

25. Therefore, Time Warner has not seriously disputed or rebutted Liberty's evidence that at all times, there was an intent to disclose to the Commission once the facts were gathered and confirmed. At best, the other parties have shown ways in which Liberty could have conducted its disclosures better or quicker, but none of these suggested improvements detract from a record establishing good faith efforts by Liberty to cure its admittedly serious violations of law. On this score, it is important to note that the Bureau seeks additional sanctions only for the failures in disclosure relating to the May 4 and May 19 STA requests, and Liberty does not understand the Bureau to be claiming that Liberty has engaged in any subsequent misrepresentation or lack of candor, as Time Warner is arguing. The essential predicates are thus established for the following findings:

- (7) *Liberty had 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.*

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

F. Liberty Can be Relied Upon to Obey the Commission's Rules and Regulations Prospectively

26. The undisputed facts show that after Liberty learned of the premature activations:

- Liberty stopped activating paths upon discovery of the premature activations;⁵⁴

⁵⁴ Liberty Proposed Findings ¶¶ 61, 84.

- Liberty suspended billing to subscribers in the affected buildings so that the company would not profit from its violations of law;⁵⁵
- Mr. Price began a process of auditing and monitoring the status of Liberty's licenses;⁵⁶
- Liberty's Chairman, after being apprised of the facts, took appropriate action against responsible personnel;⁵⁷
- Liberty has implemented an effective compliance program and has not engaged in unauthorized operation of microwave paths since April 1995;⁵⁸
- The Commission's rules on microwave license applications have been changed so that no similar violation could occur prospectively.⁵⁹

27. Based on this record, the Bureau recognizes Liberty's reliability for future

compliance with the law:

[D]ue to the compliance program they have set up, Liberty can be trusted to fully comply with the Commission's Rules in the future. The compliance program follows the Commission rules closely. It requires signoff by the (legal) compliance officer before service to a building can begin. To disqualify Liberty from being a licensee upon character grounds for its actions that do not represent untruthfulness or unreliability would be counter to the [*Character*] *Policy Statement*.⁶⁰

⁵⁵ Liberty Proposed Findings ¶¶ 66, 84.

⁵⁶ Liberty Proposed Findings ¶¶ 65, 84.

⁵⁷ Liberty Proposed Findings ¶¶ 68, 84.

⁵⁸ Liberty Proposed Findings ¶¶ 69, 84; Bureau Proposed Findings ¶¶ 26, 103.

⁵⁹ Liberty Proposed Findings ¶ 85.

⁶⁰ Bureau's Proposed Findings ¶ 103.

28. The essential facts of Liberty's immediate corrective action, as well as the effectiveness of its compliance program, are undisputed.⁶¹ The essential predicates are thus established for the following finding:

(9) *Liberty can be relied upon to remain compliant with FCC laws and regulations in the future.*

29. Therefore, the Presiding Judge should adopt the foregoing finding of fact.

II. CONCLUSIONS OF LAW

30. Under applicable precedent, Liberty has the requisite character to be a Commission licensee. The facts developed during this proceeding establish that Liberty: (1) did not intend to deceive the Commission on when they learned of the premature activations; (2) did not intend to deceive the Commission on any other issue, including their response to learning of the premature activations; and (3) did not flagrantly disregard the Commission's rules. The Bureau agrees with these conclusions, stating that "nothing developed in the candor hearing detracts from the Joint Motion. Accordingly, the Bureau remains in support of the motion and urges its adoption."⁶² Therefore, the Presiding Judge should adopt Liberty's Proposed Findings of Fact and Conclusions of Law, find that Liberty has met its burden and grant the Joint Motion for Summary Decision in this proceeding.

⁶¹ See Joint Motion ¶¶ 44-45; Bureau Proposed Findings ¶ 103.

⁶² Bureau Proposed Findings ¶ 38. Although the Bureau continues to support the Joint Motion, it did recommend an additional \$300,000 forfeiture by Liberty. Bureau Proposed Findings ¶ 112.

31. Moreover, nothing that Time Warner has been able to show should alter this conclusion. Indeed, in its zeal to see a competitor disqualified, Time Warner seriously mischaracterizes and misapplies the applicable case law.

A. Time Warner Has Mischaracterized the Applicable Legal Standard

32. Although its Conclusions of Law describe several candor and misrepresentation cases in prolix detail, Time Warner does not present the full scope the Commission's legal standard applicable to this mini-hearing. Specifically, Time Warner fails to recognize the importance that intent to deceive plays in finding misrepresentation or lack of candor. Because of this deficiency, Time Warner's pleading does not address a substantial body of Commission precedent that is directly applicable to the instant proceeding. Time Warner's misreading of case law, discussed in detail below, consequently undermines its assertions that Liberty's pending license applications should be denied. Indeed, Commission precedent squarely suggests that forfeiture, not disqualification, is the appropriate remedy here.

1. The Intent to Deceive is Essential to Find Disqualifying Lack of Candor or Misrepresentation

33. It is beyond dispute that all Commission applicants and licensees must be truthful and candid with the agency at all times and that misrepresentation and lack of candor are considered to be serious breaches of trust that could merit disqualification.⁶³ Equally clear, however, is that a demonstrated intent to deceive the Commission must also be present to find

⁶³ See, e.g., *Swan Creek Communications, Inc. v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994) ("*Swan Creek*"); *Policy Regarding Character Qualifications In Broadcast Licensing*, 102 FCC 2d 1179, 1210-11 (1986), *modified*, 5 FCC Rcd 836 (1990) ("*Character Policy Statement*").

disqualifying misrepresentation or lack of candor: “[T]otal disqualification will occur only if a willful intent to deceive is discerned.”⁶⁴ This legal standard has been approved by the Court of Appeals: “[I]ntent to deceive [is] an essential element of a misrepresentation or lack of candor showing.”⁶⁵ As Liberty’s Conclusions of Law discuss, such intent is also a necessary element in demonstrating lack of candor in testimonial evidence.⁶⁶

2. The Facts of This Case Do Not Meet the Evidentiary Standard to Show Disqualifying Misrepresentation or Lack of Candor

34. Under well-settled Commission precedent, an intent to deceive may not be found based merely on inferences from “suggestive” facts. Rather, there must be “substantial evidence of an intent to deceive”⁶⁷ that “clearly reveals serious and deliberate falsehoods”⁶⁸ on the licensee’s part.⁶⁹ Despite its exhaustive review of candor and misrepresentation precedent, Time Warner does not appear to recognize this clear standard.⁷⁰ This failure is particularly noteworthy in Time Warner’s analysis of the record: as detailed above, although the record

⁶⁴ *Fox River Broadcasting, Inc., et al.*, 88 FCC 2d 1132, 1137 (Rev. Bd. 1982) (“*Fox River*”).

⁶⁵ *Swan Creek*, 39 F.3d at 1222 (quoting *Weyburn Broadcasting Limited Partnership*, 984 F.2d 1220, 1232 (D.C. Cir. 1993)).

⁶⁶ Liberty Proposed Findings ¶ 101. Although Time Warner’s submission deliberately downplays the role intent plays in misrepresentation and candor cases, in every case in its litany of inapposite precedent, the Commission found lack of candor or misrepresentation because the facts showed an intent to somehow deceive the agency.

⁶⁷ *Capitol City Broadcasting Co.*, 8 FCC Rcd 1726, 1734 (Rev. Bd. 1993), *modified*, 8 FCC Rcd 8478 (1993) (quoting *Armando Garcia*, 3 FCC Rcd 1065, 1067 (Rev. Bd. 1988)).

⁶⁸ *Cannon Communications Corp.*, 5 FCC Rcd 2695, 2700 (Rev. Bd. 1990).

⁶⁹ *See Joseph Bahr, et al.*, 10 FCC Rcd 32, 33 (Rev. Bd. 1994) (“*Joseph Bahr*”).

⁷⁰ TW/CV Proposed Findings ¶¶ 239-282.

contains no evidence showing deliberate intent on the part of Liberty's principals, Time Warner culls "conclusions" that are nothing more than unreasonable factual inferences that fall well short of clearly revealing deliberate falsehoods.⁷¹

3. Behavior Short of Intentional Deception Does Not Warrant Disqualification

35. Time Warner's failure to address adequately the issue of intent gives the false impression that a licensee is subject to automatic, absolute and total disqualification for any number of missteps in its dealings with the Commission. Yet, as the cases discussed in Liberty's Conclusions of Law clearly show, this proposed standard is simply not in accord with clear Commission precedent. Although the Commission is justly intolerant of slipshod behavior by its licensees, both in their operations as well as in their dealings with the agency, disqualification is by no means the Commission's only sanction. Rather, disqualification, which is the most severe punishment the FCC can impose, is reserved for extraordinary circumstances, such as where there is a demonstrated intent to deceive the agency.

36. The Commission has repeatedly emphasized that it is careful not to equate merely inappropriate actions with more egregious behavior:

Conduct which may be characterized as carelessness . . . and exaggeration, puffing and slipshoddiness or faulty shading of

⁷¹ Cf. *David A. Bayer*, 7 FCC Rcd 5054, 5056 (1992) ("While there are allegations by [a party urging disqualification] that certain conversations suggest the possibility of scienter by management, there are explicit statements, under oath and subject to criminal prosecution if false, disavowing any such knowledge. We cannot conclude on the basis of the record before us that [the licensee's] owners or senior managers knew [about the misconduct].")

recollection falls short of the degree of *scienter* historically required by the Commission for [disqualification]⁷²

[T]he Commission recognizes that omissions or inconsistencies that are unaccompanied by an intent to deceive will not be sufficient to warrant a finding of misrepresentation or lack of candor. . . . In assessing candor, the Commission also has recognized that inconsistencies in testimony that reflect the varying perceptions of witnesses do not necessarily demonstrate intentionally false testimony.⁷³

[E]rrors submitted through carelessness, inadvertence, or even gross negligence do not constitute misrepresentation.⁷⁴

[T]he record does not support a finding of intentional deception in [the submission in question], although the [submission] was clearly misleading.⁷⁵

The only significant matters relevant to assessing the [licensee's] character qualifications are [the principal's] improper certification of [the licensee's] application and her inaccurate deposition testimony While we do not condone [the principal's] conduct in these matters, we believe that an examination of all circumstances indicates disqualification is entirely unwarranted.⁷⁶

Whether [a hearing witness] should have remembered or not is not relevant: the operative question is whether [it has been demonstrated that the witness] . . . misrepresented or lacked candor.⁷⁷

⁷² *Fox River*, 88 FCC 2d at 1137-38 (citations and quotations omitted).

⁷³ *Telephone and Data Systems, Inc.*, 10 FCC Rcd 10518, 10520-21 (1995) (Initial Decision) (citations omitted).

⁷⁴ *Pinelands, Inc.*, 7 FCC Rcd 6058, 6065 (1992) (citations omitted).

⁷⁵ *Abacus Broadcasting Corp.*, 8 FCC Rcd 5110, 5112 (Rev. Bd. 1993).

⁷⁶ *Broadcast Associates of Colorado*, 104 FCC 2d 16, 19 (1986).

⁷⁷ *Daytona Broadcasting Co., Inc., et al.*, 97 FCC 2d 212, 233 (Rev. Bd. 1984), *modified*, 101 FCC 2d 1010 (1985).

37. For all of Time Warner's discussion of candor and misrepresentation, its analysis of precedent fails to apply, or even acknowledge, these distinctions to the record at hand. Moreover, Time Warner has in no way shown exactly how Liberty's conduct differs from that described in these cases.

4. Liberty's Good Faith Reliance on Experts Is Recognized As a Mitigating Factor in Character Cases

38. Time Warner's incomplete review of Commission precedent is most apparent with regard to the extent to which a licensee's principals may rely on the advice of experts. In particular, Time Warner's otherwise full-dress research failed to even mention a recent case relevant to this proceeding: *David A. Bayer*.⁷⁸ In that case, the Commission states: "One of the factors generally considered is actual involvement by owners or managers in the violative conduct"⁷⁹ and goes on to conclude that the licensee did not deserve disqualification, in part because the principals "were not involved in the misconduct."⁸⁰ The *Bayer* case involved a licensee, CyberTel, that improperly used equipment that misdirected the company's cellular radio signals. When the problem was brought to light, CyberTel's principals, under sworn testimony, stated that the decision of what equipment to use was made independently by the licensee's engineer. This evidence established that the engineer never discussed the matter with the principals and that the principals never encouraged their use. Based on this record,

⁷⁸ 7 FCC Rcd 5054 (1992).

⁷⁹ *Id.* at 5056 (citing *Character Policy Statement*, 102 FCC 2d at 1228); *WJPD, Inc.*, 79 FCC 2d 115 (1980) (declining to revoke authorizations where owners and senior managers were not involved in the misconduct)).

⁸⁰ 7 FCC Rcd at 5056.

the Commission found that the principals did not know about the equipment; that, because they relied on experts, the principals' lack of supervision did not constitute merely waiting for misconduct to occur; and that the principals had no intent to deceive the Commission.⁸¹ Thus, as demonstrated in Liberty's Conclusions of Law, the Commission is loath to find lack of candor when the principals have shown a good faith reliance on expert counsel or employees.⁸²

39. Also relevant to the facts of the instant case is the Review Board's decision in *Abacus Broadcasting Corp.*, where the Board imposed a forfeiture rather than disqualification because the licensee's counsel initiated the misconduct without the licensee's knowledge.⁸³ That case involved a comparative renewal proceeding during which Abacus' counsel filed a "Threshold Showing" that sought permission to show how Abacus' proposal was superior to the other applicant's. Because engineering information in the Threshold Showing was inconsistent with Abacus' previous representations, the ALJ sought to determine whether Abacus lacked candor when it filed its Threshold Showing. Given the circumstances of that filing, however, the Review Board found that Abacus had no intent to deceive the Commission. The record demonstrated that Abacus' counsel had mistakenly used incorrect technical information in the Threshold Showing. Abacus' principal was not involved in the document's preparation or filing: he had only given his go-ahead to file such a showing beforehand and in fact only saw the actual document after it had been filed with the Commission. The Board specifically discussed the attorney's actions and the principal's

⁸¹ *Id.*

⁸² Liberty Proposed Findings ¶ 102 & n.230.

⁸³ 8 FCC Rcd at 5114-15.

knowledge in determining that there was no lack of candor.⁸⁴ Indeed, the Board stated: “[T]o disbelieve [the counsel’s] explanation for the reasons given by the ALJ is to suggest that [the counsel] colluded with [the licensee].”⁸⁵ Similarly, in order to believe Time Warner’s claims regarding Liberty’s misconduct, one must also accept that Liberty perpetuated a comprehensive conspiracy involving several prominent attorneys and Liberty’s principals -- despite a complete lack of incentive for or evidence of such a plot. Rather, the record demonstrates nothing more than that Liberty’s missteps resulted in part from its good faith reliance on experts in the field to assure that it was in compliance with FCC rules and regulations.⁸⁶

40. None of this is to say that Liberty may be totally absolved by good faith reliance on employees or counsel. That is not what is proposed in the Joint Motion. Indeed, in the Joint Motion Liberty fully accepts responsibility for the wrongdoing and joins the Bureau in recommending a substantial forfeiture.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ The D.C. Circuit has approved the approach of viewing good faith reliance on counsel by principals as a mitigating factor in character cases. *See WEBR v. FCC*, 420 F.2d 158, 167 (D.C. Circuit 1969). In that case, the court approved a Review Board decision that declined to disqualify a license applicant in part because he relied on counsel in his decision not to inform the agency of a change in the applicant company’s ownership while the application was still pending. The D.C. Circuit stated: “[W]hile his good-faith reliance upon counsel was sufficient to avoid disqualification for character reasons, such reliance on counsel would not absolve [the licensee] from responsibility for this incident.” *Id.* that while a licensee remains responsible for wrongdoing, its “good-faith reliance upon counsel was sufficient to avoid disqualification for character reasons.”

B. The Precedent Relied upon by Time Warner Is Inapposite

41. No case cited by Time Warner compels the conclusion that disqualification is compelled or warranted. Indeed, in each of the cases Time Warner cites, the licensees were disqualified because the record demonstrated the requisite degree of *scienter* to deceive the agency. By simply assuming such intent on Liberty's part, Time Warner, as demonstrated above, conveniently ignores not only the record in this case but also an entire body of case law showing why forfeiture, and not disqualification, is the appropriate sanction in this case.

42. Time Warner appears to rely primarily on four Commission cases: *KQED, Inc.*,⁸⁷ *WWOR-TV, Inc.*,⁸⁸ *Tri-State Broadcasting Co., Inc., et al.*,⁸⁹ and *RKO General, Inc., et al.*⁹⁰ While Time Warner does not discuss their specific relevance, Time Warner states that the cases "demonstrate the Commission's intolerance of lack of candor . . . and provide a measuring stick against which Liberty's actions can be evaluated in the present case."⁹¹

⁸⁷ 3 FCC Rcd 2821 (Rev. Bd. 1988), *reconsideration denied*, 5 FCC Rcd 1784 (1990) ("*KQED*").

⁸⁸ 7 FCC Rcd 636 (1992), *aff'd*, 966 F.2d 386 (D.C. Cir. 1993) ("*WWOR-TV*").

⁸⁹ 5 FCC Rcd 1156 (1992) ("*Tri-State Broadcasting*").

⁹⁰ 4 FCC Rcd 4679 (Rev. Bd. 1989). In passing, Time Warner cites a number of other cases, none of which supports Liberty's disqualification in the instant case. As an initial matter, the facts of these cited cases are not analogous. More fundamentally, the intent to deceive the Commission, which is the essential element to find misrepresentation or lack of candor, was specifically found in each of these cases. *See Capitol City Broadcasting*, 8 FCC Rcd 1726, 1734 (Rev. Bd. 1993); *Standard Broadcasting, Inc.*, 7 FCC Rcd 8571, 8576-77 (Rev. Bd. 1992); *John D. Bomberger*, 7 FCC Rcd 1849, 1858 (1992) (Initial Decision); *Mid-Ohio Communications, Inc.*, 5 FCC Rcd 940, 940 (1990); *Cacoctin Broadcasting Corp. of New York*, 4 FCC Rcd 2553, 2558 (1989). As discussed above, as the record demonstrates no such intent in the present matter, these cases are simply not relevant.

⁹¹ TW/CV Proposed Findings ¶ 250.

However, none of the cases cited by Time Warner supports Liberty's disqualification to be a Commission licensee. Indeed, used as a "measuring stick," the cases demonstrate the contrary.

43. In *KQED*, the Commission denied renewal of one of three authorizations held by the licensee based on a finding that the licensee had misrepresented or lacked candor in representations regarding the reasons that television Channel 32 in San Francisco had been taken off the air. Yet, even a cursory comparison of the facts of *KQED* with the facts in the instant case shows that the licensee, as the Review Board found, "actively and intentionally attempted to deceive the Commission."⁹²

44. This finding was based on the following facts:

- (1) The FCC had warned the licensee in 1975 that "it would no longer accept financial difficulties as justification for continued nonoperation of Channel 32."⁹³
- (2) Channel 32 again went off the air, and the licensee sent four letters to the FCC "which attributed the station's shutdown to the need for and delays in replacement ... equipment."⁹⁴
- (3) However, while some equipment for the station had been delayed, the facts showed that the station's management had planned for some months to take the station dark as a cost-savings measure and to keep it dark through the licensee's then-current fiscal year.⁹⁵ This finding was based on substantial documentary and testimonial evidence. This included various internal memoranda which discussed the costs savings that could be achieved by shutting down the station and stated that the station would "go off 1/80 - as projected" in order to save

⁹² 3 FCC Rcd at 2827.

⁹³ *Id.* at 2822.

⁹⁴ *Id.* at 2822, 2824.

⁹⁵ *Id.* at 2823.

\$134,000 in operating expenses.⁹⁶ In addition, the licensee's board of directors formally adopted a resolution "noting the necessity of temporarily deactivating [the station] 'for continued budgetary reasons.'"⁹⁷

- (4) While the licensee's general manager testified that equipment delays had also been discussed by the board, two other witnesses "sharply contradicted" the general manager's version of events.⁹⁸ Indeed, one, a station employee, testified that she knew "the proposed deactivation of [the station] was planned and presented *solely* as a deficit reduction action unrelated" to equipment problems.⁹⁹ Moreover, the general manager had sent a memo to station supervisors indicating that the station would be reactivated "[i]f our budget picture changes for the better."¹⁰⁰ And the general manager was constrained to admit in testimony that he had told senior staff members "on more than one occasion that equipment installation was a 'good excuse' to give the Commission for Channel 32's anticipated shutdown."¹⁰¹ Indeed, the Review Board found that "[w]ith the sole exception of the testimony of [the general manager], the great preponderance of testimonial and documentary evidence supports [the] inescapable conclusion" that "a severe budget crisis . . . motivated [the licensee] to deactivate Channel 32" despite what the licensee told the Commission.¹⁰²

45. Accordingly, the Review Board concluded that the station, aware of the Commission's admonition not to use financial problems as an excuse, "actively and

⁹⁶ *Id.*

⁹⁷ *KQED*, 3 FCC Rcd at 2823. As the Commission noted in its review of the case, the effect of the board's action was to delete funds for the remainder of the then-current fiscal year. *Id.* at 2822.

⁹⁸ *Id.* at 2823.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 2823.

¹⁰¹ *KQED*, 3 FCC Rcd at 2824.

¹⁰² *Id.* at 2826.

intentionally attempted to deceive the Commission by representing that its primary reasons for deactivating Channel 32 were other than those involving its budgetary problems.”¹⁰³

46. While Time Warner does not further explain the relevance of the facts in *KQED* to the instant case, and, indeed, a review of the facts in this case shows that there is not one scintilla of evidence – let alone “substantial” evidence¹⁰⁴ -- that Liberty “actively and intentionally attempted to deceive the Commission.” Unlike *KQED*, there are no documents which show intentional deception of the Commission. Unlike *KQED*, there is no testimony that Liberty engaged in some conscious attempt to keep the facts of the unauthorized operation from the Commission.

47. To the contrary, the record evidence is quite consistent that at all times Liberty’s principals intended to comply with Commission regulations, to disclose the full story of its wrongdoing to the agency, and to insure that wrongdoing would not occur in the future. That this intent was sometimes inartfully executed does not detract from Liberty’s intent to be candid with the Commission.

48. Nor does the Commission’s decision in *WWOR-TV* support Liberty’s disqualification as a licensee. There, the Commission denied the competing application of Garden State Broadcasting Limited Partnership (“Garden State”) against the Channel 9 licensee in New York based in part on lack of candor. The record showed the following:

- (1) The principals of Garden State had filed a competing application against the former licensee of channel 9 but had dismissed their application in exchange for

¹⁰³ *Id.* at 2827.

¹⁰⁴ *See supra* text accompanying notes 67-69.

a \$5.37 million settlement.¹⁰⁵ On the heels of their settlement and after WWOR-TV had been sold to another party, the same principals filed a competing application against the new licensee.¹⁰⁶

- (2) At a hearing on the applications, Garden State's principals repeatedly stated that they had filed the second challenge, in essence, because of their dissatisfaction with the licensee's programming, which they considered "unresponsive to the needs of northern New Jersey."¹⁰⁷ However, the principals were unable to establish the date when they held their first organizational meeting despite repeated discovery requests and their recognition of the importance of the date.¹⁰⁸ While the presiding officer approved the settlement, the Commission remanded the case "because it found that the witness' inability to fix the dates of pertinent discussions made it impossible to evaluate the question of whether Garden State was formed after its principals had a reasonable opportunity to monitor channel 9's programming."¹⁰⁹ Indeed, according to the record, Garden State "made no attempt to conduct a search responsive to the Bureau's concerns about the dates and instead characterized these concerns as 'quibbles.'"¹¹⁰
- (3) Within six days of the remand, the principals produced an airline ticket and credit card receipts that established that the organizational meeting occurred only three weeks after the new licensee took control of the station – far too little time in which to form a judgment about the new licensee's programming.¹¹¹ Moreover, Garden State "significantly revised its theory of the case to de-emphasize the significance of [one of the principal's] purported dissatisfaction with channel 9's programming."¹¹²

¹⁰⁵ 7 FCC Rcd at 636-37.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 637.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *WWOR-TV*, 7 FCC Rcd at 642.

¹¹¹ *Id.* at 637-38. Remarkably, at the original hearing, one of Garden State's principals testified that she "would not have voiced such criticism" of Channel 9's programming this early since "MCA had just taken over the station and it would not have had time to make significant changes in programming." *Id.* at 638.

¹¹² *Id.*

On this record, the Commission disqualified Garden State for filing an application for the primary purpose of settlement and for lack of candor. As the Commission found, Garden State sought “readily available evidence only after it realized that the case would be remanded for taking further evidence and that the Bureau would almost certainly seek the relevant documents.”¹¹³

49. While Time Warner again does not explain the case’s specific relevance, it is evident that *WWOR-TV* stands in stark contrast to the instant case. As detailed above, both the documentary and testimonial evidence have been quite consistent in showing that Liberty’s principals first learned of the premature activations between April 27 and May 1, 1995 and that they agreed to a course of action to investigate the wrongdoing, to divulge the information to the FCC, and to insure that the wrongdoing would not reoccur.

50. To the extent that Time Warner cites *WWOR-TV* to suggest that Liberty intentionally withheld evidence in this hearing, it engages in rank (and wholly false) speculation for which there is absolutely no evidence. As is the case with much of Time Warner’s legal support, the facts of *WWOR-TV* make it inapplicable to this proceeding. Given the case’s sequence of events, it was clear that Garden State had intentionally delayed handing over the documents so as not to jeopardize the possibility of a settlement.¹¹⁴

51. Indeed, the circumstances of the discovery process in this case are altogether different. In contrast to *WWOR-TV*, the record here aptly demonstrates that Liberty made every effort to find relevant documents among its files. As Liberty has explained, the late-

¹¹³ *Id.* at 642.

¹¹⁴ *Id.* at 642-43.

produced documents in this case were the result of a mistake and were voluntarily disclosed by Liberty's counsel as soon as they were discovered.¹¹⁵ Thus, unlike *WWOR-TV*, Liberty did not engage in any procedural gameplaying in the discovery process. This is especially evident when the time of production in the two cases is compared: in *WWOR-TV*, Garden State produced the material only *after* the ALJ had already made a decision and *after* that decision had been reviewed and remanded by the full Commission for the specific purpose of adducing such evidence; Liberty, on the other hand, has produced material in the course of this proceeding.

52. Time Warner also cites several cases, including *Tri-State Broadcasting*,¹¹⁶ where the Commission disqualified a licensee for misrepresenting the identity of its *de facto* general manager, and *RKO General, Inc.*,¹¹⁷ where the Commission disqualified three applicants for deception – again without discussing the cases' particular relevance. Suffice it to say that both of those cases dealt with deliberate false statements to the Commission for which there was overwhelming documentary and testimonial evidence¹¹⁸ while in the instant case, as

¹¹⁵ Liberty Proposed Findings ¶¶ 71-97.

¹¹⁶ 5 FCC Rcd 1156 (Rev. Bd. 1992).

¹¹⁷ 4 FCC Rcd 4679 (Rev. Bd. 1989).

¹¹⁸ See, e.g., *Tri-State Broadcasting*, 5 FCC Rcd at 1172 (“[O]ur most profound disagreement with Tri-State’s thesis is its postulate that no intentional misrepresentation or lack of candor has been proved”); *RKO General*, 4 FCC Rcd at 4696 (“[W]e hold that the record evidence, taken as a whole, must lead to the ineluctable conclusion that [the licensee] (1) misrepresented facts to the Commission . . . , [and] (2) that he did so with intent to deceive the Commission”). The same is true of other cases cited by Time Warner.

demonstrated above, there is absolutely no evidence that Liberty at any time intended to deceive the Commission.

C. Liberty's Principals Were At All Times Truthful and Candid with the Commission About When They Discovered Premature Activations.

53. Liberty's principals at no time intended to deceive the Commission in any way regarding the premature activation of its licenses. Notwithstanding the applicable legal standard, Time Warner has made unreasonable inferences to suggest that Liberty's principals intended to deceive the Commission with respect to the exact date that they came to know of the unauthorized microwave paths.

54. Specifically, Time Warner focuses on the discrepancies in the deposition testimony of Liberty's principals. As the above review of the record outlines, Time Warner's relentless but fruitless search for evidence of earlier knowledge has resulted only in a debate over seven days whether discovery was made on April 27 or May 5. Yet, on this point the law is clear: faulty memory itself, without demonstrated fraudulent intent, does not warrant disqualification.¹¹⁹

55. Time Warner's creative inferences are refuted by a number of points regarding the testimony:

- (1) Nowhere in the testimony do Liberty's principals, the Milsteins and Mr. Price, expressly state that May 5, 1995 was the date they discovered the unlawful activity.¹²⁰

¹¹⁹ See *supra* text accompanying notes 72, 73, 77.

¹²⁰ Bureau Proposed Findings ¶¶ 39, 41, 42, 45; TW/CV Proposed Findings ¶¶ 99, 112.

- (2) There was deposition testimony which tied discovery of premature activations to a Time Warner pleading.¹²¹ It is important to put this testimony in the appropriate context: the witnesses had to remember details about a time when Liberty was first made aware of the *possibility* of a problem on April 27 and then subsequently learned of similar allegations from Time Warner's May 5, 1995 reply. Given the highly charged competition that has existed between the two cable rivals and the series of petitions to deny filed by Time Warner, it is not surprising that certain witnesses associated the discovery of premature activations with Time Warner.¹²²

¹²¹ Liberty Proposed Findings ¶ 91; Bureau Proposed Findings ¶¶ 39, 41-45; TW/CV Proposed Findings ¶¶ 99, 104, 112.

¹²² Moreover, the Bureau has also noted that:

Time Warner's scrutiny of Liberty's actions best shows that Liberty has no reason to misrepresent to the Commission as to when they learned of the unauthorized operations:

Mr. Spitzer: Was it considered possible or plausible that Time Warner would not figure out that there was premature service?

Mr. Price: No, we – Time Warner in fact scrutinized us by site by day. Their trucks were always parked outside buildings we were installing either because they were observing what we were doing which they did on many occasions just to see out procedures and there's no law against that; or because they were disconnecting customers of theirs as we were connecting our customers.

So Time Warner was present at every one of our installations while we were installing, during the course of the installation and even as we were later hooking up individual customers because it was required by Time Warner to have those cable boxes returned. And Time Warner made quite a to-do about what the Department of Information Technologies developed as a "protocol" to -- to govern the return of Time Warner equipment which they complained was getting lost or stolen.

So we were being not only scrutinized by several public agencies, but closely scrutinized by our competitor. So we assumed they would be keenly aware of everything we were doing. And if we were doing something wrong and hid it, *we certainly wouldn't hide it from them for long.*

Mr. Spitzer: Did you in fact advertise the fact that particular buildings were being serviced by Liberty Cable?

(Continued...)

- (3) The Constantine Affidavit, written long *before* the depositions were taken, indicates clearly that late April was the time of discovery. Liberty thus has maintained a consistent view of the facts throughout this proceeding.¹²³
- (4) As the Bureau has recognized, the discrepancy between April 27 and May 5 does not reveal an intent to deceive.¹²⁴ A far more reasonable inference from this difference of a few days is that witnesses simply had understandably imprecise memories. It is hard to conceive that Time Warner is actually urging the Commission to adopt a total recall standard on witnesses when reviewing the candor of licensees.
- (5) As the Bureau has also noted, the inescapable fact exists that Time Warner's inferences have no basis in logic.¹²⁵ If Liberty's principals were to lie about when they discovered the unauthorized paths, why would they tell the Commission that they learned *before* May 5 and not that day or after? Presumably, if Liberty had intended to deceive the Commission, it would have used a date on or *after* May 5, 1995, to show that they had been kept in the dark until Time Warner's "remarkable" revelations. Similarly, if Liberty intended to deceive it certainly would not have made misrepresentations so as to increase the likely amount of forfeiture.

(...Continued)

Mr. Price: Every day. In today's *New York Times*, you'll see an ad on page 1 indicating that we've liberated another building by -- by the address of the building. And in fact I -- yesterday having familiarized myself with some of these memoranda and specifically addressing the Judge's concern that we focus on what was going on; when we learned and what we did, I looked at that week. And that same week, we were advertising at least one of those buildings in the HDO designation list on the front page of the *New York Times*.

So we certainly lacked oversight and had lousy procedures, if not, you know, terribly flawed procedures in place. But there was absolutely no intent to hide what we were doing. In fact, we advertised what we were doing.

Bureau Proposed Findings ¶ 97.

¹²³ Bureau Proposed Findings ¶ 96.

¹²⁴ Bureau Proposed Findings ¶¶ 95-98.

¹²⁵ *Id.*

56. In sum, Time Warner's eagerness to show that it in fact blew the whistle on Liberty's operations has resulted in its making unreasonable inferences from minor discrepancies in the record. Faulty recollection, however, and not deceptive intent, explains these inconsistencies easily and far more reasonably.¹²⁶

D. Liberty's Behavior After Discovering the Premature Activations Does Not Suggest an Intent to Deceive the Commission.

57. In the time after Liberty first learned about the possibility of premature activations, Liberty, in consultation with counsel, formulated a response to the potential violations. That response -- an investigation into the scope and causes of the regulatory lapses -- ultimately resulted in full disclosure to the Commission. Yet there is no evidence in this proceeding of intentional deceit, and Time Warner cites none. Accordingly, Commission precedent does not support disqualification.¹²⁷

58. Since Liberty only learned of the possibility of premature activations on April 27, Liberty's investigation was not yet complete when FCC counsel filed its May 4 STA requests, which were prepared by its counsel.¹²⁸ After consultation with counsel and

¹²⁶ As discussed above, the Commission has clearly recognized the distinction between faulty recollection and an intent to deceive. *See supra* text accompanying notes 72, 73 and 77.

¹²⁷ *WEBR, Inc. v. F.C.C.*, 420 F.2d at 167-168 (D.C. Cir. 1969) (good faith reliance on counsel is relevant in determining who is acting with candor); *Abacus Broadcasting Corp.*, 8 FCC Rcd at 5113 (Commission reluctant to impute a disqualifying lack of candor to an applicant where the record shows good faith reliance on counsel); *Professional Radio, Inc.*, 2 FCC Rcd 6666, 6667 (1987) (applicant not penalized for acting on advice of counsel); *Broadcast Associates of Colorado*, 104 FCC 2d at 19 (applicant who improperly certified application on advice of counsel not disqualified).

¹²⁸ *See Liberty Proposed Findings* ¶¶ 59-64.

completion of the investigation, Liberty reported what it believed to be the full extent of the premature activations on May 17 – twenty days after Liberty’s principals had their first indication there might possibly be a problem.¹²⁹ There is no indication that Liberty knew of the scope of the problem before its May 17 filing – certainly Liberty did not know the full extent of the problem and its causes until well after the April 27 call.¹³⁰ As the record consistently shows, Liberty at all times intended to disclose these premature activations to the Commission;¹³¹ the only issue was timing.¹³² Furthermore, the chronology outlined in this hearing is inconsistent with denial of the Joint Motion.¹³³ This is not a case where the licensee had been withholding information that it immediately produced after the whistle was blown.

¹²⁹ *Id.* ¶¶ 64-65. Short delays in complying with FCC regulations warrant forfeiture not disqualification. *See, e.g., Golden State Broadcasting Corp.*, 94 FCC 2d 212, 218 n.2 (Rev. Bd. 1983) (upholding ALJ’s finding of no intent to deceive in 30-day delay in reporting comparative data, because short reporting delay was *de minimis*) *rev’d on other grounds*, 102 FCC 2d 797 (1985). *See Arkansas Educational Television Comm’n*, 6 FCC Rcd 478, 479 (1991) (licensee did not violate 47 C.F.R. § 1.65(a) by not immediately notifying Commission when facts showed that licensee was taking corrective action and attempted to inform Commission within thirty-day timeframe).

¹³⁰ Liberty Proposed Findings ¶¶ 61-64. Although Liberty voluntarily disclosed thirteen prematurely activated paths, an additional STA request was filed on May 19, 1995 which did not reference the premature activation of that path which had been disclosed on May 17. *See supra* note 39. This additional STA request clearly constitutes a “technical violation” of Section 1.65 as set out in the Joint Motion since such service was disclosed in other contexts, and it does not form the basis for disqualification. Joint Motion ¶ 99; *see, Constellation Communications, Inc.*, 1996 WL 397437, ¶ 33; *Under His Direction, Inc.*, 1996 WL 673480, ¶ 21. Furthermore, it defies logic to argue that Liberty intended to mislead the Commission in the May 19 STA request when Liberty had disclosed the premature activation two days earlier in the May 17 surreply. *See* TW/CV 18.

¹³¹ Tr. 1367:4-1369:4 [Price]; 1625:9-16 [H. Milstein]; 1799:7-20,1801:15-25 [Barr].

¹³² Tr. 1799: 15-20, 1801: 20-25 [Barr].

¹³³ Bureau Proposed Findings ¶ 111.

Indeed, it still took several days after Time Warner's pleading for Liberty to complete its initial investigation. If, in retrospect, a more immediate disclosure of even partial information would have been the better response, Liberty's actions still do not demonstrate an intent to deceive the Commission.

59. Time Warner argues that the series of Liberty filings in June and July, 1995 violates the Commission's rules and warrant disqualification.¹³⁴ Many of Time Warner's assertions rely, in large part, on speculation as to what "should" have been done regarding premature activations. For example, Time Warner criticizes Mr. Price for "never inquir[ing] of Mr. Nourain or anyone how it was possible that Liberty was able to continue activating new microwave facilities, when Commission processing of the applications for those facilities was being held up as a result of TWCNYC's Petitions to Deny."¹³⁵ Yet Liberty has never disputed that much of what "should" have been done simply did not occur. Indeed, it has forthrightly "recognized the seriousness of the violations at issue and expressed its sincere regret for those actions."¹³⁶ Time Warner's rampant speculation and subsequent charges of intentional misconduct based on such speculation has no support in the record and should be rejected. As the Commission has consistently found, baseless speculation or innuendo provide an insufficient basis from which to discern an intent to deceive.¹³⁷

¹³⁴ TW/CV Proposed Findings ¶¶ 196-210, 277.

¹³⁵ TW/CV Proposed Findings ¶ 270.

¹³⁶ Liberty Proposed Findings, p. 72.

¹³⁷ See, e.g., *Joseph Bahr.*, 10 FCC Rcd 32, 33 (Rev. Bd. 1994) (finding that speculation and innuendo alone do not provide a basis to find intent); *Yankee Microwave, Inc.*, 7 FCC Rcd 3233, 3235 (Dom. Fac. Div. 1992) (finding that mere speculations did not show an intent to

(Continued...)

E. The Bureau's Proposed Forfeiture.

60. In its Proposed Findings, the Bureau recommends that Liberty should be assessed an additional \$300,000 forfeiture for its failure to disclose its premature activations on the May 4 and May 19 STA requests. Liberty believes in retrospect, that its failure to disclose its premature activations in its May 4 STA requests was in error and, thus, understands the Bureau's position and the proposed penalty. With the additional forfeiture, the total penalty paid by Liberty would total \$1,090,000. Liberty believes that this enormous sum represents the largest forfeiture ever imposed by the Commission for a non-safety-of-life violation¹³⁸ and is the maximum suggested forfeiture allowed under the Commission's Notice

(...Continued)

deceive the Commission); *Folkways Broadcasting Co., Inc., et al.*, 33 FCC 2d 806, 811 (Rev. Bd. 1972) (finding that an attempt to attribute intent must fail because it is based on nothing more than speculation); *see also First Interstate Cable T.V., Inc.* 14 FCC 2d 232 (1968).

Indeed, When Time Warner is not relying on speculation, at times its assertions drift into the realm of the inconsequential. Time Warner asserts that Liberty's May 26 Reply is another example of Liberty's lack of candor because in a chart attached to that pleading Liberty "did not indicate . . . that . . . service was being provided - without authorization - to all such locations." TW/CV Proposed Findings ¶ 275. Yet, as Time Warner later acknowledges, Liberty had already disclosed the premature activations in its earlier pleading. TW/CV Proposed Findings ¶ 280. In essence, Time Warner asks the Presiding Judge to sanction Liberty for a lack of repetition. This does not comport with Commission precedent. Failure to repeat with sufficient vigor surely is not grounds for sanction. *See, e.g., The Old Time Religion Hour, Inc.*, FCC 86-165, 1986 LEXIS 3652 (finding that the Commission's resources are ill spent in considering repetitious pleadings and that the General Counsel has authority to dismiss repetitious pleadings); *see also* 47 CFR § 1.106(b).

¹³⁸ Based on Liberty's research, it appears that only once has the Commission imposed a more serious forfeiture on a licensee and that case involved a violation of Commission rules that "safeguard public safety." *See Centel Cellular Company of North Carolina Limited Partnership*, 11 FCC Rcd 10800, 10801 (1996) (assessing a \$2 million forfeiture for tower lighting violations); *see also PCS 2000, L.P.*, 1997 WL 26715 (assessing a \$1 million forfeiture for gross bidding misconduct); *AT&T Communications*, 10 FCC Rcd 1664 (1995) (assessing a \$1 million forfeiture for multiple violations of Section 201.

of Proposed Rulemaking regarding the Commission's *Policy Statement on Forfeitures*.¹³⁹

While Liberty believes the additional proposed penalty is excessive, Liberty interposes no objection to the additional forfeiture and accepts full responsibility for its conduct.

F. Liberty Did Not Intend To Deceive the Commission in Filing the July 17, 1995 Applications.

61. Time Warner also argues that Liberty should be disqualified for its failure to disclose in license applications filed on July 17, 1995 that four paths were already active. In similar circumstances, the Commission has determined that such regulatory lapses without an intent to deceive warrant forfeiture rather than disqualification.¹⁴⁰ Forfeiture and not disqualification is appropriate in relation to the July 17 applications because: (1) Liberty voluntarily disclosed the premature activations; (2) the circumstances surrounding the filing show that Liberty had nothing to gain from the delay; and (3) the record suggests that the seven-day delay in disclosure can be traced to an administrative foul-up rather than an intentional deception.

62. It is undisputed that Liberty voluntarily disclosed the presence of four instances of premature activations on July 24, 1995. There is no evidence that Time Warner knew of these activations, or that these activations would soon be disclosed to the Commission by another party. Liberty's actions were completely voluntary.

¹³⁹ The maximum suggested forfeiture allowed per violation is \$20,000. *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 10 FCC Rcd 2945, 2948 (Appendix A) (1995).

¹⁴⁰ See *supra* note 128.