63. Liberty had nothing to gain from the one-week delay between filing applications and STAs. Because of the intense scrutiny of all Liberty activities, once the applications were filed, discovery of the premature activations was inevitable. Thus there was certainly no incentive for a seven-day delay.

64. Indeed, although the STA requests were filed one week after the applications, they were completed and signed on the same day, July 17, 1995[141] -- a fact which suggests that there was a contemporaneous intent to disclose the premature activations. That they were in fact not filed on the same day does not call this intent to disclose into question.

65. The Bureau agreed that Liberty's unauthorized activation of these four paths should not result in a disqualification in the Joint Motion.[142] The Joint Motion states that: "[i]t is true, however, that as to the [four paths applied for on July 17, and two others applied for on an earlier date,] Liberty applied for authorization from the Commission after service had already commenced to these buildings, and Liberty failed to indicate this information in its license applications. Therefore, Section 1.65 was technically violated. However, Liberty did fully disclose the circumstances surrounding these premature operations in other contexts to the Commission."[143] The Bureau therefore agreed that "[b]ased on the foregoing uncontroverted facts, Liberty should not be disqualified as an OFS licensee and its license applications captioned in the HDO should be granted."[144]

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[141] *See supra* ¶¶ 23-24.

[142] Joint Motion ¶¶ 99-100.

[143] *Id.*

[144] *Id.* ¶ 100.

66. These violations already have been accounted for in calculating the $710,000 forfeiture agreed to by the Bureau and Liberty.[145] Based on both the Commission standard and Bureau opinion and because this substantial forfeiture adequately deters future improper conduct, disqualification is not appropriate.[146]

G. Liberty's Actions Do Not Display a Flagrant Disregard for Commission Rules.

67. Time Warner also incorrectly asserts that Liberty's actions and communications with the Commission reveal a flagrant disregard for the Communications Act and the Commission's rules and policies.[147] In reaching this conclusion, Time Warner misstates the Commission's legal standard for "flagrant disregard of the law," and mischaracterizes Liberty's conduct.[148]

68. In the *Character Policy Statement*, the Commission explains that in "rare instances" it has found "circumstances in which [a license] applicant has engaged in repeated, willful violations of law amounting to a flagrant disregard for complying with the law . . . [that] might, of its own nature, provide sufficient evidence that the applicant lacks the traits of reliability and/or truthfulness necessary to be a licensee."[149] The Commission will only find

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[145] *Id.* ¶ 110.

[146] *See supra* note 128 and accompanying text. In addition, Time Warner's other allegations of violations of Commission rules by Liberty do not involve intentional deception and therefore do not support disqualification.

[147] TW/CV Proposed Findings ¶¶ 283-296.

[148] *See* Liberty's Proposed Findings ¶¶ 128-130 for a discussion of flagrant disregard.

[149] *Character Policy Statement*, 102 FCC 2d at 1205, n.61

such "flagrant disregard" when the licensee in question had "actual knowledge that [their] conduct constitutes a clear violation of existing law" or when "the nature of the violation itself . . . give[s] rise to a[n] irrefutable inference that the applicant knew it was violating the law."[150] Time Warner fails even to reference this standard,[151] and under applicable Commission precedent, Liberty's behavior does not approach this threshold.

69. The record shows that soon after Liberty gained "actual knowledge" that it was in violation of Commission rules for each of the violations that Time Warner lists in its Proposed Findings, it revealed such violations to the Commission.[152] Additionally, "the nature of [these] violations" does not "give rise to a[n] irrefutable inference" that Liberty knew that it was in violation of the law for any material period before it revealed such violations to the Commission. Indeed, Liberty, in consultation with counsel, responded to the potential violations via an investigation and subsequent disclosure. Therefore, although Liberty did violate Commission regulations, these violations do not "amount to a flagrant disregard for complying with the law," and therefore a forfeiture and not a disqualification, is the appropriate remedy.[153]

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[150] *Id.* Note that this prerequisite is one of three prerequisites detailed in the *Character Policy Statement*. *Id.*

[151] TW/CV Proposed Findings ¶¶ 283-296.

[152] *Id.*

[153] *See George E. Cameron Jr. Communications*, 93 FCC 2d 789, 801, 823-24 (Rev. Bd. 1983) (even repeated reporting problems do not rise to the level of "flagrant disregard," but "flagrant disregard" found for consistently ignoring fundamental reporting problems over a period of years after notice of faulty reporting); *Radio Station WABZ, Inc.*, 90 FCC 2d 818, 827 (1982) (numerous, but inadvertent violations do not rise to level of "flagrant disregard" for reporting requirements); *cf. Pass Word, Inc.*, 76 FCC 2d 465, 518-19 (1980), *recon.*

(Continued...)

70. The Bureau supports this conclusion in its Proposed Findings, stating that "[w]e do not believe that the violations, although willful and repeated, amount to a flagrant disregard of the Commission's rules."[154] In fact, because of Liberty's compliance program, the Bureau states that: "[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 sign-off by the (legal) compliance officer before service to a building can begin."[155] Liberty's willingness to cooperate with the Commission, and the institution of a compliance program, show that the company understands the importance of Commission regulations. Because of these facts, and because the Bureau does not believe that Liberty's actions amount to a flagrant disregard for complying with the law, the Presiding Judge should not impose the extreme sanction of disqualification.

III. IT IS PROPER TO GRANT THE MOTION AT ISSUE WITHOUT REFERENCE TO THE CONTENTS OF THE INTERNAL AUDIT REPORT

71. Liberty concurs in the Bureau's conclusion that "the Presiding Judge has a record which is sufficiently complete from which he [may] render a verdict and grant the Joint

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(...Continued)
denied, 86 FCC 2d 437 (1981), *aff'd sub. nom. Pass Word, Inc. v. FCC*, 673 F.2d 1363 (D.C. Cir. 1982); *Las Americas Communications, Inc.*, 1 FCC Rcd 786, 797 n.4 (1986) (blatant, repeated violation of federal tax laws over period of years "amount[ed] to a flagrant disregard for complying with the law"), *aff'd,* 6 FCC Rcd 1507 (1991); *Lewel Broadcasting, Inc.*, 86 FCC 2d 896, 915 (1981) (unattended operation, log falsification, commercial logging practices, misrepresentation, and lack of candor over a period of years after Commission warnings).

[154] Bureau Proposed Findings ¶ 103.

[155] Bureau Proposed Findings ¶ 103.

Motion for Summary Decision."[156] In support of this conclusion, the Bureau and Liberty advanced similar assertions. Both the Bureau and Liberty point out that under the Administrative Procedure Act ("APA") the Presiding Judge is limited to the facts before him as developed in the proceeding. In addition, both parties agree that Time Warner has had a full opportunity to develop the record before the Presiding Judge, limited only by relevance and claims of privilege.[157] Indeed, the Bureau also pointed out that Time Warner had discovered some of the type of factual information contained in the Report.[158] The record here is complete and "each party had adequate opportunity to investigate all the relevant facts surrounding [the] designated issue."[159]

72. Time Warner's arguments to the contrary are not persuasive. Time Warner suggests that the "provisions of the Administrative Procedure Act mandate consideration of all relevant and helpful evidence in reaching such decisions."[160] However, the APA did not overturn the Rules of Evidence or eliminate valid claims of privilege. In fact, courts have long understood that meritorious claims of privilege may withhold relevant information.[161] In addition to Time Warner's spurious logic, as both the Bureau and Liberty have suggested, to

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[156] Bureau Proposed Findings ¶ 138.

[157] *Id.* ¶¶ 132, 136; Liberty Proposed Findings ¶¶ 134-35.

[158] *See* Bureau Proposed Findings ¶¶ 134-37.

[159] *Id.* ¶ 132.

[160] TW/CV Proposed Findings ¶ 297.

[161] *Fisher v. U.S.*, 425 U.S. 391, 403 (1976); *Six Grand Jury Witnesses*, 979 F.2d 939, 943 (2d Cir. 1992); *Berkley and Co., Inc.*, 629 F.2d 548, 554-55 (8th Cir. 1980).

the extent that the Report contains relevant facts, Time Warner has been free to develop those facts through exhaustive discovery.[162] Therefore, Time Warner's claims lack merit, and the Presiding Judge may reach a decision based on the extensive record before him.[163]

IV. CONCLUSION

For the foregoing reasons, Liberty respectfully requests that the Presiding Judge adopt Liberty's Proposed Findings of Fact and Conclusions of Law and grant the Joint Motion of Liberty Cable and the Bureau.

Respectfully submitted,

LIBERTY CABLE COMPANY, INC.

CONSTANTINE & PARTNERS
Robert L. Begleiter
Eliot Spitzer
Yang Chen
909 Third Avenue
New York, NY 10022

WILEY, REIN & FIELDING
Robert L. Pettit
Bryan N. Tramont
Vipul N. Nishawala
R. Paul Margie
1776 K Street, N.W.
Washington, D.C. 20006

Dated: March 10, 1997

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[162] Bureau Proposed Findings ¶¶ 132-36; Liberty Proposed Findings ¶¶ 134-35.

[163] Moreover, Liberty has maintained that it is not relying on the Internal Report in support of any of its positions in this proceeding.

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March, 1997, I caused copies of the foregoing "Bartholdi Cable Company, Inc.'s Proposed Findings of Fact and Conclusions of Law in Reply" to be hand delivered to the following:

The Honorable Richard L. Sippel
Administrative Law Judge
Federal Communications Commission
2000 L Street, N.W., Suite 220
Washington, D.C. 20554

Joseph Weber, Esq.
Mark Keam, Esq.
Federal Communications Commission
Wireless Telecommunications Bureau
Enforcement Division
2025 M Street, N.W., Room 8308
Washington, D.C. 20554

R. Bruce Beckner, Esq.
Fleishman and Walsh, L.L.P.
1400 Sixteenth Street, N.W., Suite 600
Washington, D.C. 20036

Christopher A. Holt, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W., Suite 900
Washington, D.C. 20004

Lorraine Handel