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

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JUN 23 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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

**BARTHOLDI CABLE COMPANY, INC.'S REPLY TO SUPPLEMENTAL  
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF TIME  
WARNER CABLE OF NEW YORK CITY AND PARAGON  
COMMUNICATIONS**

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JUN 23 1997

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## SUMMARY

The Presiding Judge, in denying Time Warner's most recent attempt to add the issue of whether Liberty engaged in premature activations in 1993, held: "The Commission has limited the scope of this hearing to nineteen instances of unlicensed activation that occurred in 1994 and 1995. In view of that limited time period for a factual inquiry, there has not been an adequate showing of the decisional significance of a 1993 activation. Therefore, the issue will not be added."<sup>1</sup> The Presiding Judge then went on to delineate the proper scope of inquiry: the role of the April 20, 1993 letter from Jennifer L. Richter, Esq. to Mr. Bruce McKinnon (the "Richter Letter") as it related to Liberty's knowledge of the law, "the question of when Liberty first knew of any illegal premature activations and whether Liberty had been without knowledge of such activations before late April 1995."<sup>2</sup> This holding firmly establishes that the fact of premature activation alone, without any bearing on knowledge, is irrelevant to the candor and credibility issue for which additional discovery and hearings were ordered.

As set forth below, Time Warner ignores the Presiding Judge's sharply-focused inquiry and seeks to divert attention away from the central issue of knowledge before April 27, 1995 through an extensive but tangential discussion of whether Liberty engaged in unauthorized operations in 1993. When Time Warner touches upon the pertinent issue of knowledge, it distorts and misreads the plain language of the Richter Letter, and draws conclusions not supported by the text of that letter, the circumstances surrounding its

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<sup>1</sup> *Memorandum Opinion and Order*, FCC 97M-63 (rel. April 21, 1997), ¶ 7.

<sup>2</sup> *Id.*, ¶ 8.

creation, or the testimony of those who authored and received the Richter Letter. None of the proposed findings advanced by Time Warner in its supplemental pleadings is supported by the extensive record in this case.

The re-opened hearing has not produced any evidence whatsoever to support a finding that Liberty lacked candor or misrepresented material facts to the Commission. The events scrutinized in the re-opened hearing affirmatively show that Liberty's principals had no knowledge of the premature activations before April 27, 1995 and that Liberty never intended to deceive the Commission. Therefore, Liberty has carried its burden in this proceeding, because the re-opened hearing has confirmed that at all times, Liberty was candid and forthright with the Commission on this issue of first discovery of unauthorized operations. All of Time Warner's efforts to show otherwise have proven unavailing. Liberty's actions thus warrant forfeiture rather than denial of the pending applications, a position that the Wireless Telecommunications Bureau (the "Bureau") fully supports.<sup>3</sup>

Nothing in Time Warner's submission points to an opposite conclusion. Time Warner, as it did in this proceeding's first set of hearings, disregards the appropriate legal standard and instead clutches at straws in a result-oriented analysis. Time Warner's desire to drive Liberty out of business has led it to ignore settled law by raising inapposite legal arguments at this late juncture. Time Warner's attempts to attribute pernicious motives to Liberty's actions have gone nowhere. Rather than acknowledging the

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<sup>3</sup> Bureau Supp. Proposed Findings, ¶¶ 31, 32, 34.

fruitlessness of its inquiry, Time Warner has insisted on wasting the Commission's resources by taking this proceeding down a blind alley.

Accordingly, Liberty urges the Presiding Judge to adopt Liberty's and the Bureau's Proposed Findings of Fact and Conclusions of Law, as supplemented, and grant the Joint Motion for Summary Decision filed by Liberty and the Bureau.

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COMMUNICATIONS**

Pursuant to Order, FCC 97M-74 (rel. May 1, 1997) and Order, FCC 97M-111 (rel. June 20, 1997), Bartholdi Cable Company, Inc., formerly known as Liberty Cable Company, Inc. ("Liberty"), submits this Reply to the Supplemental Proposed Findings of Fact and Conclusions of Law filed by Time Warner Cable of New York City and Paragon Communications (together, "Time Warner").<sup>1</sup> Liberty supports the Supplemental

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<sup>1</sup> References herein to Liberty's Supplemental Proposed Findings of Fact and Conclusions of Law take the form "Liberty Supp. Proposed Findings, ¶," followed by the appropriate paragraph number. Similarly, references to Time Warner's and the Bureau's Supplemental Proposed Findings of Fact and Conclusions of Law take the form "Time Warner Supp. Proposed Findings, ¶" and "Bureau Supp. Proposed Findings, ¶."

Proposed Findings of Fact and Conclusions of Law filed by the Wireless Telecommunications Bureau (the “Bureau”).

As set forth below, none of Time Warner’s Supplemental Proposed Findings are sustained by any of the extensive evidence adduced in this proceeding. Instead, Time Warner distorts and mischaracterizes the record—including Jennifer Richter’s April 20, 1993 letter (the “Richter Letter”)—in a vain attempt to controvert the established finding that none of Liberty’s principals knew about premature activation of microwave paths before April 27, 1995. Time Warner then extends its evidentiary deficiencies to its Supplemental Conclusions of Law. Bereft of any proof that Liberty engaged in misrepresentation with the requisite intent to deceive, Time Warner chooses simply to ignore well-established Commission precedent requiring evidence of deceptive intent prior to disqualifying a Commission licensee. From this untenable position, Time Warner raises belated and meritless arguments for imposing unwarranted sanctions against Liberty, when the record provides no basis for Time Warner’s proposed penalty. Time Warner also disregards Liberty’s proper assertions of privilege and requests, for the first time, that the Presiding Judge draw an adverse inference from Liberty’s failure to produce the Internal Report. None of Time Warner’s arguments is supportable.

Accordingly, Liberty respectfully submits that Time Warner’s Supplemental Proposed Findings of Fact and Conclusions of Law should be rejected in their entirety and that the Supplemental Proposed Findings of Fact and Conclusions of Law submitted by Liberty and the Bureau should be adopted in their entirety. Moreover, as the Joint Motion for Summary Decision has not been controverted by the additional discovery and hearings, the Joint Motion should be granted.

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References to the previously filed Proposed Findings of Fact and Conclusions of Law take the form “[party] Proposed Findings, ¶.” Cablevision of New York City - Phase I has not filed a Supplemental Proposed Findings of Fact and Conclusions of Law.

**I. EACH OF TIME WARNER'S SUPPLEMENTAL PROPOSED FINDINGS OF FACT SHOULD BE REJECTED**

**A. Time Warner's Proposed Finding that Liberty Disregarded the "Clear" Warnings of the Richter Letter Mischaracterizes the Contents and Effect of the Richter Letter and Should be Rejected**

1. Liberty concurs with the Bureau that "the Richter Letter did not inform Liberty that it was operating microwave paths without a license. Nothing in the letter specifically states that Liberty is doing anything illegal. Instead, Ms. Richter voices that she had a concern, and then describes what must be done to avoid any future problems."<sup>2</sup> Ms. Richter, as Time Warner's witness, testified credibly that she was concerned by Mr. Nourain's apparent confusion regarding the Commission's rules and procedures on construction and activation of paths pending license approval.<sup>3</sup> To allay any potential for violation of Commission rules *in the future*, Ms. Richter wrote the letter.<sup>4</sup> Nothing in the letter speaks to any premature activations that had occurred as of the time the letter was written.<sup>5</sup>

2. Contrary to the plain language of the Richter Letter, and in the face of uncontroverted testimony, Time Warner claims that the letter indicates that Mr. Nourain's

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<sup>2</sup> Bureau Supp. Proposed Findings, ¶ 21.

<sup>3</sup> Liberty Supp. Proposed Findings, ¶¶ 16, 41; Bureau Supp. Proposed Findings, ¶ 9; Time Warner Supp. Proposed Findings, ¶ 44.

<sup>4</sup> Liberty Supp. Proposed Findings, ¶¶ 18, 41.

<sup>5</sup> Liberty Supp. Proposed Findings, ¶¶ 15, 43; TW/CV 51.

confusion had “in the past” led to unlicensed operations.<sup>6</sup> Time Warner offers no evidence whatsoever—whether in the text of the Richter Letter or in testimony concerning the Richter Letter—that the Richter Letter referred to any premature activation that had in fact occurred as of April 20, 1993. Ms. Richter testified explicitly that she had no knowledge of premature activations and that her letter was not meant to suggest that there had been a premature activation:<sup>7</sup>

Q [BY MR. BECKNER]: Okay. After these conversations that you had with Mr. Nourain that precipitated the April 20th letter, did you do anything to try to determine whether or not Mr. Nourain had violated the FCC rules because of these misunderstandings that he had expressed to you?

A [BY MS. RICHTER]: That wasn't my concern. My concern was not that they had done anything illegal. My concern was that confusion could cause them to if I didn't clear it up and that was the reason for the letter. But I wasn't concerned that anything had been done that was in violation of the rules.

As the Bureau correctly noted, Ms. Richter “did not . . . have any concern that any unauthorized activations had already occurred, only that there existed the potential of a future unauthorized activation.”<sup>8</sup> Time Warner apparently ignored this evidence and

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<sup>6</sup> Time Warner Proposed Findings of Fact, IV.B.: “The Richter Letter Put Liberty on Notice that Mr. Nourain Did Not Understand The FCC’s Rules And That Misunderstanding Either Had *In The Past*, Or Might In The Future, Lead To Unlicensed Operations.” (Emphasis added.) Time Warner similarly argues in its Summary, “The Richter Letter further informed Liberty that Mr. Nourain’s misunderstanding . . . *had resulted in past unlicensed operations. . . .*” Time Warner Supp. Proposed Findings, Summary, pp. vi-vii (emphasis added).

<sup>7</sup> Liberty Supp. Proposed Findings, ¶¶ 16-18, 41, 43; Bureau Supp. Proposed Findings, ¶ 9.

<sup>8</sup> Bureau Supp. Proposed Findings, ¶ 9.

proposes a finding which is not supported by the plain text of the Richter Letter or by Ms. Richter's credible testimony.

3. In a similar vein, Time Warner claims that “the letter unquestionably informed Liberty that there was a high probability that Mr. Nourain had either activated paths without authorization or, if left unsupervised, would do so in the future.”<sup>9</sup> Again, neither the plain language of the Richter Letter nor the uncontroverted testimony regarding the letter supports Time Warner's distorted reading. The Richter Letter does not—“unquestionably” or otherwise—inform anyone at Liberty about the “probability”—high or low—that any unlicensed operation had occurred. Moreover, the Richter Letter does not discuss Liberty's supervision of Mr. Nourain, much less any untoward consequences that might ensue from a lack of supervision. The evidence could not be more definite that the Richter Letter is silent on the issue of whether unauthorized operation had commenced as of the time the letter was written.<sup>10</sup> Time Warner's fanciful reading of the Richter Letter does nothing to alter the indisputable fact that the Richter Letter did not and was not intended to communicate to Liberty any actual premature activation of microwave paths.

4. Time Warner also mischaracterizes the Richter Letter as a “Clear Warning” of Commission rules violations that Mr. Price should have heeded.<sup>11</sup> Time Warner further improperly describes the Richter Letter as an “obvious warning” to

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<sup>9</sup> Time Warner Supp. Proposed Findings, ¶ 46.

<sup>10</sup> Liberty Supp. Proposed Findings, ¶¶ 15, 43; TW/CV 51.

<sup>11</sup> Time Warner Supp. Proposed Findings, ¶¶ 61-69.

“senior management” that Mr. Nourain needed to be supervised.<sup>12</sup> Again, Time Warner overstates the plain text of the Richter Letter. There was no warning alarm—“clear,” “obvious” or otherwise—sounded by the Richter Letter. The Richter Letter did not tell anyone at Liberty that a problem existed or that any rules had been violated.<sup>13</sup> At most, the letter pointed to a potential problem and reminded Liberty of the applicable rules so that such a problem might be averted.<sup>14</sup>

5. The credible and uncontroverted testimony adduced at the re-opened hearing was that the Richter Letter was seen as a cautionary note to Liberty to file for STAs because the approval process for Commission licenses was moving more slowly than had been anticipated.<sup>15</sup> As the Bureau observed, “the only follow-up Mr. Price pursued in response to the Richter letter was to check on the status of Special Temporary Authority (STA) requests because that is all he believed the Richter Letter asked him to do.”<sup>16</sup> Rather than point to evidence contradicting or rebutting Mr. Price’s and Ms. Richter’s credible testimony regarding Liberty’s reaction to the Richter Letter, Time Warner argues that “[t]he plain language [of] the Richter Letter does not bear the strained and self-serving interpretation of it that Mr. Price offers.”<sup>17</sup> The evidence, however, reveals that Time Warner’s, not Mr. Price’s, interpretation is strained and self-serving.

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<sup>12</sup> Time Warner Supp. Proposed Findings, ¶ 69.

<sup>13</sup> Liberty Supp. Proposed Findings, ¶¶ 15, 28, 29, 43; TW/CV 51.

<sup>14</sup> Liberty Supp. Proposed Findings, ¶¶ 15-18, 28, 41; TW/CV 51.

<sup>15</sup> Liberty Supp. Proposed Findings, ¶¶ 15, 28, 42, 43, 47.

<sup>16</sup> Bureau Supp. Proposed Findings, ¶ 12.

<sup>17</sup> Time Warner Supp. Proposed Findings, ¶ 69.

Contrary to the Richter Letter’s “plain language,” Time Warner argues that the letter “is an obvious warning to senior management that Mr. Nourain is an employee in need of supervision, lest the company end up violating the Commission’s rules in some serious ways.”<sup>18</sup> Nowhere does the Richter Letter advise Liberty about how it should supervise Mr. Nourain; the letter does not even remotely hint at it. And if the Richter Letter was any sort of warning to “senior management,” it was apparently “obvious” only to Time Warner and not to any of the witnesses who testified.

6. Time Warner’s argument that Liberty failed to heed the “warning” of the Richter Letter is unsupported. The only “warning” perceived by Liberty from the Richter Letter was that the Commission was taking a long time to process Liberty’s license applications.<sup>19</sup> Far from disregarding that advice, Liberty responded by requesting its licensing counsel to file for STAs—the very action recommended by Ms. Richter in her letter.<sup>20</sup> Mr. Price’s actions were appropriate and responsible, reflecting the seriousness that Liberty accorded its obligation to operate in a lawful manner.

7. The credible evidence from the re-opened hearing supports only the finding that Liberty reacted to the Richter Letter by filing for STAs; nothing in the Richter Letter was intended to be, nor was it construed as, a warning that something had gone seriously wrong with Liberty’s licensing practices. Time Warner’s proposed

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<sup>18</sup> *Id.*

<sup>19</sup> Liberty Supp. Proposed Findings, ¶¶ 28, 43; Bureau Supp. Proposed Findings, ¶ 22.

<sup>20</sup> Liberty Supp. Proposed Findings, ¶¶ 28, 43.

finding to the contrary cannot be sustained by the uncontroverted testimony and the plain text of the Richter Letter.

**B. Time Warner's Proposed Finding that Richter's Inventories Led to Discovery of Premature Activations is Against the Weight of the Evidence and Should be Rejected**

8. Liberty, in its Supplemental Proposed Findings, demonstrated that Ms. Richter's creation of license inventories had no bearing at all on discovery of premature activations at any time.<sup>21</sup> Ms. Richter stated that she prepared the inventories for organizational purposes.<sup>22</sup> Furthermore, she expressly disclaimed knowledge of any premature activation at specified sites appearing on her April 6, 1993 inventory.<sup>23</sup> Time Warner omits these key facts from their proposed findings. Time Warner acknowledges that Mr. Nourain did not use Ms. Richter's inventories in the course of his licensing

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<sup>21</sup> Liberty Supp. Proposed Findings, ¶¶ 36, 40, 44, 47.

<sup>22</sup> Liberty Supp. Proposed Findings, ¶ 20.

<sup>23</sup> Liberty Supp. Proposed Findings, ¶¶ 21, 46; Tr. 2072:16 - 2077:8 [Richter]; TW/CV 3. The referenced sites—302 East 88th Street, 175 East 74th Street, 400 East 59th Street, 812 Fifth Avenue, 116 East 66th Street, 200 East 36th Street—are some of the same sites which Time Warner claims were turned on prematurely in 1993. Time Warner Supp. Proposed Findings, ¶¶ 23-30. Since the central issue is knowledge of premature activations before April 27, 1995, *Memorandum Opinion and Order*, FCC 97M-63 (rel. April 21, 1997), ¶ 7, the fact of Ms. Richter's lack of knowledge is material, not whether such activations occurred in 1993. Moreover, Time Warner previously stated that it did not seek to conduct an audit of Liberty's licenses. Time Warner Cable of New York City and Paragon Cable Manhattan's Reply to Liberty's Opposition to Motion for Limited Discovery and the Taking of Additional Testimony, or in the Alternative, to Enlarge Issues, at 3 n.2 (Mar. 28, 1997). The Presiding Judge should not countenance Time Warner's backdoor attempt to conduct such an inventory of Liberty's licenses.

duties at Liberty.<sup>24</sup> More important, Time Warner elicited Mr. Nourain's testimony that he never performed a reconciliation between Liberty's Weekly Progress Reports and Ms. Richter's inventories.<sup>25</sup> The factual predicates necessary for Time Warner's proposed finding regarding the Richter inventories simply do not exist. In the face of the clear evidence in the record that Liberty did not discover premature activations from Ms. Richter's inventories, the most Time Warner can say is that Mr. Nourain "should have known" that Liberty was engaged in unauthorized operations.<sup>26</sup>

9. Time Warner's speculation hardly rebuts the uncontroverted evidence that Mr. Nourain did not communicate any such knowledge, if he had it, to his superiors or to any of Liberty's principals. Indeed, the extensive record establishes that what led to the premature activations was lack of communication between Mr. Nourain and his superiors at Liberty.<sup>27</sup> The additional testimony and evidence adduced at the re-opened hearing was not to the contrary. Ms. Richter testified that her contact at Liberty was through Mr. Nourain and not those above him.<sup>28</sup> This fact buttresses the uncontroverted evidence that information was not traveling upstream from Mr. Nourain to Liberty's principals, resulting in the unfortunate but inadvertent activation of microwave paths without

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<sup>24</sup> Time Warner Supp. Proposed Findings, ¶¶ 38, 94; Bureau Supp. Proposed Findings ¶ 19; Liberty Supp. Proposed Findings, ¶ 36.

<sup>25</sup> Tr. 2240:24 - 2241:2 [Nourain]; Liberty Supp. Proposed Findings ¶ 37; Time Warner Supp. Proposed Findings, ¶ 94.

<sup>26</sup> Time Warner Supp. Proposed Findings, ¶ 39.

<sup>27</sup> Liberty Proposed Findings ¶¶ 33, 34, 43-46, 71, 73, 86.

<sup>28</sup> Liberty Supp. Proposed Findings, ¶ 12.

Commission authorization.<sup>29</sup> Under these circumstances, it remains uncontroverted that Liberty's principals did not learn about premature activation of microwave paths before April 27, 1995.

10. Time Warner cannot make the requisite connection between the Richter inventories and knowledge of premature activations. As the Bureau properly pointed out, "Although Ms. Richter prepared a license inventory for Mr. Nourain to review in March 1993, based upon the testimony regarding that inventory, the only thing that *is* clear is that the inventory *is unclear* as to which paths are licensed and which are not."<sup>30</sup> Liberty agrees with the Bureau's observation that a fruitless examination, covering some twelve pages of testimony, failed to decipher which paths appearing on Ms. Richter's inventories were or were not licensed.<sup>31</sup> The Bureau correctly concluded: "As it was demonstrated that even after a lengthy discussion concerning whether it could be determined if a path listed is licensed or not, no such determination could easily be made, the only reasonable conclusion to be drawn from this exercise is that Liberty had no reason to learn from the March 1993 license inventory that any paths were being operated without a license."<sup>32</sup>

11. It is undisputed that Mr. Nourain did not undertake the line-by-line parsing of the Richter inventories that Time Warner's counsel engaged in with Ms. Richter during her examination. Moreover, given that Mr. Nourain did not perform the type of

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<sup>29</sup> Liberty Proposed Findings, ¶¶ 43, 46, 71, 73, 86.

<sup>30</sup> Bureau Supp. Proposed Findings, ¶ 17 (emphasis in the original).

<sup>31</sup> *Id.*

<sup>32</sup> Bureau Supp. Proposed Findings, ¶ 18.

reconciliation between Ms. Richter's inventories and the Weekly Progress Reports, Mr. Nourain is unlikely to have ever performed such a rigorous analysis of Ms. Richter's inventories. Time Warner's proposed finding that the Richter inventories led to discovery of premature activations is thus not supported by the evidence and should be rejected.

**C. Time Warner's Proposed Findings Based on Alleged Premature Activations in 1993 Should be Rejected Since They Do Not Address the Issue of Knowledge**

12. In the round of pleadings Time Warner commenced on March 3, 1997 which led to the additional discovery and re-opened hearing, Time Warner sought to add the issue of whether Liberty engaged in unauthorized operations in 1993. Even though the proposed enlargement was soundly rejected, Time Warner proposes a finding that Liberty activated unlicensed microwave paths prior to 1995,<sup>33</sup> and from this finding seeks to argue that Mr. Nourain blatantly disregarded the Commission's rules by activating microwave paths without Commission authorization.<sup>34</sup> Neither of these proposed findings implicate the central issue of knowledge by Liberty's principals of premature activations before April 27, 1995. Accordingly, these findings should be disregarded.

13. The emptiness and irrelevance of Time Warner's arguments concerning alleged 1993 unauthorized activations is underscored by the overstatements contained in

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<sup>33</sup> Time Warner Supp. Proposed Findings, III: "Liberty Activated Unlicensed Microwave Paths Prior to 1995."

<sup>34</sup> Time Warner Supp. Proposed Findings, V.A.: "Mr. Nourain Repeatedly And Blatantly Ignored The Commission's Rules Without Any Basis To Do So."

Time Warner’s opening Summary. Time Warner states: “Testimonial and documentary evidence presented at the May 1997 hearing overwhelmingly demonstrates that Liberty knowingly activated at least thirteen microwave paths without FCC authorization in February through June 1993.”<sup>35</sup> However, Time Warner provides no support for this statement in the text of its Supplemental Proposed Findings. There is simply no evidence adduced at the re-opened hearing that anyone at Liberty “knowingly” activated any microwave paths without authority in 1993. As discussed above, the Richter inventories did not provide any such knowledge.<sup>36</sup> Indeed, Ms. Richter specifically testified to lack of knowledge of premature activation generally and with respect to specific sites identified on her April 6, 1993 inventory.<sup>37</sup> Time Warner has advanced no evidence to connect its allegations of 1993 premature activations with knowledge by Liberty’s principals. At best, Time Warner argues that Mr. Nourain “should have known.” However, even accepting this premise *arguendo*, the uncontroverted evidence still shows that Liberty’s principals did not know before April 27, 1995 that any premature activations had occurred.

14. Similarly, Time Warner argues that “Liberty’s installation progress reports, which indicated the activation dates for microwave facilities, together with license inventories prepared jointly by counsel and Liberty’s chief engineer show that in

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<sup>35</sup> Time Warner Supp. Proposed Findings, Summary, p. vi.

<sup>36</sup> *Supra*, ¶10.

<sup>37</sup> Liberty Supp. Proposed Findings, ¶ 21; *supra*, ¶ 8, n.23.

1993, Liberty was operating microwave facilities without FCC authorization.”<sup>38</sup>

However, Time Warner ignores the evidence its own counsel adduced: that Mr. Nourain never performed this reconciliation between the Weekly Progress Reports and the Richter inventories; that Mr. Nourain only reviewed the information on the inventories for technical accuracy, and not to see if he had any unlicensed paths; and that the Richter inventories were irrelevant to Mr. Nourain’s licensing function.<sup>39</sup> On the basis of this uncontroverted evidence, Time Warner cannot sustain any finding that Liberty “knowingly” engaged in unlicensed operation in 1993 nor can Time Warner show that Liberty’s principals or its counsel knew about premature activations before April 27, 1995.

15. Based on the Richter Letter and the conversations between Ms. Richter and Mr. Nourain regarding Commission licensing rules and regulations, Time Warner argues that Mr. Nourain knew what the proper procedure was but went ahead and activated numerous sites without authority, thereby displaying a blatant disregard of the rules.<sup>40</sup> To support its proposed finding, Time Warner points to the “groundless assumptions” upon which Mr. Nourain relied in activating microwave paths.<sup>41</sup> However, the fact that Mr. Nourain harbored these “groundless assumptions,” despite Ms. Richter’s continuous efforts to instruct him otherwise, proves only that Mr. Nourain did not

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<sup>38</sup> Time Warner Supp. Proposed Findings, Summary, p. vi.

<sup>39</sup> *Supra*, ¶ 8; Time Warner Supp. Proposed Findings, ¶ 38; Liberty Supp. Proposed Findings, ¶¶ 36, 37.

<sup>40</sup> Time Warner Supp. Proposed Findings, ¶¶ 49-53.

<sup>41</sup> Time Warner Supp. Proposed Findings, ¶¶ 54-67.

understand the procedures. Indeed, Mr. Nourain's "groundless assumptions" reveal his confusion about Commission licensing rules which Ms. Richter apparently failed to clear up. Therefore, far from proving that Mr. Nourain knew what he was doing and acted in blatant disregard of the rules, the evidence relied upon by Time Warner reveals that Mr. Nourain acted almost haphazardly.

16. However, on the central issue of knowledge before April 27, 1995 of premature activations, Time Warner's lengthy discussion of Mr. Nourain's "groundless assumptions" sheds no light on what Liberty's principals knew and when they knew it. As already established, there was poor communication between Mr. Nourain and his supervisors.<sup>42</sup> The fact is undisputed that no one knew about Mr. Nourain's operative assumptions.<sup>43</sup> Ms. Richter's testimony shows that not even Liberty's licensing counsel knew about these assumptions.<sup>44</sup> Thus, Time Warner's arguments concerning Mr. Nourain's purported "disregard of the rules" and his "groundless assumptions" bear little on the crucial issue of whether Liberty's principals knew of premature activations before April 27, 1995; at most, Time Warner's arguments support the uncontroverted evidence already in the record that Liberty should have supervised Mr. Nourain more closely and that it was this lack of proper oversight that led to the inadvertent premature activations.<sup>45</sup>

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<sup>42</sup> Liberty Proposed Findings, ¶¶ 33, 34, 43-46, 71, 73, 86; Bureau Reply Proposed Findings, ¶¶ 25-27.

<sup>43</sup> Liberty Proposed Findings, ¶¶ 33, 43, 46, 71, 86; Bureau Reply Proposed Findings, ¶¶ 25-27.

<sup>44</sup> Tr. 2077:20 - 2078:7 [Richter].

<sup>45</sup> Liberty Proposed Findings, ¶¶ 33, 34, 43-46, 71, 73, 86; Bureau Reply Proposed Findings, ¶¶ 25-27.

**D. Time Warner Cannot Point to Any Evidence to Show that Liberty Made Materially False and Misleading Statements to the Commission with the Requisite Intent to Deceive.**

17. In proposing a finding that Liberty lacked candor by making allegedly “materially false and misleading statements” to the Commission, Time Warner points to (i) isolated phrases in the May 17, 1995 Surreply filed by Liberty; (ii) the purported inconsistencies between Mr. Nourain’s declaration in support of that Surreply and an earlier-filed affidavit in New York Federal Court; and (iii) Mr. Barr’s clarification of his hearing testimony. Time Warner does not, and indeed cannot, demonstrate that any of these statements were made with an intention of deceiving the Commission or, indeed, that any statement was made when it was known to be false. Accordingly, Time Warner’s proposed finding that Liberty made materially false and misleading statements should be rejected.

18. Time Warner claims that Liberty’s May 17 Surreply contained two misrepresentations: (i) “It has been Liberty’s pattern and practice to await a grant of either a pending application or request for STA prior to making a microwave path operational[;]” and (ii) “Mr. Nourain, perhaps inadvisably, assumed grant of STA requests, which in his experience has always been granted within a matter of days of filing, and thus rendered the paths operational.” At the mini-hearing, testimony was adduced that at the time these statements were made, Liberty believed them to be true.<sup>46</sup>

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<sup>46</sup> Liberty Proposed Findings, ¶ 97.

No contrary testimony was elicited during the recent re-opened hearing and, more importantly, there is no evidence that these statements were made with an intent to deceive the Commission. Indeed, these statements were made in the context of a pleading which sought to disclose forthrightly to the Commission what Liberty then knew about the fifteen instances of premature activation that Liberty had (at that time) just discovered.

19. The purpose of the re-opened hearing was to determine whether Liberty knew of unauthorized operations any earlier than the April 27, 1995 date established at the mini-hearing. Since the most recent round of hearings has shown that in fact no earlier discovery was made, the May 17 Surreply statements remain truthful and candid at the time they were made. Furthermore, the “groundless assumptions” discussed in Time Warner’s Supplemental Proposed Findings lend further credence to the Surreply’s statement that Mr. Nourain “inadvisably[] assumed grant of the STA requests[.]” Moreover, the record evidence, as amplified in the re-opened hearing, supports the Surreply’s statement that “without knowledge that his actions were in violation of the Commission’s rules, and without intent to violate those rules, Mr. Nourain commenced operation prior to grant.” The May 17 Surreply, therefore, did not include misrepresentations and was not lacking in candor.

20. As for Mr. Nourain’s allegedly inconsistent statements, Liberty concurs with the Bureau that taken in context, no inconsistency remains.<sup>47</sup> Mr. Nourain has been

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<sup>47</sup> Bureau Supp. Proposed Findings, ¶ 33.

constant and unwavering on this position,<sup>48</sup> and Time Warner has done nothing to discredit Mr. Nourain on this issue. More importantly, as the Bureau rightly observes: “Mr. Nourain is not an attorney and he is someone who, during the course of this proceeding, has shown that he believes that legal matters should be left to the attorneys. Mr. Nourain did not draft either of the affidavits himself. . . . Accordingly, there is nothing to support that Mr. Nourain had the intention of misrepresenting facts to the Commission in his affidavits.”<sup>49</sup> Time Warner does not, and cannot, point to any evidence to the contrary.

21. Instead, Time Warner mischaracterizes testimony from the mini-hearing about conversations between Mr. Nourain and Mr. Lehmkuhl regarding Time Warner’s petitions to deny.<sup>50</sup> Time Warner nowhere states that these conversations were brief and revealed that Mr. Nourain understood Mr. Lehmkuhl to be talking only about “I-Block” buildings while Mr. Lehmkuhl was speaking more generally.<sup>51</sup> Thus, nothing from the mini-hearing contradicts Mr. Nourain’s explanation of the apparent inconsistencies, as Time Warner argues. Furthermore, Time Warner points to “abundant testimony at the January 1997 hearing that Liberty was greatly concerned about [Time Warner’s] petitions

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<sup>48</sup> Liberty Supp. Proposed Findings, ¶¶ 39, 48.

<sup>49</sup> Bureau Supp. Proposed Findings, ¶ 33.

<sup>50</sup> Time Warner Supp. Proposed Findings, ¶ 78.

<sup>51</sup> Liberty Proposed Findings, ¶ 52.

against Liberty's applications to serve previously unserved buildings."<sup>52</sup> Time Warner does not cite even one line of this "abundant testimony." Time Warner then fails to make any sort of coherent argument about how this concern translated to material falsehoods by Mr. Nourain in either his affidavit or his declaration which were made with the intent to deceive the Commission. Time Warner has therefore failed to point to any evidence to support its finding, and it should accordingly be rejected.

22. Finally, Mr. Barr's correction of his hearing testimony does not demonstrate lack of candor. Time Warner had the full opportunity at the re-opened hearing to challenge or undermine Mr. Barr's position, but no testimony was adduced to show anything other than what Mr. Barr had already stated: that his correction was solely for the purpose of bringing his answer into line with the scope of the question as it was posed to him.<sup>53</sup> As clarified, Mr. Barr's correction further underscores his unequivocal testimony that he did not learn of any premature activations by Liberty before April 27, 1995. Although Time Warner would like to attribute a sinister or nefarious motive to Mr. Barr's clarification of testimony, no evidence of such a motive was presented.<sup>54</sup> Absent any proof of an intent to deceive, Mr. Barr's clarification does not show any lack of candor or misrepresentation.

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<sup>52</sup> Time Warner Supp. Proposed Findings, ¶ 79.

<sup>53</sup> Liberty Supp. Proposed Findings, ¶ 45.

<sup>54</sup> Tr. 2121:10-19, 2127:16 - 2128:9 [Barr].

## **II. TIME WARNER'S SUPPLEMENTAL CONCLUSIONS OF LAW ARE NOT SUPPORTED BY THE EVIDENCE OR BY ESTABLISHED LEGAL STANDARDS**

23. Nowhere in its Supplemental Conclusions does Time Warner acknowledge the well-established standard that lack of candor or misrepresentation requires a demonstrated intent to deceive the Commission.<sup>55</sup> Time Warner's failure to cite and apply this standard reflects the fact that this proceeding has not produced any evidence of such intent on Liberty's part. Instead, Time Warner resorts to diversionary tactics that bear no relation to the sharp focus of the re-opened hearing or the extensive record developed in this proceeding. However, these maneuvers cannot detract from the fact—as demonstrated above—that Liberty has been forthright with the Commission. As such, under well-settled FCC precedent, Liberty's pending applications should not be denied by the Commission.

### **A. Liberty Has Met Its Burden of Proof**

24. Time Warner's first attempt to divert attention from the weakness in its case is to assert that Liberty has not affirmatively proven that it acted forthrightly with the

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<sup>55</sup> *Swan Creek Communications, Inc. v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994) (“[I]ntent to deceive [is] an essential element of a misrepresentation or lack of candor showing.”) (quotation omitted); *Roy M. Speer*, 11 FCC Rcd 18393, 18421 (1996) (“While lack of candor is characterized by failure to disclose material information, misrepresentation is characterized by making a material false statement to the Commission. An intent to deceive is an essential component of both. Indeed, the nature of the misrepresentation or lack of candor is essentially irrelevant, because it is the ‘willingness to deceive’ that is most significant.”) (citations omitted).

Commission and that it thereby has not met its burden of proof.<sup>56</sup> Liberty has made available all relevant, non-privileged documents in its possession. Its principals, employees, and attorneys have been deposed, have testified under oath, and have been cross-examined. Nothing in the reams of material adduced in this re-opened hearing, however, shows that Liberty knew of the unauthorized paths before 1995. Time Warner tries to circumvent this conclusion by suggesting that Liberty must prove the negative for any allegation of misconduct Time Warner makes.

25. To the contrary, The Commission has consistently recognized the inherent unfairness of imposing such an unrealistic burden. For example, in *Seven Hills Television Co.*, the Commission stated: “To have placed a burden on the licensees to prove, by a preponderance of record evidence, that they did not historically violate Section 310(b), . . . is greater than ‘concepts of basic fairness’ will bear.”<sup>57</sup>

26. Moreover, Liberty has acknowledged its errors, has completely revamped its licensing practices, has instituted an effective compliance program, and has agreed with the Bureau to a very substantial forfeiture. Thus, Liberty not only has demonstrated its forthrightness in dealing with the Commission but has also demonstrated that a reoccurrence of the wrongdoing is extremely remote.<sup>58</sup> Therefore, consistent with the

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<sup>56</sup> Time Warner Supp. Proposed Findings, ¶¶ 88-89.

<sup>57</sup> 2 FCC Rcd 6867, 6873 (Rev. Bd. 1987); see also *Calhoun County Broadcasting Co.*, 57 RR 2d 641, 644-45 (1985) (imposing the burden of proof in a hearing designation on the applicant’s challenger, given the time that had passed since the events in question took place).

<sup>58</sup> Liberty Supp. Proposed Findings, ¶ 49 n.115.