

witnesses in the context of Commission case law which expounds on under what conditions the Commission has found that licensees either have or lack these basic characteristics.

36. The cases to which Liberty refers point to the Commission view that before the rare step will be taken of disqualifying a licensee, there must have been an intention to deceive. Inconsistencies, omissions, carelessness, reliance on incorrect advice, on the part of a licensee, must be accompanied by an intent to deceive; otherwise it is not sufficient to warrant a finding of misrepresentation or lack of candor. *Telephone and Data Systems, Inc.*, 10 FCC Rcd 10518 (I.D. 1995). Since misrepresentation and lack of candor have been found where there is evidence that the licensee had *knowledge* of the facts at issue, and deliberately disregarded it,¹⁰ it is critical to Liberty's continued viability as a licensee that it demonstrates that it did not know of its unauthorized activity long in advance of telling the Commission.

37. Liberty next argues that Peter Price and the Milstein brothers, the principals of Liberty, conformed with the *Character Policy Statement* requirements. According to Liberty, these men's actions reveal that they did not learn of their unauthorized service until April 27, 1995, just a few weeks before they told the Commission of this fact. They bring out in detail that these facts do not reveal a willful intent to deceive the Commission, and that the principals did not misrepresent facts nor lack candor before the Commission through their actions nor in their later testimony.

¹⁰ *WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1142 (D.C. Cir. 1985), *Wadeco Inc. v. FCC*, 628 F.2d 122, 129 (D.C. Cir. 1980).

38. The Bureau supports Liberty in this position. Given the record in this case, it appears that Liberty's actions "fall short of the degree of *scienter* historically required by the Commission for disqualifying."¹¹

39. In Liberty's last three arguments, Liberty claims that its principals were in conformance with the *Character Policy Statement* regarding other issues Time Warner raised. Liberty freely admits there were inconsistencies between the deposition testimony and the hearing testimony. Liberty denies that Lehmkuhl's February 24, 1995, memorandum was dispositive in Liberty's learning before April 27, 1995, of its premature activations. Liberty points out that these inconsistencies and similar activity demonstrate Liberty's disjointed procedures, that its principals were not sufficiently focused on the details of its operations to know that their service to the relevant buildings was premature. The testimony does not show, they argue, that the principals knew of their violations earlier than April 27.

40. The Bureau supports these arguments and believes that Liberty has demonstrated that its premature activations, and its actions that gave rise to them, while regrettable and worthy of the penalty the Bureau has proposed, do not rise to a level which would require the Bureau to recommend that the captioned applications be denied. Although there were 19 premature activations, and Liberty did not inform the Bureau of its violations when it filed its STA requests on May 4, 1995, this does not reflect a flagrant disregard for the Commission's Rules and policies. Rather, it reflects, *inter alia*, repeated carelessness and lack of necessary communication within their organization.

¹¹ *Fox River Broadcasting, Inc.*, 88 FCC 2d 1132, 1137-38 (Rev. Bd. 1982).

III. CONCLUSION

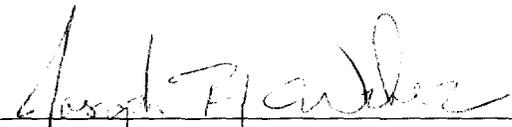
41. Although the Bureau does believe that Time Warner and Cablevision, for the most part, accurately state facts of this proceeding in their Proposed Findings, the Bureau does not believe that the facts warrant a denial of the Joint Motion for Summary Decision. To the contrary, as outlined in the Bureau's and Liberty's respective Proposed Findings, the evidence adduced at the candor hearing supports an adoption of the Joint Motion.

For the foregoing reasons, the Chief, Wireless Telecommunications Bureau, respectively requests that the Bureau's Proposed Findings of Fact and Conclusions of Law be adopted and the Joint Motion for Summary Decision be granted.

Respectfully Submitted,

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March 10, 1997

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CERTIFICATE OF SERVICE

I, Mark L. Keam, of the Enforcement Division, Wireless Telecommunications Bureau, certify that I have, on this 10th day of March, 1997, caused to be served by hand delivery followed by regular First Class United States mail, copies of the foregoing **"Wireless Telecommunications Bureau's Consolidated Reply to Proposed Findings of Fact and Conclusions of Law of Time Warner Cable of New York City and Paragon Communications, and Cablevision of New York City - Phase I, and Proposed Findings of Fact and Conclusions of Law of Bartholdi Cable Company, Inc.,"** to:

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