

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In Re Applications Of	)	WT DOCKET NO. 96-41	
)		
	)	File Nos.:	
LIBERTY CABLE CO., INC.	)	708777	WNTT370
	)	708778, 713296	WNTM210
For Private Operational Fixed	)	708779	WNTM385
Microwave Service Authorization	)	708780	WNTM555
and Modifications	)	708781, 709426, 711937	WNTM212
	)	709332	NEW
New York, New York	)	712203	WNTW782
	)	712218	WNTY584
	)	712219	WNTY605
	)	713295	WNTX889
	)	713300	NEW
	)	717325	NEW

To: Administrative Law Judge Richard L. Sippel

MAY 10 1997

**BARTHOLDI CABLE COMPANY, INC.'S
PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW IN REPLY**

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SUMMARY

On February 28, 1997, Bartholdi Cable Co., Inc., formerly known as Liberty Cable Co., Inc. (“Liberty”), along with the other parties to this proceeding, submitted their Proposed Findings of Fact and Conclusions of Law. The essential factual predicates of Liberty’s proposed findings are not in dispute concerning the inadequate licensing process before mid-1995, the lack of intent to violate FCC rules and regulations, and Liberty’s reliability to comply prospectively with FCC rules and regulations. Accordingly, Liberty’s proposed findings of fact on these points should be adopted.

At the mini-hearing, Liberty established that April 27, 1995 was the earliest date that Liberty’s principals and counsel learned about the possibility of premature activations. The Wireless Telecommunications Bureau (the “Bureau”), Time Warner Cable of New York City, Paragon Communications and Cablevision of New York City - Phase I (together, “Time Warner”) argue that the witnesses changed their testimony on this issue from their prior deposition testimony. However, as the Bureau rightly observes, the purported change in testimony does not constitute misrepresentation since Liberty has no reason to mislead or deceive the Commission on this issue, and, in fact, the “changed” testimony hurts rather than helps Liberty.

As for the argument that Liberty’s witnesses changed their testimony, the record shows that in fact, the prior deposition testimony on this issue was at best vague, and Liberty, with the aid of the April 26 Nourain Memorandum which was not previously available, was able to refresh the witnesses’ recollections, thereby supplementing and clarifying the record. The Presiding Judge ordered the mini-hearing on the narrow issue of when Liberty first discovered

the premature activations, and the focused inquiry brought forth testimony and evidence that was not previously in the record. In light of all the circumstances, Liberty's witnesses testified credibly and consistently on the date of first discovery, and Liberty's proposed finding on this issue should be adopted.

The Presiding Judge should also adopt Liberty's proposed finding that it had always intended to disclose the facts and circumstances of the premature activations, once the facts were gathered and verified. Liberty concedes that it failed to, but should have, disclosed the fact of premature activations in the May 4, 1995 and May 19, 1995 requests for STAs. For these failures, the Bureau seeks to impose a substantial additional forfeiture of \$300,000 on top of the \$790,000 that Liberty has already agreed to pay.

While its disclosures might have been done differently and may support the imposition of an additional forfeiture, Liberty believes that, the voluntary disclosure of thirteen premature activations, followed by four more in mid-July, demonstrates openness and forthrightness before the Commission and no intent to deceive the FCC. Time Warner argues otherwise, by misstating and distorting the record. Reduced to its essence, Time Warner's argument boils down to no more than a claim that Liberty could have made its disclosures differently from how they were actually done. Time Warner offers no basis for a finding that Liberty intended to deceive or mislead the Commission in disclosing the facts and circumstances of the premature activations.

The applicable law and the record developed in this proceeding lead to a single, inescapable conclusion: that Liberty's principals at no time intended to deceive the Commission and therefore forfeiture, and not disqualification, is appropriate. The Bureau, a

party that has spent the better part of this proceeding trying to determine whether Liberty had such intent, is of the identical view.

Time Warner's submission, however, does not vouchsafe to even discuss forfeiture as a possible sanction. This gap is the direct result of Time Warner's failure to discuss comprehensively the Commission's candor and misrepresentation case law. Rather, in an attempt to obscure this case's applicable legal standard, Time Warner has chosen to relate the facts of a litany of candor and misrepresentation cases that have little to do with the matter at hand. Cognizant of the fact that the record does not support its position, Time Warner downplays the requirement that the intent to deceive the Commission must be clearly demonstrated to find lack of candor or misrepresentation. Time Warner also ignores the requirement that such a finding must be based on substantial evidence of an intent to deceive that clearly reveals deliberate falsehoods. Rather, Time Warner's conclusions are merely a series of unreasonable inferences that largely result from speculation.

The record clearly supports Liberty's and the Bureau's conclusions that Liberty's principals at no time intended to deceive the Commission as to when they became aware of the unauthorized operations. Moreover, the events immediately after the discovery of the premature activations as well the events of July 1995 further give credence to the principals' lack of intent. Nor can the voluminous facts adduced in this proceeding anywhere point to a flagrant disregard of the Commission's rules on Liberty's part. On this issue, as with the case of candor and misrepresentation, Time Warner mischaracterizes the applicable law as well as Liberty's actions.

As a final matter, Time Warner has no basis to argue that the Presiding Judge must obtain the Internal Audit Report in order to decide the case. Time Warner seems to suggest

that the Administrative Procedure Act is in fact a trump of both the Rules of Evidence and valid claims of privilege. As both Liberty and the Bureau concluded, the parties have had a full opportunity for discovery in this case, limited only by relevance and claims of privilege.

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To: Administrative Law Judge Richard L. Sippel

**BARTHOLDI CABLE COMPANY, INC.’S
PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW IN REPLY**

Pursuant to 47 CFR § 1.263, Bartholdi Cable Co., Inc., formerly known as Liberty Cable Company, Inc. (“Liberty”), by its counsel, hereby submits its Proposed Findings of Fact and Conclusions of Law in Reply in the above-referenced proceeding. Based on the extensive evidence adduced in this proceeding, Liberty respectfully requests that the Presiding Judge adopt these Proposed Findings of Fact and Conclusions of Law and grant the Joint Motion for Summary Decision filed by Liberty and the Wireless Telecommunications Bureau (“Joint Motion”).

I. FINDINGS OF FACT

A. The Evidence Supports Each and Every Proposed Finding of Fact Advanced by Liberty

1. Bartholdi Cable Co., Inc., formerly known as Liberty Cable Co., Inc.

(“Liberty”), proposed the following findings of fact, based on the evidence developed throughout this proceeding:

- (1) Prior to the institution of a compliance program in mid-1995, Liberty had a inadequate licensing process without proper checks and balances to ensure against violation of the Commission’s rules and regulations.*
- (2) The witnesses presented credible and candid testimony regarding the inadequate licensing process that prevailed at Liberty prior to April 1995.*
- (3) Liberty’s principals neither approved nor encouraged the activation of any paths without Commission authorization.*
- (4) The witnesses presented credible and candid testimony that the premature activations did not result from any intent by Liberty’s principals to violate the Commission’s rules and regulations.*
- (5) The fact of premature activation became known among Liberty’s principals and outside counsel no earlier than April 27, 1995.*
- (6) The witnesses presented credible and candid testimony regarding the discovery of premature activations in late April 1995 and not earlier.*
- (7) Liberty always intended to disclose the facts and circumstances of the premature activations as soon as it had all the facts to present to the Commission.*
- (8) 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.*
- (9) Liberty can be relied upon to remain compliant with FCC laws and regulations in the future.*

2. Based on undisputed and un rebutted evidence, each of the foregoing findings of fact has been established in Liberty's favor. Accordingly, as set forth in detail below, Liberty respectfully requests the Presiding Judge to adopt all of Liberty's proposed findings of fact.

B. Liberty's Inadequate Licensing Process Before Mid-1995

3. The following material facts are undisputed regarding Liberty's licensing process before mid-1995:

- Liberty's principals knew that prior authorization was needed from the Commission before it could activate a microwave path.¹
- When Mr. Nourain was hired, he claimed to understand the licensing process.²
- Mr. Nourain activated buildings before he received an actual license or STA in hand.³
- Mr. Nourain did not monitor the progress of authorizations filed with the Commission nor did he ascertain which microwave paths were associated with a given authorization.⁴

¹ Liberty Proposed Findings ¶¶ 25, 74, 88; TW/CV Proposed Findings ¶ 49.

The numbers following "Liberty Proposed Findings ¶" refer to paragraphs in the Proposed Findings of Fact and Conclusions of Law submitted by Liberty on February 28, 1997. The numbers following "Bureau Proposed Findings ¶" refer to paragraphs in the Proposed Findings of Fact and Conclusions of Law submitted by the Bureau on February 28, 1997. The numbers following "TW/CV Proposed Findings ¶" refer to paragraphs in the Proposed Findings of Fact and Conclusions of Law submitted by Time Warner and Cablevision on February 28, 1997.

² Liberty Proposed Findings ¶ 32; TW/CV Proposed Findings ¶ 52; Bureau Proposed Findings ¶ 59.

³ Liberty Proposed Findings ¶¶ 38, 72, 86; TW/CV Proposed Findings ¶ 60; Bureau Proposed Findings ¶¶ 24, 94.

⁴ Liberty Proposed Findings ¶¶ 39, 40, 72; TW/CV Proposed Findings ¶ 62.

- Mr. Price relied on the interaction of Mr. Nourain with Pepper & Corazzini to coordinate the licensing process, but he did not actively supervise this process on a day-to-day basis nor did Mr. Price follow up to make sure that the expected interaction between Mr. Nourain and Pepper & Corazzini took place as he had envisioned.⁵
- Mr. Ontiveros, to whom Mr. Nourain reported, did not actively supervise Mr. Nourain in the performance of his licensing function and did not know about Mr. Nourain's assumptions regarding the licensing process.⁶
- No one at Liberty was aware of Mr. Nourain's practices and assumptions concerning the licensing process.⁷
- Mr. Nourain's contact with Liberty's principals was limited and infrequent.⁸
- Mr. Nourain did not attend the Thursday meetings attended by Liberty's principals, and the status of licenses was not a routine topic at those meetings.⁹
- At Mr. Ontiveros' staff meetings, which Mr. Nourain attended, the status of licenses was not regularly discussed.¹⁰

4. These undisputed facts reveal inadequate licensing practice which unfortunately prevailed at Liberty before an effective compliance program was instituted in mid-1995.

There is no dispute that poor communication existed within Liberty and between Mr. Nourain

⁵ Liberty Proposed Findings ¶¶ 43,46,71,86; TW/CV Proposed Findings ¶¶ 69, 79, 81-86.

⁶ Liberty Proposed Findings ¶¶ 45, 46, 71, 86; TW/CV Proposed Findings ¶ 70; Bureau Proposed Findings ¶ 24.

⁷ Liberty Proposed Findings ¶¶ 43, 46; TW/CV Proposed Findings ¶¶ 73, 79, 81; Bureau Proposed Findings ¶ 24.

⁸ Liberty Proposed Findings ¶ 44; TW/CV Proposed Findings ¶ 76; Bureau Proposed Findings ¶ 72.

⁹ Liberty Proposed Findings ¶ 44.

¹⁰ Liberty Proposed Findings ¶ 45; TW/CV Proposed Findings ¶ 74.

and Pepper & Corazzini concerning the licensing process. The essential factual predicates are thus established for the following proposed findings:

- (1) *Prior to the institution of a compliance program in mid-1995, Liberty had a inadequate licensing process without proper checks and balances to ensure against violation of the Commission's rules and regulations.*
- (2) *The witnesses presented credible and candid testimony regarding the inadequate licensing process that prevailed at Liberty prior to April 1995.*

Therefore, the Presiding Judge should adopt the foregoing proposed findings of fact.

C. Liberty Did Not Intentionally Activate Microwave Paths in Violation of the Commission's Rules and Regulations

5. There is no dispute that Liberty was aware that it needed authorization from the Commission before any microwave path was activated.¹¹ Furthermore, the following facts are unrebutted:

- No one at Liberty directed or encouraged anyone else in the company to activate any building without Commission authorization.¹²
- Liberty had no incentive to violate the law based either on a need to install buildings quickly or to increase the number of subscribers for the Videotron transaction.¹³

6. Most significant, the fact is undisputed that Liberty openly advertised everyday on the front page of *The New York Times* its "liberation" of buildings, including those that were listed in the HDO.¹⁴

¹¹ Liberty Proposed Findings ¶¶ 25, 74, 88; TW/CV Proposed Findings ¶ 49.

¹² Liberty Proposed Findings ¶¶ 26, 74, 88; Bureau Proposed Findings ¶ 24.

¹³ Liberty Proposed Findings ¶¶ 75, 76.

¹⁴ Liberty Proposed Findings ¶ 77; Bureau Proposed Findings ¶ 97.

7. None of the foregoing established facts is consistent with an intent by Liberty's principals to activate microwave paths in violation of Commission's rules and regulations. Indeed, given the undisputed facts concerning Liberty's unmonitored licensing process, the conclusion is readily reached that the premature activations resulted from carelessness and inadvertence. The essential predicates are thus established for the following proposed findings:

- (3) *Liberty's principals neither approved nor encouraged the activation of any paths without Commission authorization.*
- (4) *The witnesses presented credible and candid testimony that the premature activations did not result from any intent by Liberty's principals to violate the Commission's rules and regulations.*

Therefore, the Presiding Judge should adopt the foregoing proposed findings of fact.

D. Liberty's Principals Did Not Discover the Possibility of Premature Activations Earlier Than April 27, 1995

8. At the mini-hearing, the witnesses uniformly testified to learning about premature activations at the end of April 1995.¹⁵ Indeed, the record is clear that Liberty's principals and counsel made the discovery entirely by accident and not by any reference to the February 24 Inventory or any other inventory prepared by Pepper & Corazzini.¹⁶ As shown

¹⁵ Liberty Proposed Findings ¶¶ 59, 79, 91, 92, 95; Bureau Proposed Findings ¶¶ 46, 50, 60, 71, 73, 74; TW/CV Proposed Findings ¶¶ 91, 100, 103, 104, 108, 113, 122, 133. Liberty does not rely upon Mr. Nourain's testimony regarding when he learned about premature activations. Liberty Proposed Findings p.28 n.148, p.43 n.210; Bureau Proposed Findings ¶ 84; TW/CV Proposed Findings ¶119.

¹⁶ The existence of the April 20, 1993 letter from Jennifer Richter, Esq. to Mr. Bruce McKinnon (TW/CV 51) does not alter this conclusion. This letter does not inform Liberty's principals that any unauthorized activation has taken place. The letter otherwise contains information that Liberty has already acknowledged: the need for Commission authorization

(Continued...)

by the testimony and the evidence, two largely unrelated events converged on the afternoon of April 27, 1995: Liberty with its counsel had to deal with Time Warner's latest round of petitions to deny and in the course of that discussion, Mr. Price referred to the April 26 Nourain Memorandum relating to the emission designator error.¹⁷ Only by reference to that document and not the February 24 Inventory was the discovery made; the testimony at the mini-hearing effectively put an end to Time Warner's unfounded speculation regarding the ultimate import of the February 24 Inventory.

9. The credibility of the testimony regarding April 27 is strengthened by the fact that only a week passed between the initial discovery and Time Warner's May 5 reply. As the Bureau correctly noted, "[t]he time difference between when the witnesses initially testified they learned and when they eventually testified they learned is only slightly greater than a week."¹⁸ Accordingly, the Bureau "stop[ped] short . . . of concluding that any of the witnesses were actually lying because the Bureau can conceive of no purpose the witnesses would have in making such a misrepresentation in their deposition testimony."¹⁹ In other words, if Liberty had intended to deceive the Commission, the witnesses should have changed their testimony to confirm a date of May 5 or later, not May 5 or earlier. In addition, the

(...Continued)

prior to commencement of service; the time frames required for an application to be processed; and the availability of STA requests as a means of providing service while a license application is pending.

¹⁷ Liberty Proposed Findings ¶¶ 56-59; Bureau Proposed Findings ¶¶ 50-52; TW/CV Proposed Findings ¶¶ 19-22, 131-132.

¹⁸ Bureau Proposed Findings ¶ 98 (footnote omitted).

¹⁹ Bureau Proposed Findings ¶ 95.

Bureau correctly found that the Affidavit of Lloyd Constantine – submitted on September 20, 1995 -- and indicating that Liberty learned of the premature activations in late April, held particular significance for the reason that “[b]ecause this affidavit was prepared and submitted long before the witnesses’ testimony, they would have no reason to fabricate or dissemble.”²⁰

10. Furthermore, the testimony was uniform -- including the deposition testimony -- that Liberty’s principals initially reacted to the discovery of premature activations with skepticism and disbelief.²¹ The testimony from the mini-hearing sets that date at April 27, 1995. There is no dispute that about a week later, Time Warner alleged that Liberty may have been engaged in premature activations at two sites. As Mr. Price testified, and as acknowledged in the Bureau’s Proposed Findings, “Time Warner scrutinized us by site by day. . . . [We were] closely scrutinized by our competitor. So we assumed they would be keenly aware of everything we were doing.”²² The fact that discovery occurred in the midst of Time Warner’s numerous petitions to deny Liberty’s license applications is significant, and thus it is not surprising that certain Liberty witnesses recalled finding out about premature activations from a Time Warner pleading.

²⁰ Bureau Proposed Findings ¶ 96. The reliability of the late April date in the Constantine Affidavit is further supported by the undisputed fact that Mr. Constantine participated in the April 27 conference call. Liberty Proposed Findings ¶ 58. Moreover, the Constantine Affidavit is corroborated by the July 24, 1996 declaration of Mr. Barr, another participant in the April 27 conference call.

²¹ Liberty Proposed Findings ¶ 60, 61, 81; Bureau Proposed Findings ¶ 75; TW/CV Proposed Findings ¶¶ 91, 109.

²² Bureau Proposed Findings ¶ 97, quoting Tr. 1397:12-1398:11 [Price].

11. Although the mini-hearing testimony established a date only a week earlier than prior deposition testimony, Time Warner argues that the April 27, 1995 date is not credible because it sharply deviates from prior deposition testimony.²³ While the Bureau also finds troubling this apparent “change” from the deposition record, the Bureau recognizes that the time difference is insignificant and, more important, that Liberty gains nothing by its current testimony.²⁴ Indeed, based on the mini-hearing testimony, the Bureau has concluded that “when Liberty filed the 14 requests for Special Temporary Authority on May 4, 1995, it knowingly filed incomplete information with the Commission. Because of this infraction, [the] Bureau will be asking that an additional forfeiture [in the amount of \$300,000] be imposed on Liberty.”²⁵ Thus, far from deriving any benefit from its purported “change” in testimony, Liberty may have to pay substantial additional sums as a result. Therefore, the Bureau correctly concludes that Liberty has no reason to misrepresent to the Commission on the issue of first discovery.²⁶

12. The other parties’ argument that Liberty changed its testimony is not supported by the record. The deposition testimony referred either to the end of April 1995 or Time Warner’s petitions to deny, presumably the May 5, 1995 pleading.²⁷ The vague testimony

²³ TW/CV Proposed Findings ¶ 89, 90, 278.

²⁴ Bureau Proposed Findings ¶¶ 95-98.

²⁵ Bureau Proposed Finding ¶ 38.

²⁶ Bureau Proposed Findings ¶ 97.

²⁷ Liberty Proposed Findings ¶ 91; Bureau Proposed Findings ¶¶ 39, 41, 42, 43, 44, 45; TW/CV Proposed Findings ¶¶ 99, 104, 112. As noted by the Bureau, Mr. Nourain testified consistently that he learned at the end of April 1995. Bureau Proposed Findings ¶ 84. Mr.

(Continued...)

from the depositions, therefore, indicated late April or early May 1995, and not any earlier date, as the time frame of Liberty's discovery.²⁸ The other parties acknowledge that Liberty's principals did not expressly testify that they learned of the premature activations on May 5, 1995.²⁹ In recognition of this fact, the Bureau also notes that the deposition record "pointed to" a date in early May.³⁰

13. During Liberty's direct case at the mini-hearing, Liberty clarified this ambiguity concerning the actual date when Liberty first learned about the possibility of premature activations. Liberty was aided by the late discovery of the April 26 Nourain Memorandum which, unfortunately, was not produced earlier in the proceeding.³¹ While this document did

(...Continued)

Ontiveros, who did not testify at his deposition to a specific date of first discovery (Bureau Proposed Findings ¶ 38 n.5), thought that the Time Warner petitions were filed in April. Ontiveros (Dep. 40:6-11 [TW/CV 1]).

²⁸ Time Warner quoted some of this equivocal testimony directly but disregards their uncertain nature. For example:

Q [BY MR. BECKNER]: Was counsel reporting to you an allegation that had been made in a pleading filed by Time Warner?

A [BY MR. PRICE]: *I believe that's where they got their information. I can't say, but I believe that's what it is.*

TW/CV Proposed Findings ¶ 104, citing Price Dep. 96:1-6 [L/B 9] (emphases supplied).

²⁹ Bureau Proposed Findings ¶¶ 39, 41, 42, 45; TW/CV Proposed Findings ¶¶ 99, 112.

³⁰ Bureau Proposed Findings ¶ 98 n.17.

³¹ As Liberty stated in its Opposition to the Motion of Time Warner Cable of New York City and Paragon Cable Manhattan and Cablevision of New York City - Phase I for an Inquiry Into the Adequacy of Compliance by Liberty Cable Co., Inc. With Requests for Production of Documents in this Proceeding ("Opposition to The Discovery Motion"), Liberty probably suffered the most out of any party by the late discovery of the April 26 Nourain Memorandum. Liberty respectfully refers the Presiding Judge to Liberty's Opposition to the

(Continued...)

not address the issue of premature activations, the circumstances surrounding its creation and its use at the April 27 conference call refreshed vague recollections and confirmed that Liberty's principals did not know until April 27 about the possibility of premature activations. Liberty therefore carried its burden on this central issue of the mini-hearing by supplementing the ambiguous deposition record with testimony and evidence at the mini-hearing which firmly established the April 27 date. Moreover, with the April 26 Nourain Memorandum and the testimony surrounding it, Liberty also proved what it had consistently held -- that while the February 24 Inventory could have or should have triggered the realization that Liberty had prematurely activated certain buildings, it did not in fact do so.³²

14. Liberty presented Howard Barr at the mini-hearing to give testimony regarding the April 27, 1995 conference call. Based on this fact, Time Warner now argues that Liberty misrepresented Mr. Barr's knowledge about premature activations.³³ A cursory glance at the prior record in this case demonstrates that Time Warner's argument is misleading and without

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Discovery Motion for a fuller discussion of Liberty's late discovery and immediate efforts to produce documents to minimize the parties' prejudice flowing from the belated production.

Time Warner's argument that Liberty abused the discovery process by allegedly producing significant documents late represents a belated reply to Liberty's Opposition to the Discovery Motion. Although baseless, these arguments could have and should have been appropriately raised on February 21, 1997, when Time Warner and Cablevision had an opportunity to address fully their allegations concerning Liberty's allegedly faulty compliance with discovery. Time Warner instead submitted a short document which raised none of the points now contained in its proposed findings. For this reason alone, the Presiding Judge should disregard in its entirety Time Warner's claim that Liberty abused the discovery process.

³² Liberty Proposed Findings ¶¶ 48, 49, 80, 94; TW/CV Proposed Findings ¶ 46.

³³ TW/CV Proposed Findings ¶¶ 232-236.

merit. Time Warner had sought Mr. Barr's deposition testimony last July as part of its effort to prove that Liberty knew about premature activations long before late April or early May, based on the February 24 Inventory. Liberty opposed Time Warner on the basis, *inter alia*, that (i) Mr. Barr did not learn about premature activations from the February 24 Inventory; and (ii) Mr. Barr found out about premature activations at the end of April 1995.³⁴ Far from being misrepresentations, Liberty's statements about Mr. Barr's knowledge have now been confirmed by the mini-hearing.³⁵

15. Based on the foregoing, the mini-hearing testimony clarified the ambiguous deposition record and firmly established April 27, 1995 as the date that Liberty's principals and counsel first learned about the possibility of premature activations. Moreover, the mini-hearing finally put to rest any notion that the February 24 Inventory led to the discovery of unauthorized operation of microwave paths. Most critically, as the Bureau noted, the time difference in the deposition and mini-hearing testimony is *de minimis* and gives rise to no

³⁴ A copy of Liberty's July 24, 1996 opposition, with the accompanying declaration of Mr. Barr is annexed hereto as Attachment A for the Presiding Judge's reference. Mr. Barr, who was present at the April 27 conference call with Mr. Constantine (Liberty Proposed Findings ¶¶ 58, 59, 79; Bureau Proposed Findings ¶¶ 52, 74, 75, 76; TW/CV 44, 45), corroborates in his declaration the earlier affidavit of Mr. Constantine concerning Liberty's discovery of premature activations at the end of April 1995. Also, the Presiding Judge invited the other parties to depose Mr. Barr before the resumption of hearings in the last week of January 1997, but the other parties expressly declined to do so. Tr. 1472:5-1475:17.

³⁵ Liberty Proposed Findings ¶ 59; Bureau Proposed Findings ¶ 74; TW/CV Proposed Findings ¶ 133. The only testimony Liberty has found in the transcript relating to Barr's direct knowledge or involvement with the February 24 Inventory appears at Tr. 1823:15-1824:18 [Barr]. The short amount of time that the other parties spent with Mr. Barr on that issue supports Liberty's consistent position all along that Mr. Barr had no relevant evidence relating to a document which the record has shown to be fairly insignificant. See Lehmkuhl Dep. 115:15-16 [L/B 6].

plausible rationale or motive for misrepresentation, fabrication or dissembling.³⁶ Therefore, in light of all the circumstances, not only is Liberty's testimony consistent and credible, it is candid, because by openly testifying to a slightly earlier date, Liberty has incurred greater, not lesser, liability. The essential predicates are thus established for the following findings:

- (5) *The fact of premature activation became known among Liberty's principals and outside counsel no earlier than April 27, 1995.*
- (6) *The witnesses presented credible and candid testimony regarding the discovery of premature activations in late April 1995 and not earlier.*

Accordingly, the foregoing proposed findings of fact should be adopted.

E. Liberty had Always Intended to Disclose Fully the Facts and Circumstances of the Premature Activations After the Facts Were Gathered and Verified

16. The Bureau seeks an additional sanction of \$300,000 to punish Liberty for its failure to disclose fully in the May 4, 1995 and May 19, 1995 requests for STA. Liberty concedes that it did not disclose the fact of premature activations in these requests for STA. However, by May 19, 1995, when Liberty filed for an STA at 2727 Palisades Avenue, Liberty had already acknowledged in the May 17, 1995 surreply that it had prematurely activated fifteen sites.³⁷ Thus, while the facts may show that Liberty should have or could have done things differently in its STA requests,³⁸ what Liberty could have or should have done, in hindsight, does nothing to alter the fact that Liberty did disclose by May 17 to the Commission

³⁶ Bureau Proposed Findings ¶ 95-98.

³⁷ TW/CV 18,38.

³⁸ Liberty Proposed Findings ¶ 97; Bureau Proposed Findings ¶ 56; TW/CV Proposed Findings ¶ 163.

what it knew at that time about the premature activations.³⁹ The record is clear that on May 17, Liberty not only confirmed Time Warner's allegations of two premature activations; Liberty went further and openly disclosed a substantial number of additional premature activations.⁴⁰ About two months later, Liberty came forward with a disclosure of four more premature activations, a fact acknowledged by the Commission.⁴¹ This uncontroverted evidence does not demonstrate an intent to conceal or deceive.

17. The other parties exaggerate the level of Liberty's knowledge regarding the premature activations. While the Bureau may be correct that various Liberty officials knew by May 4, 1995 that Liberty was operating certain paths without authority, there is no evidence even to suggest that Liberty's principals knew that fifteen -- or any number approaching fifteen -- buildings had been prematurely activated. Indeed, Time Warner overstates what Mr. Price

³⁹ In this regard, Time Warner's recitation of alleged failures to disclose after May 17, 1995 is without force or relevance because no intent to deceive the Commission is possible after Liberty openly disclosed its premature activations and continued that process in June and July 1995, both in response to the Commission's inquiry as well as in the July 17, 1995 request for STA (TW/CV 21, 25; L/B 3). Indeed, the May 17, 1995 surreply was addressed to "Chief, Wireless Telecommunications Bureau," (TW/CV 18) and the submissions by Mr. Price and Mr. Barr on June 16, 1995 (L/B 3; TW/CV 21) were presented to Michael Hayden, Chief of the Microwave Branch. Time Warner received both the May 17 surreply and Mr. Barr's reply to Mr. Hayden (TW/CV 18, 21). Yet, in the face of these facts, Time Warner argues without merit that Liberty sought to deceive the Commission on May 19 -- just two days after the May 17 surreply -- when Liberty submitted a request for STA for 2727 Palisades Avenue without stating in that application the fact of premature activation. As plainly stated in the May 17 surreply, 2727 Palisades was one of the prematurely activated sites (TW/CV 18 at p.2). At best, Time Warner's arguments point to other means by which Liberty could have disclosed information, but Time Warner cannot show that any of these omissions were made with the requisite intent to deceive.

⁴⁰ TW/CV 18.

⁴¹ TW/CV 27, 28.

knew at the time of the April 27 conference call when it claims that “Mr. Price was certain that the addresses he listed during the conference call were actually in operation.”⁴² The April 26 Nourain Memorandum listed numerous buildings and Mr. Price recognized only two of the buildings listed, 767 Fifth Avenue (the GM Building) and 30 Waterside Plaza.⁴³ This testimony hardly reveals a wide-ranging certainty at the point of first discovery.

18. The Bureau seeks to sanction Liberty only for the failures to disclose in the May 4 and May 19 requests for STA. Time Warner goes further and claims that Liberty engaged in subsequent deliberate misrepresentations. Time Warner misstates the record in support of its argument. While Time Warner’s proposed findings are replete with errors, a few key examples highlight the misleading nature of their argument.⁴⁴

19. In one example of Time Warner’s misleading use of the record, Time Warner points to the statement in the May 17 surreply that Mr. Nourain did not know about Time Warner’s petitions against Liberty’s applications until late April 1995.⁴⁵ Time Warner omits

⁴² TW/CV Proposed Findings ¶ 134.

⁴³ Tr. 1363:25-1364:24 [Price]. *See also* Joint Motion ¶¶ 68-73.

⁴⁴ These examples are non-exhaustive and reveal Time Warner’s careless handling of basic facts in the record. For instance, Time Warner’s proposed findings contain a table showing allegedly significant dates related to the prematurely activated buildings. Time Warner created a column for Comsearch prior coordination notice (PCN) dates; however, the testimony of Mr. Nourain is explicit that he did not calculate his activation of buildings from this date but from the date he sent the technical information to Comsearch (Tr. 640:5-644:6, 696:8-697:15 [Nourain]; Nourain Dep. 128:13-130:19 [L/B7]). Therefore, the column in the chart concerning the elapsed time between Comsearch PCN dates and activation date is meaningless.

⁴⁵ TW/CV Proposed Findings ¶ 175. Although the Presiding Judge has expressly excluded the issue of Mr. Nourain’s allegedly inconsistent statements from the mini-hearing, Supplemental Order, n.2, Time Warner persists in re-visiting this topic. Time Warner’s argument on this score should be rejected on grounds of relevance alone.

clarifying testimony on this issue which in fact confirmed that Mr. Nourain did not understand the effect of Time Warner's petitions to deny until the end of April. Mr. Lehmkuhl's testimony, which Time Warner ignored, showed that (i) he and Mr. Nourain had a brief conversation about the Time Warner petitions; (ii) at the time, Mr. Nourain believed that only the hardwired buildings were affected; and (iii) in a later conversation with Mr. Lehmkuhl in April, Mr. Nourain finally understood that the petitions affected all licenses, not just the hardwired buildings.⁴⁶ The statement in the May 17 surreply about Mr. Nourain's knowledge of Time Warner's petitions, when read in light of the entire record, is therefore clear, not misleading and not intended to deceive.

20. Time Warner also claims that Liberty misled the Commission in a May 26 reply to Time Warner's opposition to the May 4, 1995 STA requests.⁴⁷ Time Warner argues that "[t]he entire May 26 Reply is based on a hypothetical situation that did not exist -- that Liberty needed STAs to provide service while waiting for final authorization."⁴⁸ Time Warner mischaracterizes Liberty's arguments and its reading of the document is so narrow that the pleading is taken out of context.

21. The May 26 reply was written in response to Time Warner's opposition to the May 4 STA requests and Liberty provided sound arguments for rejecting Time Warner's opposition, based on the Commission's own well-articulated pro-competition policies.⁴⁹ The

⁴⁶ Liberty Proposed Findings ¶ 52.

⁴⁷ TW/CV Proposed Findings ¶ 192; TW/CV 19.

⁴⁸ TW/CV Proposed Findings ¶ 274.

⁴⁹ TW/CV 19; *Amendment of Part 94 of the Commission's Rules to Permit Private Video*

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chart referred to by Time Warner was used to establish (i) that “Liberty does have short timeframes within which to meet its contractual commitments”; and (ii) “Liberty’s inability, or even perceived inability, to meet its contractual obligations will significantly impede its ability to grow and compete in the marketplace.”⁵⁰ Thus, the basis for Liberty’s argument in the May 26 reply was not some “hypothetical situation” that did not exist; Liberty’s reply was based on legitimate competitive concerns raised by the threat to continued service posed by Time Warner’s excessive use of the Commission’s procedures to impede Liberty’s growth and competitive potential.

22. Even though the Bureau has already proposed a heavy sanction for Liberty’s failure to disclose in connection with the four later discovered buildings,⁵¹ Time Warner argues that Liberty intentionally sought to deceive the Commission by not revealing the four additional premature activations in the July 17, 1995 license applications.⁵² However, the fact is undisputed that Liberty did disclose these four additional premature activations in the requests for STA signed by Mr. Price on July 17, 1995. Therefore, even though these

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Distribution systems of Video Entertainment Access to the 18 GHz Band, Report and Order, 6 FCC Rcd 1270 (1991) (“18 GHz Order”).

⁵⁰ TW/CV 19, at 4.

⁵¹ Joint Motion ¶ 99.

⁵² TW/CV Proposed Findings ¶¶ 294-296. Time Warner states erroneously that Mr. Barr “knew” on June 22, 1995 that there were four additional instances of premature activation. TW/CV 50, on which Time Warner relies for this proposition, states explicitly in Mr. Barr’s handwriting that Mr. Constantine “[t]hinks there are an additional four buildings for which no license has been issued.” Again, Time Warner seeks to attribute knowledge and certainty where none can be found.

requests were submitted a week later on July 24, the intent to disclose was present on July 17 when the license applications were filed.

23. As for why a week elapsed before the STA requests were filed, the Presiding Judge invited Time Warner's counsel to ask Mr. Price, who signed the July 17 STA requests:

JUDGE SIPPEL: . . . Well, why don't you bring to his attention that the 17th, the date of the 17th to which Mr. Price has obviously committed himself and see if that can jog his memory sufficiently or give him confidence enough in the information here to be able to pin it down or at least be able to pin it down better than he has.

MR. BECKNER: Okay. That's fine. I'll be glad to do that. And as I say, it's certainly possible that Mr. Price signed this thing on the 17th and then it sat on this desk for a couple of days and went back --

JUDGE SIPPEL: Mr. Price is going to be here. So we can -- I'm not being critical. It's very, very difficult to pull this together through one witness. And it's true it's two years after the event. But I'm assuming that he has looked at some of these issues since 1995 just by virtue of the fact that he's been deposed among other things. So this is not totally, totally new to him.⁵³

24. Although Time Warner's counsel acknowledged the possibility that these documents were sitting on Mr. Price's desk for a period of time, counsel did not take up the Presiding Judge's invitation to ask Mr. Price directly. While the reason for the week delay is not in the record, the facts show that Liberty had intended to disclose the four additional premature activations on July 17, just as Liberty had voluntarily disclosed thirteen additional premature activations on May 17.

⁵³ Tr. 1207:15-1208:7.