

applicants in turn have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate'. [citations omitted.] There is thus no question that an applicant's candor is an issue of the utmost importance to us.

Fox Television Stations, Inc., supra, 10 F.C.C. Rcd at 8478.

120. The character traits that the Commission is most concerned about are truthfulness and reliability. Character Qualifications, 102 F.C.C. 2d 1179, 1209 (1986). Liberty's demonstrated lack of these traits became evident with the announcement of the Bureau's concern that Mr. Price may not have testified truthfully in his deposition. That observation required an inquiry on Liberty's truthfulness and candor after the Joint Motion was filed. Thereafter, Liberty deliberately stalled in making full disclosure of readily available and highly relevant documentary evidence. There were unexcused delays in disclosing in discovery the Lehmkuhl memorandum of February 24, the Nourain memorandum of April 26 and the Lehmkuhl memorandum of April 28. The Richter letter, which went to the heart of the question of Liberty's knowledge starting in 1993, was only fortuitously discovered through the last witness in the first round of in-court testimony. That disclosure was further delayed by an argument over the attorney-client privilege which had been waived. The Joint Motion misrepresented that there was no Stern memorandum of instruction for Mr. Nourain when in fact there was such a memorandum discovered in the Audit Report. This disheartening episode of holding back and then serializing disclosures of highly relevant evidence demonstrates a reckless disregard or abandonment of Liberty's duty to produce such evidence or, in a worse case scenario, an intention to conceal "hot documents" from this proceeding until it became too late to effectively use them. Any suggestion that there was simply a series of inadvertent oversights is rejected by the weight of the Audit Report and its associated Constantine Affidavit which portrayed the Report as the most accurate and complete recounting of the facts that the Commission could ever expect to receive. The repeated failures to account for key evidence in the Joint Motion and the further failure to make timely disclosures in the hearing show a concerted lack of candor in this proceeding or a total and reckless disregard for the Commission's hearing process which should disqualify Liberty for a Commission license. Maria M. Ochoa, 8 F.C.C. Rcd 3135, 3137 (1993), aff'd Marie M. Ochoa v. F.C.C., 98 F.3d 646 (D.C. Cir. 1996) (distortion of hearing record will disqualify an applicant). See also Old time Religious Home, Inc., 95 F.C.C. 2d 713, 719 (Review Bd 1983) (false statements in the course of the hearing process are, in and of themselves, of substantial significance).

121. Addressing the substance of the issues, Liberty has sought to cast its licensing fiasco as a series of negligent mistakes. But this is not a case of simple negligence. Liberty was so "wanton, gross, and callous, and in total disregard of [its] obligations to the Commission [to activate only authorized OFS paths and to report truthfully] as to be equivalent to an affirmative and deliberate intent." Golden Broadcasting Systems, Inc., 68 F.C.C. 2d 1099, 1106 (1978), quoting Tipton County Broadcasters, 37 F.C.C. 191 (1964). Liberty's executive officers intentionally or recklessly and with wanton abandon, avoided clear warnings and available organized and focused data that predicted or detected unauthorized activations. Begin with the Richter letter of April 1993. Mr. Price read the letter. He was asked by Mr. Nourain for guidance on the concern expressed by counsel that there might be premature activations. Mr. Nourain was never given any advice by Mr. Price. The subject was never discussed between the two. Mr. Price was not concerned about licensing. He was concerned about how fast approvals could be sought and obtained. Inventories were prepared by Ms. Richter and Mr. Lehmkuhl and furnished to Mr. Price that were never used to compare with Mr. Price's own weekly reports. They were not even perused. They were simply filed away. Mr. Nourain, the employee assigned the responsibility to decide when to activate paths, was never asked, told or allowed to attend weekly staff meetings at which activations regularly were discussed. He was placed in another office building to fend for himself. In April 1995, when it finally became inescapably clear that there were unauthorized activations, Mr. Price decided to delay advising the Commission in the hope of obtaining STAs before Time Warner found out. Mr. Lehmkuhl and Mr. Barr immediately had seen the "seriousness of the situation." The decision to delay disclosure until after filing 14 requests for STAs was based solely on a concern that the information, if disclosed, would permanently block the authorizations.

122. On May 5, 1995, Time Warner filed a pleading which disclosed some of the unauthorized activations thereby exposing the deceit in Liberty's May 4 filings. In an effort to limit the damage caused by the May 4 filings, on May 17, 1995, Liberty made disclosure of multiple OFS activations. But Liberty misrepresented in the same pleading a pattern and practice of licensing compliance that never existed. Liberty never referred to its pattern of 93 premature activations. On May 19 and May 23, 1995, Liberty continued to file STA applications which failed to disclose the unauthorized activations and without any concern for the accuracy of the filings. These facts of record demonstrate that Liberty, in practice and as a matter of policy, will decide for itself when it will disclose significant information to the Commission and how completely it will make that disclosure. See KWQJ(FM), 110 F.C.C. Rcd 8974 (1995) (permittees have obligation to confirm accuracy of information in original application before certifying in extension request that such information is accurate and complete). There has been

no showing that Liberty has changed its attitude toward compliance with Commission licensing, as most recently illustrated by its unjustified withholding of highly relevant documents from this proceeding.

123. Throughout the proceeding, Bureau counsel were independently filing succinct pleadings and proposed findings and conclusions which cast a much more realistic light on Liberty's conduct. The Bureau concluded that the decision as to whether to grant authorizations to Liberty is a "close call." See Wireless Telecommunications Bureau's Reply To Time Warner's Supplemental Proposed Findings of Fact and Conclusions of Law dated June 23, 1997, at 10. But the Presiding Judge concludes that the appropriate outcome of that perceptive "close call" is to deny the authorizations in the public interest. It is essential to the credibility of the Communications Act to give recognition in this case to the established principle that "unlicensed operation of a radio transmitter is one of the most serious violations under the Communications Act." Robert J. Hartman, 9 F.C.C. Rcd 2057 (FOB 1994), citing Mebane Home Telephone Company, 51 Radio Reg. 2d (P&F) 926 (Com. Car. Bur. 1982). Statistics in Tables I and II above present compelling evidence of Liberty's reckless disinterest in and disregard for licensing. Ninety-three premature activations accounted for practically 75% of Liberty's total activations and 40% of those activations occurred before an application was even filed. It is hard to discern a more egregious flaunting of the most fundamental principle of licensing the spectrum. Liberty's statistics represent a far higher pattern of unlicensed use of the spectrum than was found in Hartman or in Mebane Home making this one of the worst cases of a pattern of unlicensed spectrum operations since 1934.

124. Overall, Liberty has consistently been misleading in its applications and deliberately dilatory in its disclosure to the Commission.⁵⁹ These adverse traits were demonstrated when Liberty was not forthcoming with highly relevant documentary evidence in the discovery and hearing stages of this case either out of recalcitrance, a reckless disregard for the Rules of Practices, or as a result of an unprecedented high degree of noncaring, mindless inattention. Compare Tri-State Broadcasting Co., Inc., 5 F.C.C. Rcd 1156, 1173 (Review Bd 1990) (pattern of neglect in failing to file issues lists throughout renewal period so strong as to appear "nearly willful"). In view of this record, denial of the authorizations that are in issue is

⁵⁹ Liberty also failed to report its unlawful hardwire interconnections for which Liberty had failed to obtain a local franchise in addition to its failures to timely report the premature activations in order to serve its own purposes. In the course of this proceeding, Liberty failed to initiate disclosure of the asset sale to Freedom. Although an issue was not added it was found that Liberty had violated Section 1.65. See Memorandum Opinion And Order FCC 96M-178, released July 16, 1996.

the only appropriate remedy. The repeated misleading failures to disclose highly relevant information amounted to a deliberate or reckless lack of candor in dealing with the Commission while Liberty's applications for authorizations were pending and in hearing. The evidence shows conclusively that Liberty is not likely to be forthright in dealings with the Commission. Character Qualifications, 102 F.C.C. 2d at 1209-10. It is concluded that Liberty has failed to show by a preponderance of the evidence that it can be relied upon in the future to be truthful and reliable in its disclosures or to disclose timely and to comply with the Communications Act and the Commission's Rules.⁶⁰

Forfeiture Is Unsuitable As A Remedy

125. Forfeitures were found suitable in cases where principals were merely negligent in their supervision and control and did not intend the misconduct to occur. Oil Shale Broadcasting Co.(KWSR), 68 F.C.C. 2d 517, 528-29 (1978). In some cases where there have been findings of lack of candor, a forfeiture was imposed rather than disqualification. Abacus Broadcasting Corp., 8 F.C.C. Rcd 5110 (Review Bd 1993). MCI Telecommunications Corp., supra, as supplemented, 4 F.C.C. Rcd 7299 (1988) (forfeiture found appropriate rather than disqualification). But those cases are distinguished from Liberty's conduct.⁶¹ In Oil Shale Broadcasting, a renewal case, the Commission accepted the conclusion of the Judge that the licensee was responsible for conducting a one-time turkey shoot contest. But the Commission did not find that the licensee's principal was knowingly involved. The Commission required something more than just the violation such as attempts to mislead. *Id.* at 528. The Commission found that the principal was negligent and that the conduct, while unlawful, was not egregious. *Id.* at 529. The Commission found a shortened renewal to be an appropriate penalty. Here, after Liberty and its counsel assessed the "seriousness of the situation", Mr. Price decided to not inform the Commission of activation violations until a time that he saw fit. Subsequently, there were

⁶⁰ Liberty is no longer filing for new OFS licenses. But Liberty continues to make filings on which the Commission is asked to rely. Liberty's unreliability to be truthful is not a moot issue.

⁶¹ Liberty consistently cites in pending applications the Commission policy fostering additional competition through alternative multichannel providers such as wireless cable. (TWCV Exh. 17 at 3-4.) This is an enforcement matter and the withholding of authorizations from a demonstrated untrustworthy applicant/licensee ought not be offset in order to foster competition. Also, the Presiding Judge has considered the fact that on March 1, 1996, the Commission amended its Rules to permit applicants for OFS and point-to-point microwave facilities to commence operations upon the filing of an application with the commission. See HDO at Para. 14 n.9. But the conclusions reached in this proceeding on Liberty's lack of reliability for truth and candor is the overriding consideration.

repeated failures of accurate and complete disclosure in the filings made in May, June and July 1995. And there were affirmative misrepresentations of technical licensing compliance and a policy of the station never to activate without authorization. Finally, in this case there was a gross and reckless indifference to an attorney's warning and a willful disregard of inventory data that was regularly furnished by counsel. Oil Shale Broadcasting does not apply in this case.

126. In Abacus Broadcasting, a comparative renewal case on which Liberty relies, both the Judge and the Review Board found no specific intent to deceive where a threshold showing failed to state that it did not intend to use the antenna site that was specified. The purpose for the disclosure was to put the opposing side on notice of what would be proved at hearing. That disclosure is important to litigating attorneys who prepare their cases based on the showings of other parties. The threshold showing was prepared by a litigating attorney. Such a document, albeit important, does not have the significance of an application for a license with which the applicant is fully involved and which is the prime source that the Commission relies on in making a grant. Also, the Abacus case was narrowly concerned with an isolated and recent act of misconduct at the end of a license term. The case was viewed as one in which counsel was seeking to gain a tactical advantage where the licensee "did not intend to deceive the Commission about the plans." 8 F.C.C. Rcd at 5113. The need for precision in May 4 filings was far greater than in a threshold showing because Liberty was seeking directly from the Commission multiple approvals without disclosing the discovered violations. Liberty knowingly urged the Commission to grant the STAs without disclosing those violations and affirmatively misrepresented itself as being in "technical compliance." Later, it completely misrepresented that it had a policy and practice of compliance with licensing prior to activation. Those deliberate misstatements are more egregious than a bullish proffer in a litigator's threshold statement.

127. Also, in Abacus the Review Board found the question of intent to deceive "a close one" that was made as a litigation tactic at the close of a license period. The Review Board chose to allow a short term renewal and fine. Id. The same "closeness" is not true of Liberty in view of the multiple licensing violations and the complete and reckless indifference shown by Mr. Price, a principal, as to whether or not the authorizations were being obtained prior to activation. In MCI, a case involving premature construction of a single station before a STA was granted, the Commission was provided with an unsworn hearsay statement that construction began on a certain date. In this case, there is by comparison far more reliable evidence not only that multiple unauthorized activations occurred but also that the principals of Liberty abandoned their duty against premature activations, failed to disclose the violations when seeking STAs after the fact,

and falsely misrepresented technical compliance and a policy and practice of compliance. The Abacus and MCI cases pale by comparison. Therefore, a forfeiture coupled with a grant would not be appropriate.

**An Agreed Forfeiture Would Violate The Policy Against
Negotiating On Basic Qualifications**

128. Forfeiture has been presented by Liberty and the Bureau as an agreed exchange. There would be a forfeiture of at least \$710,000 in return for Liberty receiving the authorizations. That sum is based on forfeitures of \$75,000 for each of six instances of activations that preceded the filing of license applications (\$450,000) and a lesser forfeiture of \$20,000 for each of thirteen instances of unauthorized operation before the granting of the licenses (\$260,000). See 47 U.S.C. §503 (b)(3)(A) and 47 C.F.R. §1.80(g). The Bureau has also asked for an additional forfeiture in the amount of \$300,000 for Liberty's willful misstatements in OFS authorization requests that were filed on May 4 and May 19, 1995. See Wireless Telecommunications Bureau's Proposed Findings of Fact and Conclusions of Law, filed February 28, 1997, at 40-41, Paras. 111-112. Liberty believes it to be excessive but is willing to pay certain of the additional forfeitures if it receives the authorizations. Bartholdi (Liberty) Proposed Findings of Fact and Conclusions of Law in Reply, filed March 10, 1997, at 42-43.⁶²

129. Procedurally, Liberty and the Bureau appear to be seeking a consent order in the form of a summary decision that is conditioned on a finding that there has been no disqualifying misconduct. The consent order regulation provides:

(a) [A] "consent order" is a formal decree accepting an agreement between a party to an adjudicatory hearing proceeding held to determine whether that party has violated statutes or Commission rules or policies and the appropriate operating Bureau, with regard to such party's future compliance with such statutes, rules or policies, and disposing of all issues on which the proceeding was designated for hearing.

⁶² After the full scope of Liberty's 94 illegal activations became a factor, the Bureau added a forfeiture of \$1,850,000. See fn. 17 below. Liberty has not indicated a willingness to pay that additional sum.

(b) ---. Consent orders may not be negotiated with respect to matters which involve a party's basic qualifications to hold a license (see 47 C.F.R. §§308 and 309).

47 C.F.R. §1.93. Where the Bureau is a party, there may be ongoing negotiations of a consent order at anytime during a formal adjudicatory proceeding. *Id.* The Joint Motion would effectively provide the same result by disposing of all issues on the condition that the agreed amounts of forfeitures were paid by Liberty and on the further condition that the disqualifying issues are decided in favor of Liberty. The Bureau agreed to join in the motion, apparently after being convinced by Liberty to take Liberty's position in the litigation of the issues as a joint movant.⁶³

130. Consent orders are prohibited "with respect to matters which involve a party's basic statutory qualifications to hold a license." 47 C.F.R. §1.93(b). It is concluded that Liberty activated OFS paths in reckless disregard of its licensing obligation and deliberately withheld true, complete and accurate disclosure in order to suit its own purposes in the hope of obtaining OFS authorizations before the Commission was fully informed. Liberty also attempted to deceive the Commission by stating blatant mistruths in filings that it was in "technical compliance" and that it had a "pattern and practice" of activating only after receiving authorization. Liberty even intended to mislead this proceeding by withholding highly relevant evidence and by affirmatively misrepresenting in the Joint Motion pleading that Mr. Nourain had received no written instructions from Mr. Stern. Acceptance of a substantial forfeiture in return for license authorizations under these circumstances would not be consistent with the basic standards of the Commission Character Qualifications or the basic licensing policy of the Communications Act.

Liberty's offer of forfeiture should not be accepted in exchange for Commission licenses which Liberty is fundamentally not qualified to receive.

131. Finally, a forfeiture should not be assessed here because Liberty is being denied the authorizations which it seeks and, therefore, the condition for Liberty's willingness to pay a substantial forfeiture has not been met. If a forfeiture is subsequently determined to be warranted in this case, the total amount of forfeitures sought by the Bureau would be appropriate for Liberty's conduct.

⁶³ There must have been intense "negotiations" between Liberty and the Bureau "with respect to matters which involve [Liberty's] basic statutory qualifications to hold a license." *Id.* Otherwise the Bureau would not have joined in the Joint Motion. Clearly, Bureau counsel was advocating diligently and effectively by insisting and obtaining agreement on a very substantial forfeiture. But money does not matter here because Liberty is found to not possess the basic character qualifications that are required to receive OFS authorizations.

ORDER

Accordingly, IT IS ORDERED that the Joint Motion By Bartholdi Cable Co., Inc. (formerly Liberty Cable Co., Inc.) and Wireless Telecommunications Bureau For Summary Decision IS DENIED, except for the partial summary disposition of the hardwire issues in Memorandum Opinion And Order, FCC 97M-154, released September 11, 1997.⁶⁴

IT IS FURTHER ORDERED that based on the hearing record of this proceeding, the pending applications of Bartholdi Cable Co., Inc. (formerly Liberty Cable Co., Inc.) for authorization to activate OFS microwave paths which are the subject of this hearing [HDO Appendix A] ARE DENIED.⁶⁵

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel

Administrative Law Judge

⁶⁴ There has been no license, STA or other authorization granted with respect to the summary disposition of the hardwire issues and, therefore, the policy regarding "consent orders" under Section 1.93 is not violated.

⁶⁵ This Initial Decision shall become effective and this proceeding shall be terminated 50 days after its release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. §1.276(b). There shall be no payment of any forfeiture until this case qualifies for termination.