

Nourain's testimony on this issue has been entirely consistent throughout this proceeding.<sup>90</sup>

### III. SUPPLEMENTAL PROPOSED FINDINGS OF FACT

#### A. The Richter Letter Did Not Lead to Discovery of Premature Activations.

40. The evidence developed in this proceeding has established that Liberty's principals and outside counsel did not learn about premature activation of microwave paths before April 27, 1995.<sup>91</sup> Nothing contained in the Richter Letter -- and nothing in the additional record compiled through post-hearing discovery and re-opened hearings -- alters that conclusion. The Richter Letter was not a "torpedo in the water"; as established by the record evidence, it did not even register on the sonar.

41. The uncontroverted and credible testimony adduced at the continued hearings revealed that the purpose of the Richter Letter was prophylactic.<sup>92</sup> She never suspected nor was she given cause to suspect that any Commission rules had been violated when she prepared her April 20, 1993 letter.<sup>93</sup> She was concerned, however, that Mr. Nourain was not fully familiar with Commission rules and procedures, and she thus set forth her concerns to Mr. Nourain's supervisor, Mr. McKinnon, in order to ensure

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<sup>90</sup> Joint Motion ¶¶ 72, 73; Liberty Proposed Findings ¶ 52, n. 137; Tr. 720:11 - 723:9, 2289:18 - 2290:13 [Nourain]; Nourain Dep. 169:14 - 171:8, 174:11 - 175:4, in evidence as Liberty/Bureau ("L/B") 7.

<sup>91</sup> Liberty Proposed Findings ¶¶ 59, 60, 79, 95.

<sup>92</sup> *Supra*, ¶ 15; Richter Dep. 85:8 - 87:5, 89:4-9, 120:7-17 (TW/CV 55).

<sup>93</sup> *Supra*, ¶¶ 16, 18; Richter Dep. 119:10-19, 120:7-20, 125:11-14 (TW/CV 55).

against any confusion about the applicable rules, procedures and time frames for licensing Liberty's microwave facilities.<sup>94</sup> Ms. Richter did not send a copy of her letter to Mr. Price; she was actually directing it to Mr. Nourain, her primary contact at Liberty, whom she perceived to be confused about the Commission's rules and procedures.<sup>95</sup>

42. In the letter, Ms. Richter specifically recommended filing for STA requests in case Liberty needed to provide service while license applications were pending.<sup>96</sup> About a week after the Richter Letter was sent, Mr. Price and Ms. Richter discussed this option, and Pepper & Corazzini proceeded to file for STAs.<sup>97</sup>

43. Nothing on the face of the Richter Letter refers to premature activations; nor is there any suggestion in the Richter Letter that premature activations had occurred as of the time the letter was written.<sup>98</sup> Ms. Richter firmly states that she was not informed and did not know of any unauthorized operation when she wrote the Richter Letter.<sup>99</sup> Mr. Price saw nothing in the Richter Letter to tell him that premature activations had occurred or would occur.<sup>100</sup> Mr. Price was more concerned from the Richter Letter that the continuing lag in Commission processing of Liberty's license applications would delay service to buildings, and he thus requested Pepper & Corazzini to proceed with filing for

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<sup>94</sup> *Supra*, ¶¶ 13, 15; Richter Dep. 86:20 - 88:1 (TW/CV 55); TW/CV 51.

<sup>95</sup> *Supra*, ¶ 17; Richter Dep. 85:18 - 86:2, 89:4-90:4 (TW/CV 55).

<sup>96</sup> TW/CV 51.

<sup>97</sup> *Supra*, ¶ 19; Richter Dep. 89:22 - 90:19 (TW/CV 55).

<sup>98</sup> *Supra*, ¶ 15; Richter Dep. 120:12-20 (TW/CV 55); TW/CV 51.

<sup>99</sup> *Supra*, ¶ 18; Richter Dep. 119:10-19, 121:18-21 (TW/CV 55).

<sup>100</sup> *Supra*, ¶¶ 28, 29.

STAs.<sup>101</sup> Therefore, the Richter Letter was not an alarm signaling any premature activation of paths; at best, it was a reminder to Liberty to file for STAs in order to serve its buildings with proper Commission authorization and an instructional note to insure that Mr. Nourain was fully informed about applicable licensing rules and procedures.

44. Liberty's licensing counsel did not learn of premature activations through the Richter Letter. Mr. Barr did not supervise Ms. Richter.<sup>102</sup> He also did not recall when he first saw or read the Richter Letter.<sup>103</sup> Mr. Barr testified unequivocally that he did not learn of premature activations by Liberty before April 27, 1995.<sup>104</sup>

45. Mr. Barr further testified that his post-hearing correction of testimony was solely for the sake of bringing his answer into line with the scope of the question as it was posed to him.<sup>105</sup> No evidence was adduced that the change had anything to do with the Richter Letter or with any earlier knowledge of premature activations. Indeed, Mr. Barr stated explicitly that he had no knowledge of premature activations before April 27, 1995.<sup>106</sup>

46. Nor did any circumstances surrounding the Richter Letter create even a hint that premature activations had occurred. In March and April 1993, Ms. Richter worked with Mr. Nourain to create an inventory of Liberty licenses so that she could

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<sup>101</sup> *Supra*, ¶ 28.

<sup>102</sup> *Supra*, ¶ 11; Barr Dep. 9:6-18 (TW/CV 52); Richter Dep. 19:6-20:8 (TW/CV 55).

<sup>103</sup> *Supra*, ¶ 22; Barr Dep. 48:12-13 (TW/CV 52).

<sup>104</sup> *Supra*, ¶ 22; Barr Dep. 53:22 - 54:12 (TW/CV 52).

<sup>105</sup> *Supra*, ¶ 23; Barr Dep. 52:19 - 53:10 (TW/CV 52).

<sup>106</sup> *Supra*, ¶ 22; Barr Dep. 53:22 - 54:12 (TW/CV 52).

bring some order to an otherwise disorganized file.<sup>107</sup> At no time in that process of sorting through Liberty's numerous licenses did she ask Mr. Nourain -- nor did he inform her -- about any paths that may have been operating without a license.<sup>108</sup> Moreover, in the discussions between Ms. Richter and Mr. Nourain about construction of microwave facilities during the pendency of license applications, Ms. Richter was not told anything which led her to believe that any paths had been activated prematurely.<sup>109</sup>

47. Based on the foregoing, the Richter Letter did not trigger any earlier discovery of premature activation at Liberty. At best, it struck a cautionary note which Liberty believed was resolved by the filing of requests for STA. Accordingly, the Presiding Judge should adopt the supplemental finding that the Richter Letter did not lead Liberty to discover premature activations before April 27, 1995. Furthermore, the Presiding Judge should adopt the earlier proposed finding that Liberty's principals did not know about any premature activations before April 27, 1995.

**B. The Allegedly Inconsistent Behrooz Nourain Statements Are Not in Fact Inconsistent.**

48. Liberty has consistently maintained that the allegedly inconsistent statements contained in Mr. Nourain's February 21, 1995 affidavit and his May 17, 1995 declaration were not inconsistent when taken in context.<sup>110</sup> Mr. Nourain's testimony at the mini-hearing and in this round of hearings further supports Liberty's position. As Mr.

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<sup>107</sup> *Supra*, ¶ 20; Richter Dep. 28:21 - 29:10 (TW/CV 55).

<sup>108</sup> *Supra*, ¶ 21.

<sup>109</sup> *Supra*, ¶¶ 18, 21.

Nourain testified repeatedly, the February 21, 1995 affidavit referred to his understanding at the time that Time Warner had petitioned against only microwave applications for the hardwire or “I-Block” sites.<sup>111</sup> Only in April 1995 did Mr. Nourain learn that the Time Warner petitions applied to more than the hardwire locations.<sup>112</sup> Thus, the May 17, 1995 declaration spoke to his understanding in April 1995 of Time Warner’s petitions against microwave facilities other than the “I-Block” buildings.<sup>113</sup> The allegedly inconsistent statements by Mr. Nourain should be considered in the different contexts of their making, taking into account Mr. Nourain’s misunderstanding about the scope of Time Warner’s petitions. Under these circumstances, the two statements are not contradictory.

#### **IV. SUPPLEMENTAL CONCLUSIONS OF LAW**

##### **A. Liberty Has Been Candid and Truthful on the Issue of First Discovery of Premature Activations.**

49. In Liberty’s Proposed Findings, Liberty pointed to credible and uncontroverted testimony from the various witnesses in support of the finding that Liberty’s principals did not learn about any premature activations before April 27, 1995.<sup>114</sup> More important, the Bureau concluded that none of Liberty’s witnesses

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<sup>110</sup> Joint Motion ¶¶ 72, 73; Liberty Proposed Findings ¶ 52, n. 137.

<sup>111</sup> *Supra*, ¶ 39; Liberty Proposed Findings ¶ 52; Tr. 720:11 - 723:9, 986:15 - 20, 996:22-997:4, 2289:18 - 2290:3 [Nourain]; Nourain Dep. 169:14 - 171:8 (L/B 7).

<sup>112</sup> *Supra*, ¶ 39; Liberty Proposed Findings ¶ 52; Tr. 723:7 - 8, 2290:4 - 12 [Nourain]; Nourain Dep. 176:3 - 6 (L/B 7)

<sup>113</sup> *Supra*, ¶ 39; Liberty Proposed Findings ¶ 52; Tr. 723:7-8, 2290:4-12 [Nourain].

<sup>114</sup> Liberty’s Proposed Findings, ¶¶ 57-59, 61, 79, 91, 92, 95, 104-106, 108, 109, 112, 114, 115. Although the Bureau argued that this testimony represented a change from prior testimony (which had placed early May as the time of initial discovery), the Bureau

possessed the intent to deceive necessary for the Commission to sustain a finding that a licensee lacked candor:

The testimony of the Liberty witnesses cannot be deemed deceitful, and thus it cannot be said to lack candor in that respect. Liberty officials were unaware that Liberty was violating the law; they did not knowingly violate the Commission's Rules. We do not believe that the violations, although willful and repeated, amount to a flagrant disregard of the Commission's Rules. Furthermore, due to the compliance program they set up, Liberty can be trusted to fully comply with the Commission's Rules in the future. . . . To disqualify Liberty from being a licensee upon character grounds for its actions that do not represent untruthfulness and unreliability would be counter to the *Policy Statement [Policy Regarding Character Qualifications in Broadcast Licensing]*, 102 FCC 2d 1179 (1986), *modified*, 5 FCC Rcd 836 (1990)].<sup>115</sup>

50. Nothing in the record, even after the additional discovery and hearings on the Richter Letter, alters the fundamental conclusion that Liberty was, at all times, candid, forthright and truthful with the Commission regarding the first discovery of premature activations. The record simply does not contain the "substantial evidence of intent to deceive"<sup>116</sup> that is necessary to support Liberty's disqualification.<sup>117</sup> Since the

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did not believe this purported change to be "of decisional significance. The time difference between when the witnesses initially testified they learned and when they eventually testified they learned is only slightly greater than a week. Because the time frame is so insignificant, the Bureau does not believe that the variations in testimony alter the facts and circumstances surrounding the unauthorized operations in the Joint Motion." Bureau Proposed Findings, ¶ 98 (footnote omitted).

<sup>115</sup> Bureau Proposed Findings, ¶ 103 (footnote omitted). On the factor of Liberty's reliability for future compliance, it is noteworthy that Liberty is not currently applying for licenses; it is involved only in the maintenance of the existing microwave network. Tr. 2207:6-21 [Price]. The possibility of any future licensing mishaps is therefore that much more remote.

<sup>116</sup> *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)).

filing of the Joint Motion nearly a year ago, Time Warner has been spearheading the effort to undermine Liberty's account of when it first learned about premature activations. First, Time Warner pointed to the February 24, 1995 license inventory prepared by Michael Lehmkuhl, Esq. as possible evidence of knowledge before late April 1995. The mini-hearing soundly put that theory to rest.<sup>118</sup> Time Warner then sought discovery from a third-party attorney, Stephen Coran, to explore the possibility of a pre-April 1995 discovery of premature activations. The Presiding Judge squarely held that no "substantially relevant evidence" was established through the discovery of Mr. Coran.<sup>119</sup> Most recently, Time Warner pointed to the Richter Letter and circumstances surrounding its preparation as evidence of premature activations in 1993. However, this latest excursion has proven to be a blind alley, like the fruitless discovery surrounding the February 24, 1995 Lehmkuhl license inventory and Mr. Coran.

51. The uncontroverted evidence shows that the Richter Letter and the events surrounding its creation and distribution did not reveal to Liberty's principals that premature activations had in fact occurred. The Richter Letter was read as a call to file for STAs, not as a sign that "something was amiss."<sup>120</sup> Given these facts, none of Liberty's principals knew -- nor could they know -- from the Richter Letter that the Commission's rules had been violated. Mr. Price believed that the prospective concerns

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<sup>117</sup> *Fox River Broadcasting, Inc.*, 88 FCC 2d 1132, 1137 (Rev. Bd. 1992) ("[T]otal disqualification will occur only if a willful intent to deceive is discerned.")

<sup>118</sup> Liberty Proposed Findings ¶¶ 8, 47-49, 94; Bureau Proposed Findings ¶ 98 n. 17.

<sup>119</sup> *Memorandum Opinion and Order*, FCC 96M-265 (rel. December 10, 1996), ¶ 7.

<sup>120</sup> *Supra*, ¶ 15.

raised in the letter regarding delays in the Commission's processing of Liberty applications could be resolved by filing requests for STA, which Liberty then proceeded to do.<sup>121</sup>

52. The uncontroverted testimony showed that Ms. Richter intended her letter to go to Mr. Nourain, her primary contact at Liberty, whom she believed was confused about the Commission's rules and procedures. Ms. Richter did not direct the letter to Mr. Price, and she had limited contact with him and with others above Mr. Nourain. The record thus establishes that not only was the Richter Letter irrelevant to alerting anyone at Liberty about any premature activations in 1993, it appeared not to have played a significant role in Liberty's licensing application process pre-April 1995.

53. Under these circumstances, the testimony of Liberty's principals that they did not find out about premature activations before April 27, 1995 remains uncontroverted and truthful. The Bureau's and Liberty's prior conclusion still holds: "Liberty officials were unaware that Liberty was violating the law; they did not knowingly violate the Commission's Rules."<sup>122</sup> Disqualification is unwarranted where, as here, the company's management did not know about and was not involved in the violation of the Commission's rules by the company's employees.<sup>123</sup> Nor can the

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<sup>121</sup> *Supra*, ¶ 28.

<sup>122</sup> Bureau Proposed Findings, ¶ 103; Liberty Proposed Findings, ¶¶ 25, 26, 59-61, 74, 75, 78, 79.

<sup>123</sup> *See 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 such knowledge. We cannot conclude on the basis of the

essential element of a disqualifying lack of candor -- an intent to deceive -- be found under these uncontroverted facts.

54. In light of the foregoing, together with all the facts and evidence amassed in this exhaustive proceeding, Liberty has provided candid, truthful and forthright testimony that its principals did not know of any premature activation of microwave paths before April 27, 1995.

**B. The Allegedly Inconsistent Behrooz Nourain Statements Do Not Constitute Misrepresentation or Lack of Candor.**

55. Liberty has not engaged in any misrepresentation or lack of candor through its submissions of Mr. Nourain's February 21, 1995 affidavit and his May 17, 1995 declaration which purportedly contain inconsistent statements. The Commission has repeatedly stated that inconsistencies in testimony do not suggest a lack of candor unless an accompanying intent to deceive is also shown.<sup>124</sup> Indeed, submission of incorrect information to the Commission, if done through carelessness, inadvertence or even gross negligence, does not rise to the level of misrepresentation.<sup>125</sup>

56. No evidence has been established that the allegedly inconsistent statements were made with the requisite intent to deceive. The statements are not inconsistent when considered in context, and any apparent contradiction can be attributed

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record before us that [the licensee's] owners or senior managers knew [about the misconduct].”).

<sup>124</sup> See, e.g., *Telephone and Data Systems, Inc.*, 10 FCC Rcd 10518, 10520-21 (I.D. 1995) (“[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.”).

<sup>125</sup> *Pinelands, Inc.*, 7 FCC Rcd 6058, 6065 (1992).

to carelessness or inadvertence, but not any deceptive intent. Mr. Nourain has been questioned numerous times on this issue, throughout this proceeding, and he did not waver or alter his testimony that the two statements apply to different situations, and they are not contradictory when considered in context.<sup>126</sup> Liberty concedes that the two statements could have been drafted with greater clarity;<sup>127</sup> but they were never submitted with any intent to deceive the Commission or any other tribunal.

57. There was no intent to deceive in Liberty's submission of Mr. Nourain's affidavit and declaration. Therefore, Liberty did not engage in misrepresentation or lack of candor, based on the alleged inconsistencies contained in these submissions.

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<sup>126</sup> *Supra*, ¶¶ 38, 39, 48; Joint Motion ¶¶ 72, 73; Liberty Proposed Findings ¶ 52, n. 137; Tr. 720:11 - 723:9, 2289:18 - 2290:13 [Nourain]; Nourain Dep. 169:14 - 171:8, 174:11 - 175:4 (L/B 7).

<sup>127</sup> Joint Motion, ¶ 117.

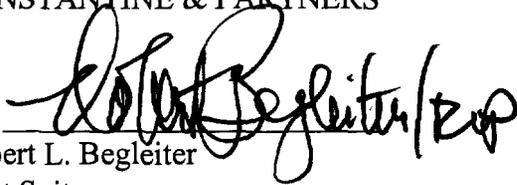
**V. CONCLUSION**

58. For the foregoing reasons, Liberty respectfully requests that the Presiding Judge adopt Liberty's Proposed Findings of Fact and Conclusions of Law, as supplemented herein, and grant the Joint Motion for Summary Decision, in its entirety, in favor of Liberty and the Bureau.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 11th day of June 1997, I caused copies of the foregoing Supplemental Proposed Findings of Fact and Conclusions of Law of Bartholdi Cable Company, Inc. to be served by hand delivery to the following:

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