

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

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NOV 19 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
	)	708788, 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
	)	711325	NEW

To: Administrative Law Judge Richard L. Sippel

**SUPPLEMENTAL PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
OF BARTHOLDI CABLE COMPANY, INC.**

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TABLE OF CONTENTS

	<u>Page</u>
SUMMARY.....	i
I. STATEMENT OF FACTS.....	2
II. SUPPLEMENTAL PROPOSED FINDINGS OF FACT.....	6
A. Admission of the Report into Evidence Does Not Change Any of Liberty’s Proposed Findings of Fact.....	6
III. SUPPLEMENTAL CONCLUSIONS OF LAW.....	13
A. Admission of the Report into Evidence Does Not Alter Liberty’s Proposed Conclusions of Law.....	13
B. Given the Extensive Record Developed by All Parties in this Case, the Report Should Be Given Little or No Weight.....	16
IV. CONCLUSION.....	19

SUMMARY

Liberty submits these Supplemental Proposed Findings of Fact and Conclusions of Law regarding the recent admission of Liberty's Internal Audit Report into evidence. The Report's admission does not change the fundamental findings of fact and conclusions of law that support granting the Joint Motion by the Bureau and Liberty for Summary Decision.

Over the last nineteen months, the parties have engaged in exhaustive discovery of Liberty's operations and employees. The conclusions drawn from that voluminous record should be given appropriate and substantial weight. In this regard, Liberty has repeatedly emphasized its desire not to rely on the Report, and such reliance is unnecessary due to the balance of the record in this case. The Report, while accurately reflecting the views of Liberty's lawyers two years ago, had a fundamentally different focus from this proceeding: to discover the scope and causes of the premature activations and development of a compliance plan to insure that premature activations would not recur.

Fundamentally, the basic facts have not changed: (1) Liberty had a disjointed licensing process; (2) Liberty's principals did not approve or encourage the activation of any paths without Commission authorization; (3) Liberty has developed an extensive compliance program and can be relied upon to comply with the Commission's rules going forward; (4) Liberty intended to fully disclose the fact and circumstances regarding the premature activations; and (5) Liberty's principals first learned of the possibility of premature activations on April 27, 1995.

Similarly, the legal conclusions to be drawn from these facts have not changed. In order to find a disqualifying misrepresentation or lack of candor, it must be proven that Liberty possessed the requisite intent to deceive. This intent cannot be inferred from suggestive facts; it must be based on substantial evidence that clearly reveals serious and deliberate falsehoods by the

licensee. Yet nothing in the record supports a finding that Liberty's principals at any time acted with an intent to deceive the Commission. Indeed, the record shows that, despite its licensing missteps, Liberty has at all times been truthful and forthright with the Commission. Nor did Liberty's conduct amount to a flagrant disregard for the Commission's rules. To the contrary, once the problem was identified, Liberty moved to disclose the violations and rectify the problems. In light of the extensive record supporting these findings and conclusions, the Report should be given little or no weight. The Report's distinct purpose, temporal remoteness and largely cumulative nature mandate this conclusion. Therefore, Liberty's Proposed Findings of Fact and Conclusions of Law should be adopted in their entirety and the Joint Motion of the Bureau and Liberty should be granted.

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To: Administrative Law Judge Richard L. Sippel

**SUPPLEMENTAL PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW OF BARTHOLDI CABLE COMPANY, INC.
REGARDING THE INTERNAL AUDIT REPORT**

Pursuant to 47 C.F.R. § 1.263 and Order, FCC 97M-185 (rel. Nov. 10, 1997), Bartholdi Cable Company, Inc., formerly known as Liberty Cable Company, Inc. ("Liberty"), hereby submits its supplemental proposed findings of fact and conclusions of law regarding Liberty's Internal Audit Report (the "Report"). The Report's admission into evidence adds nothing of decisional significance to an extensive record that has been developed over the last nineteen months by Liberty, the Wireless Telecommunications Bureau (the "Bureau"), Time Warner Cable of New York City and Paragon Communications ("Time Warner"), and Cablevision of New York City - Phase I ("Cablevision"). Accordingly, Liberty respectfully requests that the Presiding Judge adopt in full Liberty's Proposed Findings of Fact and Conclusions of Law, as

supplemented, and also grant the pending Joint Motion by the Bureau and Liberty for Summary Decision, based on the substantial evidentiary record developed in this proceeding.

I. STATEMENT OF FACTS

1. In June 1995, after Liberty's principals discovered that certain of Liberty's microwave paths had been prematurely activated, Liberty's Chairman directed outside counsel to conduct an internal audit to determine the scope of Liberty's premature activations as well as to prepare a Compliance Program in order to prevent a recurrence of such unauthorized operations.¹ The internal audit did not focus on the question of who found out when about premature activations.

2. The internal audit was conducted over the course of about two months, after which Liberty submitted to the Commission a copy of the Report generated from the internal audit.² The Report represented the conclusions reached by Liberty's attorneys two years ago after a two-month internal investigation.

¹ TW/CV 29; Liberty Proposed Findings ¶¶ 61, 65. Citations to the record and prior proposed findings follow the forms used in previous Liberty submissions.

² TW/CV 29; TW/CV 67. In making this submission, Liberty requested confidential treatment in accordance with the Commission's rules, 47 C.F.R. §§ 0.457, 0.459, because the Report revealed privileged attorney-client communications as well as the work product of Liberty's attorneys, as reflected in the mental impressions, analyses and conclusions contained in the Report (TW/CV 33). The Bureau and then the Commission denied Liberty's request for confidentiality, and this issue was appealed to the Circuit Court of Appeals for the District of Columbia. The D.C. Circuit affirmed the Commission's decision on June 3, 1997, and Liberty's petition for rehearing *en banc* was denied on September 10, 1997. *Bartholdi Cable Co., Inc. v. Federal Communications Comm'n*, 114 F.3d 274 (D.C. Cir. 1997). Thereafter, the Report became a public document, and Liberty promptly provided a courtesy copy to the Presiding Judge. In doing so, Liberty re-affirmed that it "does not and will not rely upon the report for any purpose." Letter dated September 16, 1997 from Robert L. Pettit, Esq. to Hon. Richard L. Sippel, ALJ.

3. On March 5, 1996, with the full benefit of knowledge regarding the Report's substance, the Commission commenced this proceeding by issuing its *Hearing Designation Order and Notice of Opportunity for Hearing* (the "HDO").³ In an order early in this proceeding, the Presiding Judge noted that the Bureau's staff "had already seen the contents of the [Report], which was voluntarily disclosed by Liberty."⁴ The Bureau proceeded with discovery in the HDO, with complete awareness of the facts contained in the Report. Time Warner and Cablevision were made parties to the proceeding,⁵ and they participated fully in discovery and the factual development of this case.

4. Over the course of the months of discovery that followed, Liberty answered detailed interrogatories and provided volumes of information to the other parties.⁶ Sixteen individuals were ultimately deposed, including Howard and Edward Milstein, and Peter Price, Liberty's principals. In addition, Liberty produced hundreds of documents at the parties' request. As part of document discovery, Liberty produced numerous internal documents, such as Liberty's license inventories and Weekly Progress Reports.

5. After the close of initial discovery in early June 1996, the Bureau joined Liberty in making a Joint Motion for Summary Decision on all issues designated in the HDO (the "Joint Motion"). After the Joint Motion was submitted, the parties became entangled in a second round of discovery regarding Liberty's license inventories which, according to Time Warner, contained

³ 11 FCC Rcd 14133 (1996).

⁴ *Memorandum Opinion and Order*, FCC 96M-116 (rel. May 15, 1996), n.2.

⁵ HDO, ¶ 33.

⁶ Liberty Proposed Findings ¶¶ 3, 135.

proof of earlier discovery by Liberty of premature activations. After the close of round two of discovery, the Presiding Judge ordered a mini-hearing to resolve candor issues related to Liberty's knowledge of premature activations, in aid of the pending Joint Motion.⁷

6. The mini-hearing lasted seven days and produced nearly 1,500 pages of testimony from seven witnesses, including testimony from Liberty's principals, Howard and Edward Milstein and Peter Price, as well as testimony from Liberty's licensing counsel, Howard Barr and Michael Lehmkuhl, of Pepper & Corazzini ("P&C").⁸ All parties had a full opportunity to examine and cross-examine these witnesses, sometimes for multiple days.

7. In the course of the mini-hearing, Liberty discovered -- and immediately produced -- a memorandum dated April 26, 1995 from Behrooz Nourain to Edward Milstein,⁹ which Liberty's counsel had not seen before.¹⁰ As the record showed, this document played a part in the realization by Liberty's principals and outside counsel, that the wrongdoing was discovered during the course of a meeting held on April 27, 1995.¹¹ This discovery led to the internal investigation and ultimately to the submission of the Internal Audit Report to the FCC.¹² All

⁷ *Memorandum Opinion and Order*, FCC 96M-265 (released Dec. 10, 1996).

⁸ Two more days of testimony were taken in connection with the April 20, 1993 Jennifer Richter letter, adding another 353 pages of testimony, for a total of 1,842 pages of testimony.

⁹ TW/CV 34.

¹⁰ Liberty Proposed Findings ¶ 13.

¹¹ Liberty Proposed Findings ¶¶ 56-59, 79.

¹² Liberty Proposed Findings ¶¶ 60-69.

parties to the HDO received copies of this document as soon as Liberty discovered it in January 1997.¹³

8. After the mini-hearing closed, the parties submitted their proposed findings of fact and conclusions of law. Liberty expressly stated in its initial proposed findings that it “has not relied on the Internal Audit Report in asserting that the licenses at issue should be granted.”¹⁴

9. Just as the proceeding appeared to be drawing to a close with the submission by all parties of proposed findings of fact and conclusions of law, Time Warner moved for a third round of discovery designed to prove that Liberty’s principals discovered premature activations before late April 1995. The purported basis for this motion was the April 20, 1993 letter by Jennifer Richter, Esq., then a P&C attorney, to Mr. Bruce McKinnon which appeared to reflect a concern on the part of Ms. Richter that Mr. Nourain did not properly understand the Commission’s licensing procedures.¹⁵ Time Warner’s motion for a third round of discovery was granted, additional documents were produced, more depositions were taken and witnesses, including Ms. Richter, were called to testify before the Presiding Judge.¹⁶ After round three of additional discovery and hearings, the parties submitted their supplemental proposed findings of fact and conclusions of law. As Liberty has previously shown, the additional discovery relating

¹³ Liberty Proposed Findings ¶ 13.

¹⁴ Liberty Proposed Findings ¶ 136. However, Liberty holds fast to its position that the Report is an accurate statement of what Liberty’s investigating counsel knew and understood to be the facts as of the date that the Report was prepared (Tr. 2362:22-2363:10) (Nov. 5, 1997 hearing before the Presiding Judge).

¹⁵ TW/CV 51.

¹⁶ In the course of this additional discovery, license inventories prepared by Ms. Richter were produced, as well as billing records from P&C (TW/CV 58-62, 63).

to Ms. Richter and her letter did not demonstrate any knowledge by Liberty's principals of premature activations before late April 1995.

10. After the Report became public in September 1997, Time Warner moved on October 1, 1997 for a fourth round of discovery and also moved for admission of the Report into evidence. Liberty did not oppose the introduction of the Report into evidence but questioned its evidentiary value. Liberty opposed further discovery on grounds that it was repetitive and that Time Warner was seeking to discover materials underlying the Report which were protected by the attorney-client privilege and the work product doctrine.

11. On November 5, 1997, pursuant to Order FCC 97M-180 (rel. Oct. 28, 1997), a conference was held before the Presiding Judge. At this conference, the Presiding Judge accepted the Report into evidence. The Presiding Judge declared the record closed and put an end to any further discovery. By Order FCC 97M-185 (rel. Nov. 10, 1997), the Presiding Judge directed the parties to proceed with submitting proposed findings of fact and conclusions of law on the Report. In that Order, the Presiding Judge confirmed that "[t]he record is closed for all other purposes."

II. SUPPLEMENTAL PROPOSED FINDINGS OF FACT

A. Admission of the Report into Evidence Does Not Change Any of Liberty's Proposed Findings of Fact

12. No information contained in the Internal Audit Report alters the facts adduced during the course of this proceeding. A substantial evidentiary record has been developed in this case through all the parties' full participation in discovery and hearings. In fact, much of the additional discovery in this case was initiated at the insistence of Time Warner. Throughout this

continual discovery process, as the Bureau acknowledged, “Liberty, to its counsel’s credit, did not, in any significant manner, withhold responses to questions during these proceedings which may have touched upon information which may be contained in the Report.”¹⁷ Therefore, all the parties had full access to find and discover whatever relevant, non-privileged material was available relating to the issues designated in the HDO. As shown by Liberty’s previous submissions, each of its proposed findings of fact is supported by the record evidence in this proceeding, and the addition of the Report does nothing to alter the fundamental findings and conclusions urged by Liberty.¹⁸

13. For example, Liberty has provided evidence that it had a disjointed licensing process before the institution of a compliance program in mid-1995.¹⁹ This finding has not been disputed by any of the other parties.²⁰ With or without the Report in this proceeding, this proposed finding remains firmly established.

14. Also, the evidence adduced in this proceeding established that Liberty’s principals did not approve or encourage the activation of any paths without Commission authorization.²¹ The testimony of the witnesses amply supports this conclusion, and the Report does not challenge it. Nor has there been any testimony or other evidence produced in this proceeding to show that the cause of the premature activations was anything other than the disjointed licensing

¹⁷ Bureau Reply Proposed Findings ¶ 21.

¹⁸ Since the Report does not even address the third issue designated in the HDO -- that of the allegedly inconsistent Behrooz Nourain statements -- there is no need in this proposed finding to discuss the effect of the Report on Liberty’s proposed finding on that issue.

¹⁹ Liberty Proposed Findings ¶¶ 27-46, 71-73, 86.

²⁰ Liberty Reply Proposed Findings ¶¶ 3, 4.

process that prevailed at Liberty during the time in question. Therefore, with or without the Report, Liberty has demonstrated that none of Liberty's principals intended to violate the law or the Commission's rules.²²

15. The internal investigation was aimed at developing a Compliance Program so that future violations of law could be averted.²³ In this proceeding, Liberty has more than shown that it now has an effective Compliance Program in place and that Liberty can be relied upon prospectively to follow the law and the Commission's rules. The record is uncontroverted on this essential point. As the Bureau recognized, "[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."²⁴ Again, the Report does not change this conclusion at all.

16. The record demonstrates that Liberty always intended to disclose fully to the Commission the facts and circumstances of the premature activations.²⁵ While the parties have questioned the completeness of Liberty's disclosures, they have not been able to produce any evidence to rebut credible and candid testimony that Liberty had always intended to make full disclosure to the Commission once Liberty had ascertained what actually happened.²⁶ The inclusion of the Report in the record does not lead to a contrary finding. Since Liberty does not rely on the Report for any purpose in this proceeding, Liberty does not seek to argue that its

²¹ Liberty Proposed Findings ¶¶ 25, 26, 74, 77-78, 88, 90.

²² Liberty Proposed Findings ¶¶ 73, 75-78, 88-90; Bureau Proposed Findings ¶¶ 102-103.

²³ TW/CV 29.

²⁴ Bureau Proposed Findings ¶ 103.

²⁵ Liberty Proposed Findings ¶¶ 81-83, 96-97.

²⁶ Liberty Reply Proposed Findings ¶¶ 16-25.

submission of the Report revealed its intent to disclose fully to the Commission the facts and circumstances of the premature activations. Consistent with the foregoing, however, Liberty submits that the substantial record developed in this case fully supports the proposition that -- independent of the Report's submission -- Liberty had always intended to disclose the facts and circumstances of the premature activations to the Commission.

17. Finally, Liberty has proposed findings that its principals -- *i.e.*, Howard and Edward Milstein and Peter Price --²⁷ did not learn of premature activations before April 27, 1995, and that the witnesses testified credibly and candidly about this issue.²⁸ Again, while it does not rely on the Report, Liberty observes that the Report's fundamental conclusion on this point is not different. Furthermore, the primary thrust of the internal investigation was not to learn when anyone at Liberty found out about premature activations; it was aimed at discovering the full extent of the violations and then developing an effective Compliance Program.²⁹ These considerations must be kept in mind in properly evaluating the effect the Report has on the proposed finding that Liberty's principals did not learn of unauthorized service before late April 1995.

18. Substantial discovery and factual development in the course of the hearing has definitively established that Liberty's principals discovered the possibility of premature

²⁷ Liberty believes that the word principal accurately describes these three individuals because of their roles in running Liberty Cable. Under Commission precedent, the term may also include Mr. Philip Milstein by virtue of his ownership position in the company. However, Mr. Philip Milstein was not active in the management of the company. H. Milstein Dep. 11:11-12:1 (LIB4). *See infra*, Supplemental Conclusions of Law at ¶ 5.

²⁸ Liberty Proposed Findings ¶¶ 79-80, 91-95.

²⁹ TW/CV 29.

activations no earlier than April 27, 1995.³⁰ In particular, Liberty points to the April 26, 1995 memorandum from Mr. Nourain to Mr. Edward Milstein, which assisted the witnesses in recalling the sequence of events that led to the realization on April 27, 1995 that a serious violation of law may have occurred.³¹ The April 26 memorandum was not found until January 1997, in the course of the mini-hearing, and, thus, neither Liberty nor its investigating counsel had the benefit of this document in preparing the Report. In this and many other ways, the record amassed in the hearing, with the full participation of all the parties, is more complete than what the Report disclosed in 1995. Since the HDO honed in on the precise issue of first discovery of premature activations by Liberty's principals -- which was not the focus of the internal investigation -- reliance should be placed on the sharply focused discovery and fact-finding efforts on this central issue in the HDO.

19. Even if the parties seek to argue based on the Report that Liberty's employees and agents knew about premature activations before late April 1995, such a finding should have no decisional significance absent some competent proof that Liberty's principals knew about unauthorized operations before late April 1995. Even with the Report in the record, there is simply no evidence that any Liberty employees or agents communicated any knowledge of unauthorized activations to Liberty's principals at any time. Indeed, the record is uncontroverted that part of the problem was the lack of communication between Liberty's employees and agents and its principals on licensing matters.³² Accordingly, the Report does not rebut the finding

³⁰ Liberty Proposed Findings ¶¶ 47-59, 79-80, 91-95

³¹ TW/CV 34; Liberty Proposed Findings ¶¶ 91-93.

³² Liberty Proposed Findings ¶¶ 43-46, 71, 86; Liberty Reply Proposed Findings ¶ 3. Since the discovery of the premature activations in late April 1995, and with the institution of the

consistently advanced by Liberty that its principals did not discover premature activations before late April 1995.

20. Any potential doubt about Mr. McKinnon's role is insufficient to upset Liberty's proposed finding, and any such doubts are resolved by a full examination of the record. First, Mr. McKinnon's testimony and the Report are not on their face inconsistent. Mr. McKinnon testified consistently at his depositions that he was not aware of Liberty's engaging in operations without a Commission license or other authorization to do so.³³ For its part, the Report states the conclusions of Liberty's investigating counsel that Mr. McKinnon "appears" to have been aware "that some buildings were being activated without a specific FCC license or STA" but goes on to state that Mr. McKinnon "did not believe that the absence of a specific license or STA was a problem because he believed Liberty could operate on the authority of Hughes Aircraft's experimental license until the FCC specifically granted the microwave paths".³⁴ Mr. McKinnon's testimony in the HDO that he was not aware of *unauthorized* operations is therefore not contradicted by the Report. The Report also concludes that Mr. McKinnon did not pass on

Compliance Program, Liberty has not engaged in any unauthorized service. Liberty Proposed Findings ¶¶ 69, 84.

³³ McKinnon I Dep. 13:3-8 (TW/CV 41); McKinnon II Dep. 23:18-24 (TW/CV 53). Furthermore, Mr. McKinnon's employment at Liberty terminated on May 14, 1993,³³ two years before Liberty's principals found out about premature activations. McKinnon II Dep. 21:16-22:3 (May 14, 1997) (TW/CV 53). In addition, although Mr. McKinnon was the addressee of the April 20, 1993 letter from Ms. Richter, he was already leaving Liberty as of the date of the letter and does not recall receiving it. Liberty Supp. Proposed Findings ¶ 15 n.23. Therefore, there is simply no evidence that Mr. McKinnon received it or took any action on it.

³⁴ Report at 11.

any information about the paths “Mr. Price or other Liberty management officials.”³⁵ Therefore, even with the Report in the record, there is no evidence to support the finding that Liberty’s principals knew about premature activations before late April 1995.

21. Second, even assuming the record supported Mr. McKinnon’s knowledge of wrongdoing, it is important to clarify Mr. McKinnon’s role in the company. As stated by counsel for Liberty at the last hearing conference, Mr. McKinnon, despite his title, was not a corporate officer of Liberty and was not considered a “principal” of the company as Liberty used that term in the most recent pleadings filed in this case.³⁶ These are accurate statements. However, Liberty has become aware that in its Third Supplemental Responses to Interrogatories, it included Mr. McKinnon, along with Messrs. Bell and Curbelo in response to the Bureau’s interrogatory. In fact, none of these individuals was a corporate officer. Rather, the response in the Third Supplemental Responses was an attempt by Liberty, on the basis of inquiries from the Bureau, to respond as broadly and inclusively as possible to the discovery inquiry. To this end, Liberty, in its response, included any Liberty employee whose title included the word “officer”. Even so, this expansive use of the word “officer” does not take away from the fact that Mr. McKinnon and the other individuals were not corporate officers of Liberty Cable Co., Inc., and their responsibilities and roles in the company would not place them in that category. In fact, as Mr. McKinnon testified, his duties consisted only of “tactical things” such as “day-to-day operations, answering the phones, installing the cable, activating new buildings, [and] processing

³⁵ Report at 11 and n.9. Liberty points out this language in the Report not to rely on it, but to show that even with the Report in evidence, the essential conclusions found by the HDO are not ultimately undermined.

³⁶ Liberty Proposed Findings, ¶ 22; Liberty Reply Proposed Findings, ¶ 8; Liberty Supplemental Proposed Findings, ¶¶ 49-54.

of bills.”³⁷ Additionally, in its review of the record of this case, Liberty has found another instance in which Mr. McKinnon (and, in fact, other Liberty managers) were inadvertently included in a list of “principals”.³⁸ Again, however, this statement is incorrect and, in fact, is contradicted on its face by Liberty’s express statement that “[c]ommencing in 1991 and through the period relevant to this proceeding, the principals of Liberty consisted only of Howard Milstein, Edward Milstein and Peter Price.”³⁹ In any event, it is clear that Mr. McKinnon, who was not an officer, director, or owner of the company, could not be considered a principal of Liberty.

III. SUPPLEMENTAL CONCLUSIONS OF LAW

A. Admission of the Report into Evidence Does Not Alter Liberty’s Proposed Conclusions of Law

1. Commission precedent is well-established that the character qualifications of a Commission licensee hinge on two factors: the licensee’s truthfulness and its reliability to obey the law and the Commission’s rules.⁴⁰ Liberty, in numerous prior submissions, has more than amply demonstrated both its truthfulness before the Commission and its reliability to follow the law. Inclusion of the Report into the record does not upset this basic conclusion in any way.

³⁷ McKinnon I Dep. 5:16-19 (June 5, 1996)(TW/CV 41).

³⁸ Liberty Proposed Findings at ¶ 24 n. 36

³⁹ Liberty Proposed Findings ¶ 22 (emphasis added).

⁴⁰ *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1183 (1986) (“*Character Policy Statement*”).

2. The HDO has in essence boiled down to the question of first discovery of premature activations at Liberty. Liberty has been consistent that its principals did not learn before late April 1995 that unauthorized operations had occurred.

3. Time Warner and Cablevision will no doubt harp on the alleged inconsistencies between what Liberty's witnesses testified to in the HDO versus what Liberty's attorneys concluded two years ago in the Report. However, even if this were the case, Commission precedent holds that disqualifying misrepresentation or lack of candor requires a demonstrated intent to deceive.⁴¹ The same intent is required to find lack of candor in testimonial evidence.⁴² This intent cannot be inferred from suggestive facts; it must be based on "substantial evidence of an intent to deceive" that "clearly reveals serious and deliberate falsehoods by the licensee."⁴³ The other parties cannot meet this standard, even with the Report in evidence.

4. Whatever the Report may have concluded about any knowledge purportedly possessed by Liberty's other employees or agents -- such as Mr. McKinnon and Ms. Richter -- Liberty has consistently represented to the Commission that none of Liberty's principals found out about unauthorized operations before late April 1995.⁴⁴ Liberty's position has now been

⁴¹ *Swan Creek Communications, Inc. v. Federal Communications Comm'n*, 39 F.3d 1217, 1222 (D.C. Cir. 1994), quoting *Weyburn Broadcasting Limited Partnership*, 984 F.2d 1220, 1232 (D.C. Cir. 1993); *Fox River Broadcasting, Inc., et al.*, 88 FCC 2d 1132, 1137 (Rev. Bd. 1982).

⁴² Liberty Proposed Findings ¶ 101.

⁴³ *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. 1990); *Cannon Communications Corp.*, 5 FCC Rcd 2695, 2700 (Rev. Bd. 1990); see, *Joseph Bahr, et al.*, 10 FCC Rcd 32, 33 (Rev. Bd. 1994).

⁴⁴ TW/CV 29; Joint Motion, ¶¶ 36, 95, 114; Liberty Proposed Findings ¶¶ 79, 91-93, 95; Liberty Supplemental Proposed Findings ¶ 40.

substantiated by the record in this case which was fully developed with the participation of all parties. Even with the Report in the record, no “substantial evidence” has been presented that “clearly reveals serious and deliberate falsehoods” required for the Commission to find a disqualifying intent to deceive. Liberty, therefore, neither lacked candor nor misrepresented facts to the Commission and was at all times truthful and forthright with the Commission.

5. As shown above at ¶¶ 12 through 21 of the Supplemental Proposed Findings of Fact, none of the other proposed findings in this case is adversely affected by the Report, thus supporting the conclusion of law that Liberty has been truthful and candid on all other issues in this case. In particular, the Report leaves undisturbed the finding that none of Liberty’s principals approved or encouraged anyone at Liberty to activate paths without Commission authorization. The Commission has repeatedly found that disqualification is inappropriate where its owners and senior managers are not involved in the improper conduct by the company’s employees.⁴⁵

6. Even with the inclusion of the Report in the record, the following conclusion by the Bureau still holds true:

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

⁴⁵ See *David A. Bayer*, 7 FCC Rcd 5054, 5055-56 (1992) (imposing forfeitures of \$100,000 and \$405,000 but not revocations for repeated, intentional violations of various Commission rules by engineers, an engineering supervisor, and outside contractors). See also *Pinelands, Inc.*, 7 FCC Rcd 6058, 6063-66 (1992) (granting application for transfer of control despite misstatements on Commission license application by general counsel, secretary and vice president of broadcast company); *MCI Telecommunications Corp.*, 3 FCC Rcd 509, 511-14 (1988) (imposing forfeiture of \$10,000 but not revocation for improper activations, premature construction of facilities and inaccurate Commission filings by engineers, frequency coordinators and contractors); *Abacus Broadcasting Corp.*, 8 FCC Rcd 5110 (Rev. Bd. 1993) (imposing \$5,000 forfeiture but not revocation for misconduct initiated by counsel).

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 [*Character Policy Statement*].⁴⁶

Accordingly, based on the extensive record developed in the HDO, Liberty has been candid, forthright and truthful with the Commission and can be counted on to comply prospectively with the law. Adding the Report to the record does not change this fundamental conclusion, and accordingly, disqualification of Liberty as a Commission licensee would be unwarranted.

B. Given the Extensive Record Developed by All Parties in this Case, the Report Should Be Given Little or No Weight

7. In light of the substantial factual development and the extensive record accumulated in the HDO, the significance of the Report has been diminished. Its evidentiary value has decreased accordingly and the Report should be accorded little or no weight.⁴⁷

8. As shown above, adding the Report to the record has not changed any of the essential findings in this case, in particular the finding that Liberty's principals did not discover premature activations before late April 1995. Time Warner for well over a year now has been trying to find contrary proof, and it has been repeatedly indulged in this pointless fishing expedition, to no avail. Although the Report is now in the record, there is still no evidence to rebut the conclusion that Liberty's principals found out about the possibility of premature activations in late April 1995, and not before.

⁴⁶ Bureau Proposed Findings, ¶ 103 (footnote omitted).

9. With the Report in hand, Time Warner and the other parties have seized on a few conclusions in the Report indicating that certain Liberty employees may have known about unauthorized service before April 1995. Yet, even accepting *arguendo* the validity of these conclusions in the Report, there is still no evidence that the purported knowledge of Liberty's employees was imparted to Liberty's principals. In fact, the uncontroverted record has established that Mr. Price, together with Liberty's outside counsel, came to the realization of premature activations in the course of a meeting on April 27, 1995 to discuss how to deal with the delays engendered by Time Warner's repetitive petitions to deny Liberty's license applications.⁴⁸ According to the extensive record in this case, discovery of premature activations was not triggered by contact between Liberty's principals and its employees. Therefore, whatever the Report may have concluded as to the knowledge purportedly possessed by Liberty's employees or agents regarding unauthorized operations, such knowledge -- if it ever existed -- was ultimately inconsequential to the question of how and when Liberty's principals found out about premature activations.

10. The question of the credibility of Liberty's witnesses regarding when they first learned about premature activations has been the subject of intense scrutiny in this proceeding. To the extent the Report may be used by Time Warner and Cablevision to support their credibility arguments further, it represents merely cumulative evidence on a well-worn issue, and as such, the Report should be entitled little or no weight.

⁴⁷ Cf. Fed. R. Evid. 403 (evidence, even if relevant, should be excluded if its probative value is substantially outweighed by the danger or confusion of the issues or if it constitutes "needless presentation of cumulative evidence.").

⁴⁸ Liberty Proposed Findings ¶¶ 56-59, 79.

11. More to the point, during the rounds of hearings on the narrow issue of first discovery, the Presiding Judge had the full opportunity to assess the demeanor of the testifying witnesses who were examined and cross-examined by the Presiding Judge and all parties. Their credibility should be determined within the total context of the hearings and the substantial record developed in the HDO. The Presiding Judge should decide this case on the extensive record that all parties had a hand in developing, not on the conclusions reached two years ago by Liberty's counsel during the internal audit.

IV. CONCLUSION

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

Respectfully submitted,
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Dated: November 19, 1997

CERTIFICATE OF SERVICE

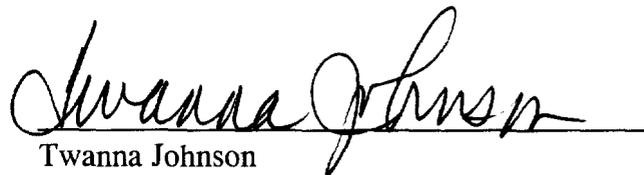
I hereby certify that on this 19th day of November 1997, I caused copies of the foregoing "Supplemental Proposed Findings of Fact and Conclusions of Law" to be hand-delivered to the following:

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