of facilities Liberty was operating unlicensed in the spring of 1995, as well as the duration of these operations. See TWCV Ex. 34.

- C. Liberty always intended to reveal to the Commission the fact that it was operating unlicensed.

In essence, Liberty argues, it was pure coincidence that TWCNYC happened to have filed its paper revealing Liberty's unlicensed operation before Liberty did so on its own. Other than Liberty's witnesses' obviously self-serving *post hoc* testimony, the evidence contradicts this assertion. First, although there was no particular reason to do so immediately, Liberty filed its STA requests on May 4 without telling the Commission that they were for paths that already had been activated. TWCNYC Findings, ¶¶ 158, 161, 163. Liberty's engineer, Mr. Nourain, was able to identify these facilities as being unlicensed on April 26, *before he spoke to Mr. Lehmkuhl about them.* Id. at ¶ 115. Secondly, by April 28, Messrs. Lehmkuhl and Barr had confirmed by memorandum to Liberty that the facilities in question were unlicensed. TWCV Ex. 34. Third, although Mr. Lehmkuhl testified that he did not know any of the facilities covered by the May 4 STA requests were already

operating, many persons who did know that information reviewed the requests in draft without modifying them to include this information: Messrs. Price, Constantine, Rivera, and Barr. TWCNYC Findings, ¶¶ 154-55. Fourth, on April 27, Mr. Price and his attorneys had a conference call to discuss the situation. Id. at ¶ 131. They knew that STA requests were already being prepared by Mr. Lehmkuhl. Id. at ¶ 139. Although Mr. Barr suggested that the Commission be advised immediately of the fact of Liberty's unlicensed operations, preparation of the STA requests without disclosure of these facts was allowed to proceed to a filing made on May 4. Id. at ¶ 150. Fifth, Mr. Barr did not begin to work on any document to reveal Liberty's unlicensed operations to the Commission until after TWCNYC had filed its allegations of unlicensed operations and after the STA requests had been filed. Id. at ¶ 151.

### CONCLUSIONS OF LAW

#### I. Liberty's Actions Clearly Indicate A Deliberate Intent To Deceive The Commission.

In its Conclusions of Law, Liberty correctly states that "[i]n order to disqualify a licensee, both misrepresentation and lack of candor require the presence of an intent to deceive." Liberty Conclusions, ¶ 100. Liberty further explains that such an intent can be inferred from the applicant's actions, as well as from a motive to deceive. Liberty Conclusions, ¶¶ 101 n.227, 102. A determination of intent is a factual issue which can be resolved by reasonable inferences from the evidence. California Public Broadcasting Forum v. FCC, 752 F.2d 670, 679 (D.C. Cir. 1985). For example, "the fact of misrepresentation coupled with proof that the party making it had knowledge of its falsity" demonstrates an

intent to deceive. David Ortiz Radio Corp. v. FCC, 941 F.2d 1253, 1260 (D.C. Cir. 1991) (quotations omitted).

Liberty's intent to deceive is easily inferred from its witnesses' pervasive lack of candor and its numerous knowing misrepresentations and omissions in statements to the Commission, together with a motive for deceiving the Commission.

The evidence does not support Liberty's assertion that its witnesses were "candid, truthful, and forthright" in their testimony regarding when they learned of Liberty's unauthorized activation of microwave paths. Liberty entirely overlooks the significant change in testimony that occurred between the depositions and the hearing. Liberty Conclusions, ¶¶ 104-16. As demonstrated in TWCNYC's Findings, Messrs. Price, H. Milstein, and E. Milstein testified uniformly that they learned from a TWCNYC pleading, filed on May 5, 1995, that Liberty was operating without FCC authorization. After the late production of additional documents shortly before and during the hearing, all three witnesses changed their testimony to reflect knowledge of Liberty's unauthorized operations during the last week of April 1995. Liberty Findings, ¶¶ 227-29. The Bureau concluded that Liberty's witnesses lacked credibility because not one could provide a sufficient explanation for their change in testimony. Bureau Findings, ¶¶ 80, 82, 89.

Liberty cites to Telephone and Data Systems, Inc., 10 FCC Rcd. 10518 (1995) for the proposition that "inconsistencies in testimony that reflect the varying perceptions of witnesses do not necessarily demonstrate intentionally false testimony." Id. at ¶ 17. In that case, the situation was one that is fairly common in hearings -- different witnesses have different recollections of the same event. Unlike the situation in Telephone and Data

Systems, the testimony elicited at the credibility hearing was not consistent with information provided by those same witnesses during discovery. See id. at ¶ 104. Moreover, Liberty's witnesses each provided testimony that was internally inconsistent, rather than being inconsistent with the other witnesses' testimony. The inconsistency of each individual's testimony with that witness's prior testimony cannot be explained by "varying perceptions." The fact that Liberty's witnesses uniformly testified one way during depositions and then all similarly changed their testimony at the hearing must result in an adverse conclusion -- Liberty's witnesses lacked candor.

Liberty's statements to the Commission in its applications, STA requests, correspondence, and pleadings contained omissions and misrepresentations. TWCNYC Findings, ¶¶ 154-212. Significantly, in its May 4, 1995 requests for STA, Liberty omitted the known fact that it was already operating the very paths for which it requested STA. Id. at ¶¶ 154-64. Liberty's conduct is not merely misleading. See Abacus Broadcasting Corp., 8 FCC Rcd 5110, ¶ 14 (Rev. Bd. 1993) (applicant's filing created the *impression* that the applicant had chosen a location for a transmitter as of a certain date, when that decision was not finalized until after that date) (emphasis added). The STA requests affirmatively and explicitly informed the Commission that STA was necessary to commence service. TWCNYC Findings, ¶¶ 156-60.

Liberty possessed a motive for deceiving the Commission regarding when it first learned that it was operating without FCC authorization. Evidence of Liberty's motive for deceiving the Commission goes beyond "speculation and innuendo." Joseph Bahr, 10 FCC Rcd 32, ¶ 6 (1994). At the hearing, Liberty's witnesses testified that Liberty learned of its

unauthorized operation of microwave paths during the last week of April 1995. Liberty Conclusions, ¶ 104. Liberty also admitted that its May 4, 1995 STA requests failed to mention this knowledge. *Id.* at ¶ 121. Liberty learned that TWCNYC had discovered at least some of its illegally operated paths on May 5, 1995. Therefore, to avoid any sanctions for filing a document with the Commission that contained a knowing omission and several misrepresentations, Liberty's principals testified at their depositions that TWCNYC's May 5, 1995 filing was the first indication that Liberty was operating without authorization. Thus, if this testimony were accurate, the omissions from the May 4 STA requests would not have been "knowing." See Standard Broadcasting, Inc., 7 FCC Rcd 8571, ¶ 18 (1992) ("Fear of culpability if caught is sufficient" to find a motive to deceive). Only after the belated production of two memoranda dated in late April 1995 which indicated that Liberty had knowledge of its unauthorized operations prior to May 4, 1995, did Liberty's witnesses testify to possessing such knowledge in April 1995. TWCNYC Findings, ¶¶ 228-29.

Liberty also had a motive for deceiving the Commission when it filed its STA requests on May 4, 1995. Liberty's attorney testified that Liberty needed the paths "authorized and licenses as soon as possible." TWCNYC Findings, ¶ 154. There is no deadline for filing an STA request. *Id.* at ¶ 164. Therefore, Liberty's only motive for omitting the fact that the paths were already operating was to gain authorization prior to anyone discovering its unauthorized operations, thereby avoiding any sanction for its improper actions.

Even if Liberty intended eventually to disclose the existence of unauthorized operations, this does not negate its intent to deceive the Commission in its May 4, 1995 STA

requests. See Liberty Conclusions, ¶ 116. Liberty still had an obligation to be truthful when submitting statements to the Commission. 47 C.F.R. § 1.17.

Liberty emphasizes that even carelessness, inadvertence, and gross negligence in submitting information to the Commission do not demonstrate the required deliberate intention to deceive. Liberty Conclusions, ¶¶ 100, 125. Liberty relies on a case in which the applicant was not disqualified based on its inadvertence and ineptitude. Liberty Conclusions, ¶ 126; Valley Broadcasting Systems, Inc., 4 FCC Rcd 2611 (Rev. Bd. 1989). However, Liberty overlooks the fact that its conduct was neither inadvertent nor inept, because it made a conscious decision to misrepresent known facts to the Commission.

Liberty cites Valley Broadcasting Systems, Inc. for the premise that disqualification was not an appropriate sanction for ineptitude. Liberty Conclusions, ¶ 126. Liberty fails to mention that when an applicant erroneously reports information to the Commission with an intent to conceal, disqualification is warranted. Valley Broadcasting System, 4 FCC Rcd 2611, ¶¶ 30, 36. In Valley Broadcasting System, no intent to conceal was found when misstatements in a pleading did not benefit the applicant and the attorney who drafted the pleading had no knowledge of the misstatement. Id. at ¶¶ 23-24. Unlike the applicant in Valley Broadcasting Systems, Liberty's failure to disclose unauthorized operations (for example in its May 4, 1995 STA requests) benefitted Liberty. If TWCNYC had not discovered Liberty's unauthorized operations, Liberty would have received an STA for previously activated paths and would have continued to collect revenue from those paths. Moreover, if the illegal operation of those paths had not been discovered before the STA requests were granted, most likely it never would have been discovered. In addition,

Liberty's counsel was keenly aware of the misrepresentations and omissions in the May 4, 1995 STA request. TWCNYC Findings, ¶¶ 161-62.

The Commission should disqualify Liberty based on its deliberate intent to deceive the Commission. Liberty's intent is reasonably and conclusively inferred from the fact that Liberty's witnesses were not candid, Liberty's statements to the Commission knowingly contained misrepresentations and material omissions, and Liberty had a motive to conceal information from the Commission.

II. Liberty's Alleged Reliance On Counsel Does Not Exonerate It From Its Deceptive Behavior.

Liberty contends that "the Commission has been reluctant to impute a disqualifying lack of candor to a licensee where the record demonstrates that principals relied in good faith on counsel or employees. 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." Liberty Conclusions, ¶ 102 (footnotes omitted). While it is true that good faith reliance on counsel *may* render disqualification too harsh a sanction in some circumstances (see RKO General, Inc. v. FCC, 670 F.2d 215, 231 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982)), the facts show that this case does not present such circumstances. Moreover, the facts show that Liberty not only knew about, but had actually discussed with its counsel the fact that material information was omitted from, and misleading statements contained in, pleadings filed with the Commission. See, e.g., TWCNYC Findings, ¶¶ 155, 158-63. Thus, Liberty's alleged innocent reliance on its counsel's advice cannot excuse its breach of the duty of candor to the Commission. See RKO General, 670 F.2d at 231 (citing Asheboro Broadcasting Co., 20 FCC 2d 1, 3 (1969)). "The client becomes fully responsible

at some point, and that point is reached more quickly in practice before the FCC than in courts of law." RKO General, 670 F.2d at 231; see also WADECO, Inc. v. FCC 628 F.2d 122, 128 (D.C. Cir. 1980).

Specifically, Liberty claims that, with regard to the May 4, 1995 STA requests, such "requests were prepared by FCC licensing counsel. They were reviewed by experienced FCC attorneys from two law firms. They did not advise Liberty to modify or delay filing the May 4, 1995 STA requests." Liberty Conclusions, ¶ 121. Liberty then claims that its good faith reliance on counsel warrants only a forfeiture, rather than disqualification of Liberty as a licensee. Liberty Conclusions, ¶ 122. This is a peculiar sort of "reliance," where the client "relies" on its counsel's silence, rather than its advice. This defense, if accepted, would be unprecedented, because the typical client "reliance" occurs when the client relies on some affirmative advice given by counsel. Liberty can point to no opinion of counsel that advised that it was not required to reveal the known fact of unlicensed operation in its STA requests. "Reliance" on counsel's silence is no reliance at all. In fact, Liberty ignored its counsel's advice. During Mr. Price's April 27, 1995 conference call with counsel, Mr. Barr advised Mr. Price that Liberty "needed to act quickly" to disclose information to the Commission about its unauthorized operations. TWCNYC Findings, ¶ 150. Moreover, given the circumstances of Liberty's material omissions and misleading statements in the May 4 STA requests (see, e.g., TWCNYC Conclusions, ¶¶ 263-66), disqualification is not too harsh a sanction, and should be imposed. See KOED, Inc., 3 FCC Rcd 2821 (Rev. Bd. 1988); Mid-Ohio Communications, Inc., 5 FCC Rcd 940 (1990); TWCNYC Conclusions, ¶ 267. Liberty should not be permitted to claim that it relied on its

counsel in good faith when it filed STA requests that it *knew* contained misleading statements and material omissions. Such deliberate lack of candor in dealing with the Commission warrants the harsh sanction of disqualification. See TWCNYC Conclusions, ¶¶ 248, 251, 253, 254, 261.

Liberty relies primarily on WEBR, Inc. v. FCC, 420 F.2d 158 (D.C. Cir. 1969), for the premise that disqualification is not warranted when the principal acts in good faith in relying on the advice of his attorney, and on Abacus Broadcasting Corp., 8 FCC Rcd 5110 (Rev. Bd. 1993), for the premise that an applicant should not be penalized for the innocent failure of communication between the applicant and its counsel. Liberty Conclusions, ¶ 123. Both of these cases are readily distinguishable from the present case, and do not support Liberty's position.

In WEBR, a principal of the applicant company notified counsel of a material change in the investments of two of the company's owners. Counsel advised the applicant not to disclose this information to the Commission until after the license was granted. The applicant, in reliance on his counsel's advice, did not inform the Commission of this material change in its application. The Review Board decided, and the D.C. Circuit affirmed, that the record supported the proposition that the applicant "acted in good faith reliance on his counsel, and decided that he should not be disqualified on character grounds." WEBR, 420 F.2d at 168.

The present case is markedly different from WEBR. Here, the facts show that Mr. Barr, upon learning of Liberty's illegal microwave operations in late April 1995, stated that Liberty did not have to file STA requests on May 4, 1995, but could wait until Liberty