Misleading Pleading And Applications

77. In multiple STAs prepared by Mr. Lehmkuhl after April 26, 1995, Liberty misleadingly advised the Commission that its applications were "in technical order." That disclosure is misleading and lacks candor because technical compliance implies, at a minimum, fundamental licensing compliance before activation. (Id.) In view of the regulatory function of an STA to authorize activations on short notice, truth and accuracy are prime concerns and carry an added importance to the licensing process. The Rule leaves nothing to chance. It specifically requires that an STA request:

> must contain full particulars as to the proposed operation including all facts sufficient to justify the temporary authority sought and the public interest therein."

47 C.F.R. §101.31. [Emphasis added.] Liberty failed to meet these basic requirements. Through a deliberate choice made by Liberty, there was no disclosure made to the Commission of the most significant of regulatory facts, i.e.; that multiple STAs were being sought for paths that already had been activated without authorizations. Instead, the STAs misleadingly used prospective language of a "need for service" and urged that any delay "would seriously prejudice the public interest." (TWCV Exh. 17 at 3.) Each filing is analyzed below in the context of an overall deliberate plan to keep information from the Commission.

May 4 STAs

78. Mr. Nourain signed an STA application that was prepared by Mr. Lehmkuhl for an OFS station at 20 West 64th Street. The original application had been filed on November 7, 1994, to add four new microwave paths. The application states:

> Grant of the application has been severely hampered because of processing delays and because of the petition to deny filed by Time Warner of New York and Paragon Cable of Manhattan (collectively "Time Warner").

(TWCV Exh. 17 at 3.) In requesting an STA, Liberty merely notes that it must convert buildings from Time Warner's service to Liberty service where customers had opted to switch to Liberty. Liberty must deliver the services within 30 days or loose the business to Time Warner which would be contrary to the policy encouraging new competition to counter the market power of established cable systems. Liberty makes its argument as follows:

> Since Liberty's applications are in technical order, and since Time Warner has not challenged Liberty's application on a technical basis, -- , Liberty submits that the institution of an STA as requested herein is very much in the public interest and should be granted immediately.

(TWCV Exh. 17 at 5.) The same argument was applied in each of the 14 STA applications that were filed on May 4. Also, in misleading fashion the future tense was used, i.e., "will operate." There was no disclosure of ongoing unauthorized activations of which Liberty management, and Mr. Nourain, and Liberty's counsel had full knowledge on April 28, 1995, a date which was four business days and one weekend before the filing date of May 4. As found above, Mr. Price, with advice from the several legal counsel who were advising Liberty, determined that disclosure to the Commission was to be deferred in Liberty's interest. Therefore, at least one Liberty principal had knowledge of the misleading and candorless multiple disclosures of May 4.

May 17 Surreply

79. On May 5, 1995, Time Warner filed its reply to an opposition of Liberty to a Time Warner petition. Time Warner identified facilities at 639 W. End Avenue and 1775 Fifth Avenue which are listed in Appendix A of the HDO as providing microwave service without the required license. Liberty filed a surreply on May 17, 1995, which admitted that it had activated the two facilities. (TWCV Exh. 18 at 1-2.) Liberty also disclosed unauthorized activations at 13 additional facilities: 35 W.End Avenue; 767 Fifth Avenue; 564 First Avenue; 545 First Avenue; 200 E. 32nd Street; 30 Waterside Plaza; 433 E. 56th Street; 114 E. 72nd Street; 524 E. 72nd Street; 25 W. 54th Street; 16 W. 16th Street; 6 E. 44th Street; and 2727 Palisades Avenue. (Id.at 2; compare Appendix A of HDO.)

80. The surreply pleading was signed and affirmed by Messrs. Price and Nourain. Liberty admitted that it had activated microwave service at two sites at 639 West End Avenue and 1775 York Avenue and that applications for authorizations were pending. (TWCV Exh. 18.) Liberty stated in justification that it had "traditionally sought special temporary authority" to operate pending Commission approval of license applications and represented that it has been "Liberty's pattern and practice" to either receive a grant or request an STA prior to activation. (Id.) Liberty offered the following explanation:

> [A]pplication for each of the above-referenced sites[46] has exceeded the norm due to the frequency coordinator's use of incorrect emission designators. Mr. Nourain, perhaps inadvisably, assumed grant of the STA requests, which in his experience had always been granted within a matter of days of filing, and thus rendered the paths operational. To compound the situation, the administration department failed to notify Mr. Nourain that grant of Liberty's applications was being held up indefinitely as a result of the Time Warner petitions. Mr. Nourain was unaware of the petitions against Liberty's applications until late April of 1995. Thus, 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.

(TWCV Exh. 18 at 3.) There was no disclosure of the detailed information about additional paths which Liberty had activated prior to May 17, information which Mr. Barr had received from the April 26 Nourain memorandum (TWCV Exh. 35) and Mr. Lehmkuhl's April 28 inventory (TWCV Exh. 34.) The Bureau did not have the information about those activations because on April 27, 1995, Mr. Price had decided not to disclose that information until some later date. However, the disclosure on May 17 was not merely incomplete and lacking in candor. It was misleading to represent that STAs were always granted "within a matter of days." (Nourain, Tr. 640.) It was a misrepresentation to represent to the Commission that it was Liberty's "practice" to have a license grant or STA authorization prior to activating paths because, as disclosed in the Audit Report, there were 93 instances of premature activations since Liberty began offering service in the OFS spectrum. It also was a misrepresentation to state that except for the two site activations reported by Time Warner on May 5, Liberty was never found to be operating in

[46] The "above referenced sites" would apply to the 2 identified by Time Warner and to 14 other sites identified by Liberty as being subjects of the May 4 STA requests. There is no explanation made in the May 17 filing as to why there had been no disclosure made on May 4.

violation of the Commission's rules. (TWCV Exh. 18 at 2.) That representation is false and directly at odds with Mr. Price's knowledge of unauthorized activations that he reported to counsel on April 27, 1995, and which Mr. Lehmkuhl confirmed on April 28, 1995.

May 19 STA

81. The Palisades Avenue episode was a uniquely flagrant event because it presented Liberty with a myriad of missed opportunities to disclose the premature activation of the facility. Liberty had filed an application on March 24, 1995, as a modification to add an OFS path to provide a service to Palisades Avenue from the "Century Station" located at 2600 Netherlands Avenue. (TWCV Exh. 38.) On May 19, 1995, Liberty filed an STA request for the microwave facility at 2727 Palisades Avenue. Liberty used the same infirm disclosure as the May 4 STA request while omitting the fact that unauthorized activation had already occurred at the same facility.[47] This facility was never subjected to a Time Warner petition to deny. (TWCV Exhs. 38, 40; Lehmkuhl, Tr. 1274-77.) The May 19 request failed to report that service had already been activated on April 24, nearly a month before the STA request and only four days after activation. Also, there was no disclosure made that after-the-fact authorization was being sought for Palisades Avenue. This was another instance of Liberty's lack of candor with the Commission.

May 23 Amendment

82. On May 23, 1995, Liberty applied for an amendment to add an additional path from the Century Station to a receive site at 4525 Henry Hudson Parkway. The application included a schematic diagram indicating that an application for Palisades Avenue was still pending. (TWCV Exh. 39 at 9.) But Liberty did not disclose that the path to 2727 Palisades Avenue was already in operation without authorization. (Id.). On the very next day, May 24, 1995, Liberty filed an amendment to the May 19 STA request for Palisades Avenue in order to include the OFS path for Henry Hudson Parkway. (TWCV Exh. 39; Lehmkuhl, Tr. 1271-72.) Liberty requested that the May 24 STA amendment be considered a part of the original May 19 request. (TWCV Exh. 39 at 1; Lehmkuhl, Tr. 1271-72.) In another missed opportunity for truth and accuracy, Liberty did not disclose the fact that the Palisades Avenue facility was already activated. (Lehmkuhl, Tr. 1273.) Later, on May 26, 1995, Liberty filed a reply to Time Warner's

[47] The STA request was not granted until September 7, 1995. (Lehmkuhl, Tr. 1282; TWCV Exh. 43 at 2.)

opposition to the May 4 STA requests. Liberty failed to mention the fact that 15 of the facilities for which it was seeking STA relief (14 in the May 4 applications plus Palisades Avenue) were already in operation. (TWCV Exh. 19.) This pleading was repetitious in its failure to fully disclose significant information.

July 17 License Application

83. On July 17, 1995, Liberty filed applications for four new locations: 1295 Madison Avenue,; 38 E. 85th Street; 430/440 E. 56th Street; and 380 Rector Place. (TWCV Exh. 25.) These facilities are listed in Appendix A of the HDO. The facilities were in operation on July 17 when the applications were being filed. Mr. Lehmkuhl prepared Liberty's license applications. (Lehmkuhl, Tr. 1193-94; TWCV Exh. 25.) Mr. Nourain and Mr. Barr reviewed the license applications prior to filing. (Nourain, Tr. 884-85; Lehmkuhl, Tr. 1193-94; TWCV Exh. 25.) The license applications lacked candor by failing to disclose that Liberty was already operating the microwave paths for which it was requesting licenses. (TWCV Exh. 25.) On July 24, 1995, Liberty filed STA requests urging the Commission to authorize activation that contained only minimal conclusory disclosure that certain paths were already activated. (TWCV Exhs. 27, 30.)

Other Nondisclosures Of Activations

84. On July 12 and July 24, 1995, Liberty again amended the Palisades Avenue STA request to include additional receive sites at 3001 Henry Hudson Parkway, 3875 Waldo Avenue and 2500 Johnson Avenue. (TWCV Ex.40.) Liberty disclosed that its original May 19 STA request was still pending and that authority was required in order to operate the requested facilities until the grant of the underlying license. (TWCV Exhs. 40, 43.) But there was no disclosure of the fact that the facility at Palisades Avenue was operating without authorization.

85. The Bureau issued a Section 308(b) request on June 9, 1995, which required Liberty to provide more detailed information about Liberty's unauthorized activations. (TWCV Exh. 20.) The letter stated that the information was relevant to the pending STA requests and required that Liberty furnish the Bureau with "the date each unauthorized path was placed in preparation as well as the number of subscribers currently being served by each new path." (Id.) On June 16, 1995, Mr. Barr submitted a response on behalf of Liberty and Mr. Price provided a cover letter. (TWCV Exh. 21 and L/B Exh. 3.) Mr. Barr listed only the same unauthorized

facilities that had been disclosed in the May 17 Surreply. (TWCV Exh. 18.) There was no disclosure of the 4 additional activations which were the subject of Liberty's license applications filed on the following day, July 17, 1995, for the paths that were operating without authorization after Liberty's May 17 surreply. (TWCV Exh. 25.) At no time did Liberty supplement its June 16 response to the Section 308 letter to reveal the 4 additional unauthorized activations.

Liberty's Affirmative Defense

86. There were 13 facilities that were prematurely activated after a license application had been filed. (HDO at App. A and Table I.) A number of those applications were the subject of Time Warner petitions to deny that were filed on January 9, 1995. [48] Mr. Price regularly received copies of the petitions. (Barr, Tr. 1815-16; Price, Tr. 1435-36.) In January 1995, Mr. Barr told Mr. Price that the petitions would delay the granting of the licenses. (Barr, Tr. 1795-96.) Mr. Lehmkuhl gave similar advice to Mr. Nourain. (Lehmkuhl, Tr. 1189-90.) Mr. Nourain testified that he understood that the petitions would delay receiving grants of the licenses. (Nourain, Tr. 1069-70, 1188-89.)

87. Liberty defends its admitted failure to know about unauthorized activations on Mr. Nourain's belief that at the time that applications were filed, Mr. Lehmkuhl was simultaneously applying for STAs. (Nourain, Tr. 645, 714-15, 936-37.) Mr. Price first learned of STAs at a "brownbag" meeting of the Bureau staff in 1991. (Price, Tr. 1357.) Mr. Price knew that Liberty was experiencing delay in obtaining OFS licenses and he believed the delays were caused by a problem in the Commission's computer program. (Price, Tr. 1357-58.) It was acknowledged by Bureau staff that Liberty could seek STA relief for unopened paths that were the subject of pending licenses. (Price, Tr. 1358.) But the pending petitions to deny licenses were still in place to block the STA requests. There was no realistic procedure available to expedite authorizations and Liberty and its filing counsel at Pepper & Corazzini knew that. On April 20, 1993, Ms. Richter explained the situation in detail to Mr. Nourain who passed it on to Mr. Price. (TWCV Exh. 51.) Notwithstanding those realities, Mr. Nourain testified that he had instructed Mr. Lehmkuhl to file STAs simultaneously with license applications. Liberty asserts as a "good faith" defense that from late 1994 to late April 1995, Mr. Nourain believed that the activations for unlicensed paths were covered by STAs. But that defense was negated by the Lehmkuhl inventory of February 1995 which did not disclose any STAs (L/B Exh. 1.) Mr. Lehmkuhl

[48] Those petitions to deny were not based on allegations of premature activations.

contradicted Mr. Nourain in testifying that Mr. Nourain was never told that he should file STAs as a matter of course. (Lehmkuhl, Tr. 1038.) Mr. Barr denied that there was any such standing instruction for Liberty to automatically file STAs. (Barr, Tr. 1821.)

88. There is no substantial evidence of record to support this "good faith" belief in STAs as a defense and it is rejected. The facts established through the testimony show that there were delays resulting from the petitions to deny and Mr. Nourain and Mr. Price were aware of those delays since January 1995. The testimony of Mr. Lehmkuhl and Mr. Barr is accepted over the contradictory testimony of Mr. Nourain. Therefore, the STA defense is meritless. In January 1995, Liberty activated 4 facilities for which there were pending applications and one facility at 441 E. 92nd Street for which there was no pending application. (TWCV Exh 30.) There has been no explanation given as to how the 92nd Street facility was activated without a pending license application. The evidence shows in its totality that Mr. Nourain activated OFS paths without any regard to authorizations and Liberty's executives were totally removed from and unconcerned about licensing compliance.

89. Liberty and the Bureau believe that Mr. Price did attempt to implement a compliance procedure which, if followed in practice, would have prevented the unauthorized activations. The credible evidence of the hearing record does not support that argument. See Liberty/ Bureau Proposed Findings And Conclusions of Law filed February 28, 1997, at 12-23. In defense of its noncompliance, Mr. Price relies on a memorandum which he sent to Mr. McKinnon on February 26, 1992. (L/B Exh. 2.) The memorandum contains a brief general outline of a procedure "to accurately audit what licenses Liberty has requested and which have been provided." It also warns Mr. McKinnon:

> Please don't get diverted by the piles of paper arriving from Washington because they require an inordinate amount of time in order to log and maintain.

(Id.) The advice to Mr. McKinnon (and to persons at his level of management) to avoid the licensing paperwork after it has been filed shows a predisposition at the executive level to remain uninformed of licensing. Mr. McKinnon believed that the Price memorandum instructed him to leave the engineering and licensing to Mr. Stern. (TWCV Exh. 41 at 20.)

90. Mr. Price's memorandum of February 1992, also instructed Mr. Stern to audit Liberty's list of applications against licenses received. (Id.) Copies of Mr. Price's memorandum were sent to Mr. Stern and to Mr. Parriott at Pepper & Corazzini. Liberty argues in its brief:

> Unfortunately, as detailed below, Mr. Price did not follow through to make sure that his procedure was being carried out in the way that he wanted it to be.

Liberty/Bureau Proposed Findings of Fact and Conclusions of Law filed February 28, 1997, at 14. But there were actions taken and procedures adopted that implemented the policy. Liberty's principals recklessly ignored or abandoned the policy. For example, in early 1993, Ms. Richter prepared an inventory which she reviewed with Mr. Nourain. (TWCV Exhs. 58, 59.) After conversing with Mr. Nourain and becoming concerned that there may be a future problem of unauthorized activation, Ms. Richter wrote her uniquely instructive letter of April 20, 1993, which Mr. Price claims to have totally ignored insofar as it served as a warning against unauthorized activations. (TWCV Exh. 51.) There were later inventories prepared by Mr. Lehmkuhl that were highly informative, including those of February and April 1995, which Liberty was reluctant to share in this proceeding. In addition, Mr. Price had meetings at which internal weekly activity reports were discussed which identified sites and could have readily been used to monitor activations. However, the one person who had front-line responsibility for the activations, Mr. Nourain, was not invited to the meetings. These facts and circumstances show an institutional rejection by Liberty of licensing duties and responsibilities.[49]

Inconsistent Sworn Statements Of Behrooz Nourain

91. The HDO cites two sworn and facially inconsistent statements of Mr. Nourain that concern his knowledge of Time Warner's petitions to deny OFS applications. The HDO sets forth the following:

[49] Compare the hardwire interconnect violations that were the subject of a partial summary decision wherein it was shown that Liberty also intentionally averted compliance with local franchising procedures. Memorandum Opinion And Order FCC 97M-154, released September 11, 1997. Liberty has clearly demonstrated a propensity for avoidance of licensing regulation.

> As part of Liberty's explanation of the circumstances surrounding its initiation of unauthorized service, Mr. Nourain declared to the Commission that he was "unaware of the petitions against Liberty's applications until late April of 1995. Thus, without knowledge that his actions were in violation of the Commission's rules, and without intent to violate those rules, [he] commenced operation prior to grant." Surreply, May 17, 1995, p. 3. However, in an affidavit to the U.S. District Court for the Southern District of New York, dated February 23, 1995, Mr. Nourain stated, "I am advised that Time Warner has opposed Liberty's pending application to the Federal Communications Commission for various 18 Ghz microwave licenses." Response to Surreply, Attachment 2, p. 3. Liberty claims that the "placement of each of these statements in its proper context demonstrates that they are consistent." Reply, June 16, 1995, p. 3. Liberty explains that in the district court affidavit, Mr. Nourain focused exclusively on buildings Liberty served by hardwire interconnections. Mr. Nourain in that affidavit pointed out that one of the obstacles to converting these buildings to microwave was that Time Warner had filed petitions to deny Liberty's OFS applications. Liberty further explains that when Mr. Nourain submitted his May 17, 1995, statement to the Commission, he did not know until April, 1995, (as opposed to February 23, 1995) that Time Warner had opposed all of Liberty's OFS applications, including those proposing to provide service to the locations which Liberty was serving without authority.

HDO at Para. 8.

92. The first statement was submitted on February 23, 1995, to a federal district court. (TWCV Exh. 13; Jt. Exh. 26.) The second was submitted on May 17, 1995, to the Commission. (L/B Exh. 3; Jt. Exh. 6.) HDO at Paras. 8, 18. Both statements concern Mr. Nourain's knowledge at different points in time of Time Warner's petitions to deny that were filed in opposition to Liberty's OFS applications. In an affidavit dated February 23, 1995, Mr. Nourain stated that he was "advised that TWCV had opposed Liberty's pending application to the Commission for various 18 GHz microwave licenses." See HDO at Para. 8 quoted above which points out the apparent inconsistencies. Mr. Nourain "focused exclusively on buildings Liberty served by hardwire connections." (Id.) Mr. Nourain represented that if the Commission grants

Time Warner's petition to deny, "then Liberty will not be able to legally deliver its signal --- by microwave." (TWCV Exh. 13 at 4-5.) The HDO refers to Mr. Nourain's seemingly contradictory explanation in the May 17 Surreply [TWCV Exh. 18] and Liberty's contention that Mr. Nourain "did not know until April, 1995, (as opposed to February 23, 1995) that Time Warner had opposed all of Liberty's OFS applications, including those proposing to provide service to the locations which Liberty was serving without authority."[50] HDO at Para. 8. [Emphasis added.] In February 1995, Time Warner was petitioning only against Liberty's unlawful hardwire interconnects at three specified address locations. Liberty offers the explanation that the earlier statement addressed only those oppositions of Time Warner to microwave applications that would replace the illegal hardwiring interconnects. Consistent with that narrow focus (which was relevant to the issue before the court) Mr. Nourain noted that one of the obstacles to converting the buildings in question was the petitions to deny the replacement microwave applications which are distinguished from the premature OFS activations.

93. In the second declaration which was directed to the Commission in a Surreply dated May 17, 1995, Mr. Nourain endorsed a representation that was prepared by counsel which stated that he was "unaware of the petitions against liberty's applications until late April of 1995." (Jt. Exh. 27 at 3; TWCV Exh. 18 at 3.) To place the quote in context, on May 17, 1995, Liberty's counsel (with declaration endorsements of Mr. Price and Mr. Nourain) submitted the following pleading disclosure to the Commission:

> Mr. Nourain, perhaps inadvisably, assumed grant of the STA requests, which in his experience had always been granted within a matter of days of filing, and thus rendered the paths operational. To compound the situation, the administration department failed to notify Mr. Nourain that grant of Liberty's applications was being held up indefinitely as a result of the Time Warner petitions. Mr. Nourain was unaware of the petitions against Liberty's applications until late April of 1995. (Emphasis added and internal cites omitted.)

[50] The May 17th Surreply represented that "the administration department [Mr. Price] failed to notify Mr. Nourain that grant of Liberty's applications was being held up indefinitely as a result of the Time Warner petitions." (TWCV Exh. 18 at 3.) Yet in the February 23rd district court affidavit Mr. Nourain was representing that he knew of Time Warner's oppositions filed against Liberty's pending microwave applications. (TWCV Exh. 13.) [Nourain Tr. 718 etc. (1-13-97)]

Mr. Nourain admitted that he read the declaration before it was filed with the Commission. (Nourain, Tr. 2288, 2290.)

94. The language placed before Mr. Nourain for his signature was equivocal. On June 9, 1995, acting on the complaint of Time Warner, the Bureau requested an explanation. (Jt. Exh. 28.) On June 12, 1995, Mr. Nourain submitted a statement wherein he pointed out that the narrow purpose of the February affidavit was to address engineering assertions in an opposing affidavit on the requirement of local franchises for the Liberty non-common hardwire interconnects. Premature activations of Commission licensed microwave paths was not an issue before the district court. Mr. Nourain had reason to believe that Time Warner was complaining in the district court only about the unfranchised operations of Liberty and the limited number of microwave applications which would replace the unlawful hardwire interconnects. It cannot be determined from the evidence that Mr. Nourain had an intent to deceive. The truthfulness of Mr. Nourain's assertion that in February 1995 he knew of no premature microwave activations is not refuted on the narrow issue of inconsistent statements. It reasonably can be inferred that in February 1995, on counsel's instruction, Mr. Nourain was only addressing the narrow franchise issues.

95. In the final analysis, those narrowly drafted ambiguous representations authored by Liberty's counsel for Mr. Nourain's signature were not shown to be intentionally untruthful. The substantive document was drafted by Liberty's counsel and was faxed to Mr. Nourain for his review and signature. (Nourain, Tr. 2288 [Exh. 18 at Surreply], 2288-99 [Exh. 13, Affidavit], 2292 (input from counsel for Exh. 13 - "I Block" 2293 ["the lawyer wrote and I just read it"]). To put Mr. Nourain's statements in context, the February affidavit focused only on the rebuttal of Time Warner's engineering statement concerning the feasibility of serving three specified locations by microwave should Liberty decide to abandon the hardwiring rather than seek franchises. Mr. Nourain was only concerned with microwave service that would replace hardwire service in three locations. The May 17 declaration to the Commission addressed issues of known prematurely activated microwave paths which were discovered by Liberty no later than April 1995. There is a valid factual distinction found between the two statements.

DISCUSSION AND CONCLUSIONS OF LAW

Legal Standards

96. Liberty has admitted to violations of Section 301 of the Communications Act and Section 94.23 of the Commission's Rules [47 U.S.C. §301 and 47 C.F.R. §94.23] by operating OFS microwave facilities without obtaining Commission authorization. HDO at Para. 30 1)(a) and Appendix A to the HDO. See Joint Motion at para. 90.

97. It remains to be decided whether Liberty has violated Section 1.65 of the Commission's Rules [47 C.F.R. §1.65] by failing to notify the Commission of the premature activations in its underlying applications or in its requests for STAs. It also must be determined whether in relation to its premature OFS activations Liberty misrepresented facts to the Commission, lacked candor in its dealings with the Commission and whether liberty violated Section 1.17 of the Commission Rules [47 C.F.R. §1.17, HDO at Paras. 30(2)(b) and 30(3)(a)]. It is also necessary to determine whether based on those findings and conclusions, Liberty is qualified to be granted the OFS authorizations which it seeks [HDO at Paras. 30(2)(c) and 30(3)(b)].

98. The burden of proceeding and the burden of proof were assigned to Liberty. HDO at Para. 34. To convince the Commission that a decision in its favor is appropriate, Liberty must show by a preponderance of credible evidence that Liberty was merely negligent in its admittedly premature activations of microwave paths. Telestar, Inc., 2 F.C.C. Rcd 7352-53 (1987). Liberty must show that it did not intend to mislead the Commission by misrepresenting on May 4, 1995, that its applications were in "technical order" when it failed to timely disclose on May 4, 1995, that it had prematurely activated microwave facilities and that the nondisclosures in its licenses and STA filings were not intended to be misrepresentations and/or lacking in candor. Liberty also bears the same burden to show that its misrepresentation on May 17, 1995, of a "pattern and practice" of authorized activations was not intended to deceive or mislead.

99. The legal standards to be applied to the record evidence are as follows:

Section 1.65

> [W]henever the information in the pending application is no longer substantially accurate and complete in all respects, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of his application so as to furnish such additional or corrected information as may be appropriate. [Emphasis added.]

100. Liberty's failure to disclose in connection with its pending applications the admitted discovery of unlawful activations "as promptly as possible" after April 26, 1995, violated Section 1.65.[51] The repeated intentional omissions to disclose the unauthorized activations that were discovered by Mr. Price in April 1995, demonstrate more than the minimum needed for violations of Section 1.65, i.e., "a pattern of carelessness or inattentiveness to the reporting requirements." Merrimack Valley B/Casting, Inc., 55 Radio Reg. 2d (P&F) 23, 25 (1983). There were no issues added by the Presiding Judge under Section 1.65. These issues were cited in the HDO. These were not mere "trivial reporting failures." Id. These failures to report were the result of a thoughtful and reflective decision by Mr.Price, Liberty's President. Mr. Price hoped to obtain STAs before Time Warner learned the facts and so Liberty was motivated to willingly violate Section 1.65. Therefore, the undisclosed activations which were known at the highest levels of Liberty's management clearly amounted to (1) unreported interests of decisional significance; (2) show a conclusive intent to conceal the unauthorized activations until Liberty was ready to make the disclosures on its own terms; (3) a pattern of intentional non-disclosures which surpass the standard of carelessness or inattentiveness. Id.

[51] Cf. Memorandum Opinion And Order, FCC 97M-154, released September 11, 1997 at Para. 25 (there also was a violation of Section 1.65 in failing to disclose to the Commission in and after November 1992, the facts related to the alleged hardwiring and in failing to assure that its OFS applications were substantially accurate and complete in all respects). There was no penalty assigned to that violation of Section 1.65 because there was no realistic ability under those circumstances to mislead the Commission by failing to timely report to the Commission when there was related disclosure occurring in litigation to which the Commission was a party. Id. Here there was the opportunity and motivation to deceive the Commission with respect to the unauthorized OFS activations, even for a limited period of time, in the hope of obtaining the STAs.

101. There are two additional aggravating circumstances. First, Liberty has shown a predisposition to ignore prompt reporting under Section 1.65 in connection with hardwiring violations and the transfer of its assets to Freedom. Cf. Memorandum Opinion And Order, 97M-154, released September 11, 1997 at Para.25 (delayed reporting of hardwiring) and Memorandum Opinion And Order, FCC 96M-178 at Para 23, released July 16, 1996 (delayed disclosure of asset sale). Second, the disclosures of the 74 unauthorized activations that were made in the Audit Report were not made under Section 1.65 which would have been immediately available to Time Warner and Cablevision (as well as the general public) as is the policy behind the disclosure rule. Liberty further delayed the public disclosure of highly relevant evidence by litigating a waived privilege in the hope of obtaining authorizations while the Audit Report was sub judice and before Time Warner, Cablevision, the Presiding Judge or the public at large became informed of the true scope of Liberty's premature OFS activations.

Section 1.17

> No applicant, permittee or licensee shall in any response to Commission correspondence or inquiry or in any application, pleading, report or any other written statement submitted to the Commission, make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission.

102. This Rule expressly prohibits the making of any misrepresentation or willful material omission in any response to an inquiry by the Bureau and in any affirmative filing. Applicants for Commission authorizations are required to provide "true and accurate information" to the Commission and the Commission can take "disciplinary action against those who make false representations to the Commission." California Broadcasting Corp., 2 F.C.C. Rcd 4175, 4177 (Review Bd. 1987), quoting Navarro Broadcasting Ass'n, 8 F.C.C. 198, 199 (1940). And an applicant may be disqualified for lacking candor with the Commission. Garden State Broadcasting, Ltd. P'ship v. F.C.C., 996 F.2d 386, 393 (D.C. Cir. 1993); RKO General, Inc. v. F.C.C., 670 F.2d 215, 234 (D.C. Cir. 1981); Fox River Broadcasting, Inc. 93 F.C.C. 2d 127, 130 (1983) (lack of candor involves concealment, evasion, and other failures to be fully informative). Liberty's deliberate decision to not disclose to the Commission the unauthorized activations when first learned on April 26, 1995, and the continued failure to disclose that information until May 17, 1995, lacked candor in failing to inform the Commission on a substantial matter relating to licensing. The affirmative statement on May 17, 1995, that Liberty had a continuing practice

and policy to comply with licensing was a deliberate misrepresentation. Id. The less than complete disclosures in authorization requests that were authorized by Mr. Price in May, June and July 1995 constituted a pattern of willful failures to fully disclose significant information for which there was a duty to fully disclose. Swan Creek Communications, Inc. v. F.C.C., 39 F.3d 1217, 1222 (D.C. Cir. 1994).

Analysis Of Evidence

103. Summary decision will not be granted where there are substantial disputes over conflicting inferences to be drawn from evidentiary facts even if the facts are undisputed. Summary Decision Procedures, 34 F.C.C. 2d 485, 487-488 (1972). Cf. Carroll v. American Fed. of Musicians, 35 F.R.D. 535, 539-540 (DCNY 1964). Serious questions of candor arise with regard to the willful withholding of highly significant evidence. The unauthorized activations which were the subject of hearings and proposed findings are not appropriate conduct for summary decision. Summary Decision Procedures, supra at 490-491 (where evidentiary hearing is held on dispositive issue there should be proposed findings and an initial decision).[52] There is substantial evidence that Liberty did not assure that Commission authorizations had been granted before activations; that Liberty lacked candor in its disclosure of illegally activated pathways; that there was a deliberate and premeditated decision by Mr. Price in April 1995, to not then disclose to the Commission under Section 1.65; and that there were misrepresentations made in support of license and STA applications. There also were highly significant facts withheld from the Joint Motion. Liberty has not met its burden for summary decision. However, it can be decided by the preponderance of the substantial and reliable evidence in this record that Liberty is not qualified to receive the licenses to operate OFS microwave services for which applications have not yet been granted.[53]

[52] The issues with respect to the hardwire interconnects did not require testimony. Those issues were decided on the basis of the pleadings and papers submitted in support of and in opposition to summary decision. Memorandum Opinion And Order, FCC 97M-154, released September 11, 1997 (granting summary decision and accepting forfeiture of $80,000).

[53] A distinction is recognized between the 74 licenses which were granted despite unauthorized activations (because the Commission had no knowledge and was not informed of the violations) and the 19 paths for which licenses have not yet been granted which are the subject of this proceeding. Only the 15 license applications for which Liberty is seeking approval are effected by this decision.

104. The Commission's Policy Regarding Character Qualifications In Broadcast Licensing ("Character Policy Statement"), 102 F.C.C. 2d 1179 et seq. (1986) states that violations of the Communications Act or the Commission's Rules or policies are:

> matters which are predictive of licensee behavior and directly relevant to the Commission's regulatory activities. Thus, we will in the future treat violations of the Communications Act, Commission's Rules or Commission policies as having a potential bearing on character qualifications.

Character Qualifications, 102 F.C.C. 2d at 1209. The Commission will look to "truthfulness" and "reliability" in questioning whether a licensee "will in the future be likely to be forthright in its dealings with the Commission and to operate its station consistent with the requirements of the Communications Act and the Commission's Rules and policies." Id. Liberty has failed in both categories. Also, Liberty has not shown itself to be likely to be forthright in the future and candor is a matter of the highest concern to the Commission. Cf. F.C.C. v. WOKO, Inc., 329 U.S. 223, 229 (1946).

Liberty's Indifference To Available Data Is More Than Simple Negligence

105. A corporation is responsible for the actions of its employees and, as is particularly pertinent here, the Commission is alert to the improper delegation of authority over operations to "neutralize" conduct. Character Qualifications, supra at 1218. An applicant may not insulate itself from consequences of noncompliance by delegating all of the authority and responsibility to an employee and then insulate management from knowledge of the unlawful activities. Liberty has admitted to 19 violations of unauthorized activations in 1994-95 but asserts that all were due to the simple negligence of an employee and of an executive officer who merely failed to supervise. Liberty's effort to make light of its pattern of unlicensed activations is illustrated by the testimony of Mr. Howard Milstein that quite simply, Mr. Nourain was "confused about all these matters" and he was "not properly supervised". (H. Milstein, Tr. 40.) But the evidence does not lead to that simple a conclusion. Liberty continuously activated 93 paths prematurely since 1992, despite Ms. Richter's warning that Liberty should be concerned about unlawful activations and should be mindful of the steps and time it took to receive Commission authorizations. Mr. Price paid absolutely no attention to the admonition. He merely asked Ms. Richter about procedures which could hasten the authorization process and refused to

discuss noted concerns with Mr. Nourain. Mr. Price admits that he learned of the activations on April 26, 1995, by consulting a memorandum which had the same type of information that he chose to ignore in February 1995 and that was also available in 1993. Then, without any justification, Mr. Price authorized multiple STA requests which did not disclose the violations. These are not acts of simple negligence.

Nourain's Opportunities For Gaining Knowledge Of Unauthorized Activations

106. Mr. Nourain was never asked by senior management to account for corresponding licenses for activated microwave paths while conducting Liberty's business. It cannot be determined from the record whether before late April 1995, Mr. Nourain was aware or was unaware that Liberty had activated unlicensed microwave paths. (Joint Opposition at 14-22.) Mr. Nourain's explanations raise doubts about whether STA applications were regularly filed with license applications, about his inconsistent testimony about activating microwave paths, and about the absences of posted licenses at transmitter sites. But those doubts do not establish that Mr. Nourain failed to pay attention to obvious red flags. Mr. Nourain could have known, and the Audit Report concludes that he probably did know, of unauthorized activations well before April 1995 and that he probably told Mr. Price. On June 16, 1992, Mr. Stern, a paid consultant, alerted Mr. Nourain to the close supervision of licensing that would be necessary to successfully avoid premature activations. Thereafter, he was put on notice in early 1993 in conversations with Ms. Richter which culminated in the Richter letter. He received inventories prepared by Ms. Richter in 1993. He was sufficiently concerned to ask Mr. Price for advice. He had access to Mr. Lehmkuhl's inventory of February 1995 and to Mr. Price's internal Installation Progress Reports. But despite having all that information, Mr. Nourain never took time to make the comparison of pending applications with activated paths. Instead, he recklessly went forward to activate because Liberty's principals were more concerned about activation of paths than about regulatory compliance.

Misleading Disclosures Made To Obtain STAs

107. From May 4, 1995 to July 17, 1995, Liberty was engaged in a pattern of failing to disclose, misrepresenting or lacking in candor. On May 4, 1995, Liberty filed 14 STA requests which failed to disclose the unlawful premature activations. (Joint Opposition at 22-23.)

On April 27th Mr. Price had told Liberty's attorneys of the unlawful activations reported in Mr. Nourain's memorandum. On May 5, 1995, a Friday, Time Warner's filing disclosed to the Commission these unauthorized activations. Liberty's disclosure was made in a Surreply on May 17, 1995, eight business days after Time Warner's disclosure. In that filing Liberty disclosed 15 unauthorized activations. Liberty and its counsel were actively investigating the scope of the violations between April 27 and May 17. Liberty projected business losses from prospective customer cancellations if STA relief were denied. (TWCV Joint Opposition Exh. 11.) The Commission would be misled by the implication that the pathways were not in operation. The equally reasonable inference is that Liberty wanted to avoid rejection of the STAs and therefore facts were presented on May 4 in a light most favorable to Liberty. Intentional misleading nondisclosure of significant information concerning unauthorized activations of microwave paths constitutes a misrepresentation. Liberty must have known that the Commission eventually would receive information on the scope of the activations. However, Liberty's attorneys concluded that "owing to the seriousness of the situation" [TWCV Exh. 34] Liberty still should press forward on May 4, 1995, without making disclosure in an effort to obtain STA relief.

108. Four additional activated paths were not disclosed to the Commission in Liberty's filing of May 17, 1995 (Surreply) or in Liberty's response of June 16, 1995, to the Commission's first Section 308(b) inquiry. On July 17, 1995, Liberty filed applications for each of the four paths without providing an explanation for having failed earlier to disclose the unauthorized activations. Liberty admits to having violated Section 1.65 with respect to those four paths. (Joint Motion at Para. 99.) Time Warner and Cablevision argue that the absence of Comsearch records is more probative of the conclusion that there never was a request for frequency coordination made to Comsearch. But that conclusion is not proven and there is no motive for Mr. Nourain to deliberately avoid coordination and licensing of four microwave paths in light of the evidence on how Mr. Nourain operated. On May 17, 1995, in its Surreply to Time Warner's petition to deny, Liberty merely represented to the Commission that Mr. Nourain was unaware of the petitions to deny until "late April of 1995" and that Mr. Nourain had no knowledge of the unlawfulness of the microwave activations at the times of their activations. (L/B Exh. 11.) The July 17 disclosure was not complete and the Commission continued to be denied sufficient information to know the full extent of Liberty's unauthorized activations.

Reliance On Experts Is No Defense Of Liberty's Reckless Failures To Utilize Readily Available Data

109. To briefly recapitulate, since first use of the OFS spectrum, Liberty prematurely activated 93 paths. On June 16, 1995, in response to a Commission letter of inquiry, Liberty disclosed a list identifying the date on which each of 15 unauthorized microwave paths were placed in operation. (Joint Motion at Exh. 6.) The dates range from November 16, 1994 [524 E. 72nd] to April 24, 1995 [2727 Palisades]. The Lehmkuhl memorandum of February 1995, addressed to Mr. Nourain and Mr. Price, reported applications for 7 of 15 paths as "pending." Joint Opposition at 11 and Exh. 5.[54] There are no reasons given in the documents or in the testimony of Mr. Price and Mr. Nourain to explain why it was not until "late April" that the unauthorized activations were discovered. The inattention paid by Mr. Price to Mr. Lehmkuhl's memorandum of February 1995, is a significant circumstance. The warning to Mr. Price in Ms. Richter's letter of April 1993, shows reckless indifference to readily available information that was furnished to Liberty's principals by outside counsel who were being paid for their expertise. The ignoring of that information was a gross and wanton act of indifference which, in view of the consequences, cannot be excused as mere negligence. As a matter of policy, the Commission has rejected such a defense.

> Merely standing back and waiting for disaster to strike or for the Commission to become aware of it will not insulate corporate owners from the consequences of misconduct.

Character Qualifications, 102 F.C.C. 2d at 1218.

[54] The Lehmkuhl memorandum was prepared in February 1995 as an inventory of the status of OFS license applications. It is highly relevant evidence that has characteristics of reliability (contemporaneous, course of business, outside counsel). It was addressed to Mr. Price and Mr. Nourain. Yet neither could recall having seen the memorandum although neither one denied having received it. The copy was produced from the files of Pepper and Corazzini. Copies were not located in the offices of Mr. Price or Mr. Nourain.

110. The Bureau argues that Liberty showed a sufficient regard for compliance with the Commission's processes by hiring "experts to run Liberty", including Mr. Price, Mr. Nourain and outside communications counsel. See Bureau's Reply to Time Warner's Supplemental Proposed Findings of Fact and Conclusions of Law dated June 23, 1997, at 11. But the mere hiring of experts is not enough to rebut evidence of a total disregard of a duty to assure that an authorization has been granted before activating a path. Experts are not an absolute defense to a reckless disregard of licensing procedures.

111. In addition, Liberty should not be permitted to insulate itself by placing all responsibility on its legal counsel. RKO General, Inc. v. F.C.C., 670 F.2d 214 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982); and WADECO, Inc. v. F.C.C., 628 F.2d 122, 128 (D.C. Cir. 1980) (there reaches a point where the client must assume responsibility for compliance with the law). In fact, Liberty ignored the services of its experts. Denial of the applications is appropriate in light of Ms. Richter's early warning, the regular inventories that were made available by Pepper & Corazzini, and the deliberate withholding of known unauthorized activations from multiple STA applications in May 1995. Any further consideration of a good faith defense on technical assistance and/or advice of legal counsel is further offset by the deliberate delay in this proceeding in the production of highly relevant documentary evidence.

Cases Relied On By Liberty
Do Not Support A Favorable Decision

112. The Presiding Judge has considered case authority where forfeitures were assessed for constructing without a license and applicants were not disqualified for reliance on counsel's advice. In the case of MCI Telecommunications Corp., 3 F.C.C. Rcd 509 (1988), supplemented, 4 F.C.C. Rcd 7299 (1988), radio authorizations had been granted for facilities at which there had been a premature construction. The Commission denied a petition for revocation and issued a notice of liability for forfeiture. The conduct in that case involved a series of miscommunications. There did not appear to be service to the public before the situation was reported to and addressed by the Commission. That case did not involve a deliberate decision to not report unauthorized activations and to seek temporary authority after making a deliberate choice to not disclose unauthorized activations. Also, in MCI, there was no advance warning by outside communications counsel against the possibility of premature activations as was done for Liberty. The facts in that case did not raise a sufficient question to warrant issuance of a show cause order for revocation because the violations were "isolated" and there was no evidence of

misrepresentation or lack of candor or of any intent to violate the Act or the Rules. Id. at 514. In this case, the evidence shows that Liberty did knowingly misrepresent by asserting "technical order" and by failing to disclose its known unauthorized activations in applications for STAs that were filed on May 4, 1995. In 1993, Mr. Price was warned by counsel of the possibility of unauthorized activations. He disregarded the warning and turned away from licensing responsibilities. Since 1993, Mr. Price was recklessly indifferent to counsels' warnings and to their activation/licensing inventories. His intentional avoidance was a reckless disregard for compliance with licensing that allowed the violations to occur. There also was a clear pattern of unauthorized activations occurring since 1992, which Liberty omitted when it falsely represented to the Commission on May 17, 1995, that it was Liberty's practice to obtain authorizations before activating. This case is distinguishable from MCI.

113. In the case of David A. Bayer, 7 F.C.C. Rcd 5054 (1992), the Commission issued a notice of apparent liability for a licensee's unauthorized activations of cells. The Commission concluded that there were only "inadvertent technical violations" and therefore the Commission believed that a hearing was not necessary and that a forfeiture was an appropriate sanction. Id. at 5055. The facts in Bayer do not approach the substantial evidence in this case developed at hearing which shows that Liberty knew in April 1995 that it had activated multiple microwave paths without authorization and deliberately chose to mislead the Commission in STA applications for the same paths. Liberty also relies on the case of Abacus Broadcasting Corp., 8 F.C.C. Rcd 5110 (Review Bd 1993). The Review Board had found that the question of disqualification was a close one where counsel for a broadcast license applicant misstated information about the availability of an antenna site in a threshold showing at hearing. That case had an element of good faith reliance on trial counsel for the inaccurate disclosure in a document that was prepared by counsel for litigation. Id. at 5113. By comparison, this case involves an intentional withholding of information from the Commission in multiple filings, a decision knowingly made by Liberty's President, Mr. Price, himself a lawyer, in the course of a telephone conversation with multiple counsel for Liberty. Mr. Price's executive decision to not disclose was focused, reflective, informed and fully intended. The situations between Liberty and Abacus are clearly distinct.

There Are Inferences Negating Liberty's Reliability By Not Producing Highly Relevant Evidence

114. In seeking summary decision, Liberty submitted the Constantine Affidavit (L/B Exh. 4 and TWCV Exh. 29) which states that the audit was conducted in June, July and August 1995 by professionals having "complete access to Liberty's books and records and an unfettered and unlimited opportunity to interview all Liberty personnel, officers and outside-retained counsel." (Id.at Para. 5.) Mr. Constantine even describes the audit to have been "far more comprehensive, precise and accurate" than an agency investigation. Id. at para. 6. The Bureau classified the Audit Report as "relevant and substantial evidence." The Bureau reached that conclusion "because of the very purpose underlying the creation of that document by Liberty." See Bureau's Proposed Findings of Fact and Conclusion's of Law dated February 28, 1997, at 41-47:

> Because the Report was prepared by Liberty's counsel as a result of an internal audit into this very same question, it is indisputable that the information contained in the Report is relevant evidence for the hearing.

Id. at 47. The Bureau correctly argues that as a matter of law the Audit Report is admissible evidence in this case, citing Fed. R. Evid. 402 (all relevant evidence is admissible). Yet Liberty and the Bureau were urging a favorable summary decision without the Presiding Judge (or the Commission on appeal) ever seeing this highly relevant document in the context of this proceeding.

115. Mr. Price advised the Bureau on June 16, 1995, that "a complete investigation of this administrative foul-up is currently being conducted by outside counsel who have extensive government backgrounds [and] [s]teps have been taken to assure that these errors will not occur again." Id. at 43. The "complete investigation" was submitted to the Bureau as the Audit Report in response to a Bureau request for information under Section 308(b) of the Communications Act. A copy of the Audit Report was denied to Time Warner and Cablevision by submitting the Report to the Bureau pursuant to the confidentiality provisions of the Commission's Rules [47 C.F.R. §§0.457, 0.459] on assertions by Liberty that the Report contained information that was commercial or financial, covered by the attorney-client privilege, and that the information would, if disclosed to the public, constitute an invasion of privacy. Id. at 44. Thereafter, on August 22, 1995, Liberty's counsel argued that "the internal investigation was not conducted in response to

a Commission request" and that "Liberty undertook its internal review voluntarily and submitted its report and other supporting documents to the Commission voluntarily." Id. at 45 [quoting letter from Liberty counsel to Bureau dated August 22, 1995]. Checkmate? Hardly so! The Bureau had received sufficient information to make a formal Section 308(b) request. The Bureau did make such a request and asked under Section 308(b) for the results of that investigation. On August 14, 1995, the Audit Report which contains the result of that investigation was submitted by Liberty to the Bureau. The Court of Appeals concluded that the Audit Report was sought by the Bureau under Section 308. See Bartholdi Cable Company, Inc. v. F.C.C. supra, 114 F.3d at 278.

116. The Audit Report was used in August 1995 and in the Joint Motion to convince the Commission and the Presiding Judge that Liberty was acting in a responsible manner to fully investigate the facts and to report them to the Commission in an orderly manner. But the information was not to be freely shared. First, Liberty asserted confidentiality which was rejected by the Commission. Then Liberty asserted a claim of attorney-client privilege which the Court of Appeals rejected as waived as to a timely a claim.[55] In that way, Liberty succeeded in keeping the Audit Report from this proceeding until the very end when it was too late to use it as a discovery tool. The Court of Appeals has made a distinction for an abuse of the privilege to foster some other purpose than the protection of client communications. It has been held:

> Implied waiver deals with an abuse of a privilege itself rather than of a privileged relationship. Where society has subordinated its interest in the search for truth in favor of allowing certain information to remain confidential, it need not allow that confidentiality to be used as a tool for manipulation of the truth-seeking process.

In re Sealed Case, 676 F.2d 793, 807 (D.C. Cir. 1982). In this case, there was an untimely assertion of the privilege by Liberty as a tool to keep highly relevant information from timely consideration in this proceeding - e.g., the Richter letter, and the Stern memorandum which were attached to the Audit Report and the Audit Report itself. Liberty withheld significant documentary evidence to such an extent that Liberty is not to be trusted to make full disclosures in the future.

[55] The privilege was not waived in the context of an understandable inadvertent disclosure to a third-person. The privilege was never raised in the first instance before the Commission and therefore was waived to assert in appellate court.

117. The Bureau reached a conclusion, without citing any sources, that Liberty "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." See Bureau's Consolidated Reply filed on March 10, 1997, at 11.[56] The Presiding Judge disagrees totally with that conclusion in light of the withheld Richter letter which was discovered only as a matter of chance in cross-examination. Also, the two Lehmkuhl memorandums and Nourain's memorandum were produced only on the eve of trial. Although it has not conclusively been shown that the withholdings were intentional, a difficult case to make, the completeness of Liberty's evidentiary production was seriously tainted and remains deeply suspect. The Audit Report remains the one reliable "complete investigation" which Liberty always had in its control to produce. Liberty's withholding of the Audit Report until after all discovery and testimony were completed was part of the pattern to deprive this proceeding of timely evidence. Liberty's intent to mislead is evident from the deliberate omission of the highly relevant documents from the Joint Motion that was filed with an expectation that there would be no further inquiry. The conduct of Liberty in withholding the Lehmkuhl and Nourain memoranda, the Richter letter, the Stern memorandum and in shielding the Audit Report from this proceeding until mandated by the Court of Appeals adversely reflects on Liberty's reliability for dealing with the Commission in the future with honesty, completeness and in full compliance with the regulations.[57] It is recognized, however, that the Bureau strenuously argued in pleadings and in open court for discovery of the withheld evidence and, since the beginning of this case, the Bureau was urging Liberty to disclose the Audit Report. All adverse findings and conclusions in this proceeding as a result of withholding evidence are solely attributable to Liberty.

[56] The Bureau and Liberty have joined together on the motion. If the Bureau's conclusion were true, it also represents the position of Liberty. If Liberty did not withhold significant evidence that was in the Report, why did not Liberty produce it in support of the motion?

[57] Since the Audit Report was produced before the record was closed, there can be no adverse inference of the substantive facts because the adverse facts of the Audit Report are a matter of record for all to see. But the predictive probability for future withholding of significant information will be inferred. Cf. Character Qualifications II, 5 F.C.C. Rcd 3252, 3253 (1990) (misconduct is relevant which is predictive of whether the applicant is "possessed of the requisite propensity to obey the law").

Nourain's Conflicting Statements Were Not Intentional Misrepresentations

118. There has been an adequate explanation provided by Mr. Nourain's testimony for the facially inconsistent statements he signed that were made to a federal district court in February 1995 and later to the Commission in May 1995. See Paras. 91 to 95 above. In February 1995, Liberty was defending a charge by the City of New York that it had installed and activated hardwire cable without obtaining a local franchise. The hardwire was being replaced by Liberty's OFS systems and therefore the issue before the federal court was entirely different from the later disclosure to the Commission of unauthorized OFS activations. The statements that Mr. Nourain signed were prepared by legal counsel and the language used was not the language of a lay person who is a trained engineer. Also, as a mid-level employee, Mr. Nourain was not in a position to challenge the draftsmanship of legal counsels' documents. He offered a plausible explanation in his testimony that he was addressing the issues as a technician who was rebutting the assertions of an expert. There was no evidence that legal counsel who wrote the statements were intending to mislead the Commission as Liberty's agent.[58] Based on the reasoned explanation provided by Mr. Nourain, the evidence with respect to the conflicting statements of Mr. Nourain does not support a finding of misrepresentation or lack of candor on the part of Liberty. Compare Fox Television Stations, Inc., 10 F.C.C. Rcd 8452, 8478-79 (1995). Therefore, it is concluded that there was no violation of the Act or of Commission rules proven by the filing of the statements of Mr. Nourain in February 1995 and in May 1995.

Ultimate Conclusions

119. The Commission relies heavily on the honesty of its licensees.

> A licensee's duty of candor is critical given the FCC's many duties. 'The FCC has an affirmative obligation to license more than 10,000 radio and television stations in the public interest, each required to apply for [periodic] renewal[s] ---. As a result, the Commission must rely heavily on the completeness and accuracy of the submissions made to it, and its

[58] The conduct or misconduct of Liberty and its principals and executive officers is the primary focus of the hearing. See Opal Chadwell, 2 F.C.C.Rcd 1197, 1198 (Review Bd 1987), aff'd, 2 F.C.C. Rcd 3458 (1987).