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BEFORE THE
Federal Communications Commission
WASHINGTON, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In Re Applications of)
)
LIBERTY CABLE CO., INC.)
)
For Private Operational Fixed)
Microwave Service Authorizations and)
Modifications)
)
New York, New York)

WT DOCKET NO. 96-41

To: The Commission

**TIME WARNER CABLE OF NEW YORK CITY AND PARAGON
COMMUNICATIONS, AND CABLEVISION OF NEW YORK CITY - PHASE I'S
JOINT BRIEF IN SUPPORT OF THE INITIAL DECISION**

James A. Kirkland
Christopher A. Holt
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300

Arthur H. Harding
R. Bruce Beckner
Jill Kleppe McClelland
Debra A. McGuire
FLEISCHMAN AND WALSH, L.L.P.
1400 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 939-7900

Attorneys for
CABLEVISION OF NEW YORK CITY-
PHASE I

Attorneys for
TIME WARNER CABLE OF NEW YORK CITY
and
PARAGON COMMUNICATIONS

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SUMMARY

Substantial record evidence and well-settled Commission precedent fully support the Presiding Judge's action in denying the applications of Liberty Cable Co., Inc. that are at issue here. It is undisputed that Liberty operated numerous microwave facilities without FCC authorization to do so over a period of more than three years. This pattern of unlicensed activity was not the result of innocent mistakes and misunderstandings. The record compels the conclusion that Liberty lacked candor with the Commission by knowingly making false and misleading statements in support of the captioned applications, by filing a motion for summary decision that was based on a material factual assertion that Liberty knew was false at the time it was made, and by strategically delaying production of critical documents in the hearing proceeding until it was compelled to do so.

There are three major -- and numerous lesser -- instances of a lack of candor by Liberty. First, on May 4, 1995, Liberty filed STA requests for unlicensed microwave facilities that it knew were already operating. Not only did Liberty fail to state in these requests that the facilities were operating; but also, by affirmatively misleading statements, Liberty suggested that the facilities were *not* operating. Secondly, after six weeks of discovery, Liberty and the Wireless Telecommunications Bureau jointly moved for summary decision, arguing that Liberty's chief engineer (who was responsible for licensing and activation of its microwave facilities) never received written advice from the company's expert consultant explaining the entire FCC application process. Consequently, Liberty argued, the engineer operated under some mistaken assumptions that led him to activate microwave facilities before they had been licensed. In fact, the chief engineer had received two such memoranda, but Liberty failed to produce them in discovery. Thirdly, Liberty strategically failed to produce other documents that were not helpful

to its case. For example, memoranda to Liberty's chief engineer were two of four documents attached to a so-called "Internal Audit Report" that Liberty had supplied to the Wireless Bureau, *ex parte*, in August 1995, before these applications were designated for a hearing. Liberty elected to produce only one of those four documents in discovery, which Liberty used in support of its position, but it failed to produce the other three. In addition to the two memoranda to its chief engineer, the third document that Liberty concealed was a 1993 letter from its licensing counsel to Liberty's executive vice president (that also was routed to its president), warning Liberty's management that the chief engineer did not understand the Commission's licensing requirements.

At the time the hearing was designated in this proceeding, Liberty was vigorously challenging in the U.S. Court of Appeals a Commission Order directing that the Internal Audit Report be made public and furnished to Time Warner. The documents, which were attached to the Report, could not have been "lost" or "misplaced." Only after Liberty's appeals were exhausted, in September, 1997, did it produce the Report and all of its attachments. The 1993 letter from its licensing counsel was produced earlier only because its existence had been revealed in cross-examination of a witness at the hearing.

In addition to the repeated examples of lack of candor, the record shows that for a period of years, Liberty either knowingly engaged in a practice of activating microwave facilities without regard to whether they had been licensed; or operated with reckless disregard of its obligations to comply with FCC licensing requirements. Either scenario, coupled with Liberty's demonstrated lack of candor, is ample justification for the Presiding Judge's ultimate conclusion that Liberty is not fit to hold Commission licenses. The Presiding Judge's decision should be affirmed in all respects.

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JOINT BRIEF IN SUPPORT OF THE INITIAL DECISION**

Pursuant to Federal Communications Commission ("FCC" or "Commission") rule 1.277(b) (47 C.F.R. § 1.277(b)) Time Warner Cable of New York City and Paragon Communications ("TWCNYC"), and Cablevision of New York City - Phase I ("Cablevision") (collectively, "TWCV"), hereby file this Brief in Support of the Initial Decision of Administrative Law Judge Richard L. Sippel (the "Presiding Judge"). Initial Decision, WT Docket No. 96-41, FCC 98D-1 (rel. Mar. 6, 1998) ("LD"). The record evidence and applicable legal precedent fully justify the Presiding Judge's denial of the pending applications of Liberty Cable Co., Inc. ("Liberty")¹ for licenses to provide operational fixed microwave service ("OFS"). The Initial Decision should be adopted by the Commission in all respects. See LD, ¶ 124.

¹TWCV is aware that Liberty Cable Co., Inc. is now known as "Bartholdi Cable Company, Inc." following the sale of most of the former Liberty's assets (including its name) to a subsidiary of RCN Corporation. However, for clarity, the applicant for the licenses at issue in this proceeding will be referred to by its former name, "Liberty."

STATEMENT OF THE CASE

Following petitions to deny by TWCNYC, the Commission on March 5, 1996, designated for hearing applications for OFS licenses filed by Liberty to determine whether Liberty possessed the requisite character qualifications to hold such licenses. Hearing Designation Order and Notice of Opportunity for Hearing, 11 FCC Rcd 14133 (1996) (“HDO”); I.D., ¶ 2. The applications were for nineteen OFS paths that Liberty had activated before receiving FCC authorization (HDO, Appendix A), and thirteen OFS paths to non-commonly owned buildings that Liberty had covertly interconnected by coaxial cable without obtaining the necessary franchise. HDO, Appendix B; see I.D., ¶¶ 1, 3, 9. The Commission specified issues regarding whether Liberty violated Commission Rules 1.17 and 1.65, and whether Liberty lacked candor in its Commission filings by failing to disclose its unauthorized operation of OFS paths and its unlawful cable interconnection of non-commonly owned buildings. HDO, ¶ 30; I.D., ¶ 11; see 47 C.F.R. §§ 1.17, 1.65. The Commission named TWCV and the Wireless Telecommunications Bureau (the “Bureau”) as parties to the licensing proceeding (HDO, ¶ 33), and assigned Liberty the burden of proceeding with the introduction of evidence and the burden of proof. HDO, ¶ 34; I.D., ¶ 11.

On July 15, 1996, Liberty and the Bureau jointly moved for summary decision on the issues designated in the HDO. Joint Motion by Bartholdi Cable Co., Inc. and Wireless Telecommunications Bureau for Summary Decision, July 15, 1996 (“Joint Motion”); I.D., ¶ 12. TWCV opposed that motion. Combined Opposition to Joint Motion for Summary Decision, September 13, 1996; I.D., ¶ 12.

In December 1996, the Presiding Judge determined that a “mini-hearing” was necessary to evaluate the credibility and candor of Liberty’s witnesses. Memorandum Opinion and Order, WT

Docket No. 96-41, FCC 96M-265, ¶¶ 3 n.2, 4 (rel. Dec. 10, 1996). The Presiding Judge held hearing sessions on January 13-16, 21, 27 and 28, 1997 (hereinafter, the “January 1997 hearing”), in Washington, D.C. TWCV, Liberty, and the Bureau filed proposed findings of fact and conclusions of law on February 28, 1997, and replies to the proposed findings and conclusions on March 10, 1997. After Liberty produced additional documents following the January 1997 hearing, and Liberty’s counsel disavowed the testimony of one of their witnesses, the Presiding Judge granted TWCNYC’s motion for additional discovery and the taking of testimony.

Memorandum Opinion and Order, WT Docket No. 96-41, FCC 97M-63, ¶ 10 (rel. April 21, 1997). More hearings were held on May 28 and 29, 1997. TWCNYC, Liberty, and the Bureau filed supplemental proposed findings of fact and conclusions of law on June 11, 1997, and replies to the supplemental proposed findings and conclusions on June 23, 1997.

On September 9, 1997, the Presiding Judge partially granted the Joint Motion.

Memorandum Opinion and Order, WT Docket No. 96-41, FCC 97M-154 (rel. Sept. 11, 1997) (“S.D.”); I.D., ¶ 15. In the S.D., the Presiding Judge imposed a forfeiture as the penalty for Liberty’s failure to disclose to the Commission its unlawful hardwire interconnection of non-commonly owned buildings. S.D., ¶¶ 33-34; I.D., ¶ 15. The S.D. took no action with respect to any pending license application. S.D., at 23; I.D., ¶ 15, n.64.

On September 16, 1997, Liberty finally produced to TWCV and the Presiding Judge copies of a so-called Internal Audit Report (the “Report”) that it had furnished, *ex parte*, to the Bureau in August 1995, in response to a request from the Bureau for more information under 47 U.S.C.

§ 308(b).² See 47 U.S.C. § 308(b); TWCV Exs. 28, 33, 67;³ LD., ¶ 25. The Report purports to be the result of Liberty's counsel's investigation into Liberty's compliance with FCC regulations in applying for microwave licenses and commencing operation of new microwave paths. See TWCV Ex. 67, at 1; LD., ¶ 29. Although Liberty refused to produce the Report in discovery and refused to allow discovery of information related to the Report (such as identifying the names of persons who were interviewed for the Report), the Joint Motion made extensive reference to the document. On October 1, 1997, TWCNYC filed a "Motion to Place Documents in Evidence, to Take Additional Discovery and to Compel Discovery Responses" moving the Report in evidence and seeking discovery of the factual foundation for statements contained in the Report. The Presiding Judge initially granted TWCNYC's motion. Order, WT Docket No. 96-41, FCC 97M-177 (rel. Oct. 24, 1997). However, at a status conference held on November 5, 1997, the Presiding Judge reversed his ruling, *sua sponte*, and ordered the filing of supplemental findings and conclusions related to the Report without allowing any further discovery. Sippel, Tr. 2382-84, 2400-02; see also Order, WT Docket No. 96-41, FCC 97M-185 (rel. Nov. 10, 1997); LD., ¶ 28 & n.18. The parties filed their second supplemental proposed findings on November 19, 1997, and replies on December 2, 1997.

²Only after the D.C. Circuit sustained a Commission Order that Liberty produce the Report to TWCV, did Liberty provide it to TWCV and the Presiding Judge on September 16, 1997. Bartholdi Cable Co. v. FCC, 114 F.3d 274 (D.C. Cir. 1997), aff'g Liberty Cable Co., 11 FCC Rcd 2475 (1996); LD., ¶ 26.

³Liberty and the Bureau introduced joint exhibits which are cited as "L/B Ex. ___." Time Warner and Cablevision submitted joint exhibits which are cited as "TWCV Ex. ___."

On March 6, 1998, the Presiding Judge issued the LD, which found that Liberty lacked the character qualifications to be a Commission licensee, and accordingly, denied the captioned applications.

QUESTION OF LAW PRESENTED

Whether the Presiding Judge correctly denied Liberty's pending applications based on a determination that Liberty was not qualified to be a Commission licensee.

ARGUMENT

I. The Record Evidence Supports The Presiding Judge's Determination That Liberty Was Unqualified To Hold A Commission License.

Liberty's pending OFS license applications were designated for hearing to determine whether "Liberty possesses the requisite character qualifications to be granted" Commission licenses. HDO, ¶ 30(4); LD, ¶ 11. The Commission directed the Presiding Judge to examine whether Liberty "misrepresented facts to the Commission, lacked candor in its dealings with the Commission, or attempted to mislead the Commission." HDO, ¶ 30(3); LD, ¶ 11. The findings of fact set forth in the LD reflect not only the substance of what was said, but also the Presiding Judge's assessment of Liberty witnesses' credibility and candor in their testimony about the discovery and disclosure to the Commission of Liberty's unlawful microwave operations. Memorandum Opinion and Order, WT Docket No. 96-41, FCC 96M-265, ¶¶ 3-4, n.2 (rel. Dec. 10, 1996); see LD, ¶ 12.

The Commission must affirm the LD if "[t]he preponderance of the record evidence, as a whole, establishes that [Liberty] does not possess the qualifications to be a Commission licensee." RKO General, Inc., 4 FCC Rcd 4679, ¶ 30 (Rev. Bd. 1989) (citing Steadman v. SEC, 450 U.S. 91 (1981)); see David R. Price, 7 FCC Rcd 1838, ¶ 13 (Rev. Bd. 1992). The

Commission's review of the record is limited to ensuring that substantial evidence supports the Presiding Judge's decision. See Lorain Journal Co. v. FCC, 351 F.2d 824, 828 (D.C. Cir. 1965). The veracity of a potential licensee's principals is a key factor when evaluating the qualifications of a license applicant. TeleSTAR Inc., 2 FCC Rcd 7352, ¶ 11 (1987). Moreover, "Commission precedent requires that credibility findings of an ALJ be given decisional deference, unless those findings are in irreconcilable conflict with the record evidence." RKO General, Inc., 4 FCC Rcd 4679, ¶ 46 (citing Opal Chadwell, 2 FCC Rcd 5502, 5504 (Rev. Bd. 1987)); see also WHW Enterprises, Inc. v. FCC, 753 F.2d 1132, 1141 (D.C. Cir. 1985) (substantial evidence needed to upset a Presiding Judge's credibility findings); Black Television Workshop of Los Angeles, Inc., 8 FCC Rcd 4192, ¶ 9 (1993).

The Presiding Judge concluded that Liberty engaged in substantial misconduct both in its communications with the Commission about the pending applications and during the hearing. See, e.g., I.D., ¶¶ 30-35, 73-85. Furthermore, the Presiding Judge concluded that Liberty most likely knew of its unauthorized microwave operations prior to late April 1995, the date that Liberty admits having such knowledge (Supplemental Proposed Findings of Fact and Conclusions of Law of Bartholdi Cable Co., Inc., November 19, 1997, ¶ 17); or at a minimum, operated with reckless disregard of the Commission's licensing requirements over a period of four years. I.D., ¶¶ 49, 54-72. The Presiding Judge's findings of fact, based on his evaluation of witnesses' credibility, are abundantly supported by the record and should be accorded substantial deference. See Pensacitos Village, Inc. v. NLRB, 565 F.2d 1074, 1079 (9th Cir. 1977) (citing Universal Camera Corp. v. NLRB, 340 U.S. 474, 496 (1951)); see also I.D., nn.27, 33.

A. Liberty made material false statements in support of its license applications.

The Presiding Judge found that “[f]rom May 4, 1995 to July 17, 1995, Liberty was engaged in a pattern of failing to disclose, misrepresenting or lacking in candor” to the Commission. I.D., ¶ 107. The record evidence substantially supports this finding. See I.D., ¶¶ 73, 76-85. During this period, Liberty filed requests for Special Temporary Authority (“STA”), license applications, and pleadings opposing TWCNYC’s petitions to deny those and other previously filed license applications. Liberty failed to state in these filings that it knew it was seeking authorization for paths that were already operational, and affirmatively misrepresented that currently operating paths would be activated in the future. Through testimony and analysis of documenting evidence, the Presiding Judge discerned in these filings a “deliberate plan to keep information from the Commission.” I.D., ¶ 77.

1. May 4, 1995 STA requests

Documentary and testimonial evidence shows that by late April 1995, Liberty knew that it had been operating unlicensed microwave facilities (H. Milstein, Tr. 517-18; E. Milstein, Tr. 1623-24; Price, Tr. 1362-64), but decided not to disclose that fact to the Commission. I.D., ¶ 78. It did so only after Time Warner discovered two operational Liberty microwave facilities and revealed that discovery to the Commission. On April 27, 1995, during a conference call with its attorneys, Liberty (specifically, Mr. Price) discussed the unauthorized activations and consciously decided not to reveal the fact of its unauthorized operations to the Commission. H. Milstein, Tr. 586; Price, Tr. 1365-69, 1383. One of Liberty’s attorneys, Michael Lehmkuhl, prepared an inventory of Liberty’s pending applications on April 28, 1995, which Mr. Price recognized as including operating facilities. Liberty filed fourteen STA requests on May 4, 1995,

to cover these facilities. TWCV Ex. 34. In the STA requests, Liberty not only failed to disclose the material fact that the paths were already in operation, but also included several false statements in the requests that affirmatively suggested they were *not* in operation. TWCV Ex. 17. For example, Liberty asserted that “[i]f Liberty cannot meet its *potential* customers’ demand for service, those *potential* customers will cancel their contracts with Liberty.” Id. at 5 (emphasis added).

2. May 17, 1995 Surreply

Even when Liberty “confessed” its violations of the Communications Act to the Commission, it failed to tell the whole truth. See I.D., ¶ 80. On May 5, 1995, TWCNYC revealed the existence of two operating, but unlicensed, Liberty microwave facilities. In its Surreply, filed on May 17, Liberty admitted that it had activated those two facilities, as well as thirteen others, without FCC authorization. TWCV Ex. 18, at 1-2. Although Liberty revealed the existence of unauthorized operations, the disclosure was minimal. Liberty failed to include information about the length of time these facilities had been operating, or the fact that many of them had been turned on before a license application was on file, even though that information was available to Liberty in Mr. Nourain’s April 26, 1995 memorandum (TWCV Ex. 35) and in Mr. Lehmkuhl’s April 28, 1995 inventory. TWCV Ex. 34. The April 26, 1995 memorandum identifies eight of the fifteen unlawfully activated facilities listed in the Surreply as requiring STA. Compare TWCV Ex. 35 with TWCV Ex. 18. The April 28, 1995 inventory lists nine of the operating facilities cited in the Surreply as having pending license applications. Compare TWCV Ex. 34 with TWCV Ex. 18. Moreover, a review of the April 28, 1995 inventory reveals that when Liberty filed its requests for STA on May 4 and 19 1995, most of the facilities identified in

the two late April 1995 documents had been operating unlawfully for over two months, and one facility had been operating unlicensed for over five months (524 East 72nd Street). See TWCV Exs. 34, 35. Thus, when Liberty filed its Surreply on May 17, as well its May 4 STA requests, it knew that it had some facilities that had been operating without authorization for almost six months and that a number of these had been turned on even before applications for them had been filed. However, Liberty portrayed the unauthorized activations as rare deviations from its usual practices. See TWCV Ex. 18, at 2-3. In addition, by omitting from the Surreply any reference to the source of its discovery of the unauthorized activations -- the April 26 and 28 documents -- Liberty failed to disclose that the material misstatements and omissions in its May 4 STA requests were knowingly made.

The evidence also shows that the Surreply misrepresented other facts about Liberty's microwave operations. First, Liberty attempted to explain its premature activations by stating that "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." TWCV Ex. 18, at 3. Mr. Nourain had no basis for this assumption. There was no established pattern whereby Liberty's counsel would routinely file STA requests, no such requests had been filed, and a number of the facilities had been turned on before applications for them had been filed, even though Mr. Nourain was the person who signed the applications. Lehmkuhl, Tr. 1186-87; Nourain, Tr. 640. Second, Liberty falsely claimed "[i]t has been Liberty's pattern and practice to await a grant of either a pending application or request for STA prior to making a microwave path operational." TWCV Ex. 18, at 3. Liberty's 93 unauthorized activations since it began providing microwave service in 1993 show that it had no such pattern

or practice. TWCV Ex. 67, Exhibit B. Moreover, Mr. Price testified that when he executed his declaration supporting the Surreply, he understood that Liberty's actual "pattern and practice" was different from its asserted policy of compliance. Price, Tr. 1579-81. Liberty also misrepresented that, except for the two premature activations identified by TWCNYC in its May 5, 1995 petition to deny, Liberty never was found to be operating in violation of the Commission's Rules. TWCV Ex. 18, at 2. This statement is inconsistent with the Report's conclusion that certain Liberty executives knew in 1993 that Liberty was operating numerous microwave facilities without authorization. See TWCV Exs. 34, 35, 67.

3. Filings related to Palisades Avenue

The Presiding Judge justifiably found that Liberty's filings related to the facilities at 2727 Palisades Avenue "was a uniquely flagrant event because it presented Liberty with a myriad of missed opportunities to disclose the premature activation of the facility." I.D., ¶ 81. On March 24, 1995, Liberty applied for a license to serve 2727 Palisades and, on May 19, 1995, filed an STA request for these facilities. TWCV Ex. 38. However, in the STA request, Liberty knowingly concealed the fact that 2727 Palisades was already operating.⁴ TWCV Ex. 38; Lehmkuhl, Tr. 1265. In fact, Liberty misleadingly implied that STA was necessary for the *future* operation of the 2727 Palisades facility. See, e.g., TWCV Ex. 38, at 2 ("any delay in the

⁴Although Liberty did disclose in the May 17, 1995 Surreply that facilities at 2727 Palisades were operating, this disclosure does not excuse Liberty's failure to include pertinent information in the STA request. The fact that information relevant to a pending application is reported elsewhere in the Commission's files does not satisfy Liberty's obligation, under Commission rule 1.65, to keep its applications current. See Vogel-Ellington Corp., 41 FCC 2d 1005, ¶ 14 (Rev. Bd. 1973) (citing Folkways Broadcasting Co., 27 FCC 2d 614, ¶¶ 4-5 (Rev. Bd. 1971)); see also 47 C.F.R. § 1.65.

institution of temporary operation would seriously prejudice the public interest”) (emphasis added).

In later filings relating to 2727 Palisades, Liberty continued to conceal its unauthorized operation. On May 23, 1995, Liberty amended its application for 2727 Palisades to add a facility to serve 4525 Henry Hudson Parkway. TWCV Ex. 39, at 2; Lehmkuhl, Tr. 1271-72. The amendment included a system diagram indicating that the application for 2727 Palisades was still pending, but did not say that the path to that address had been activated. TWCV Ex. 39, at 9; Lehmkuhl, Tr. 1273. On May 24, 1995, Liberty amended its May 19 STA request to add the facility serving 4525 Henry Hudson, including a copy of the original May 19 request, but again failing to disclose that the facilities serving 2727 Palisades were operating. TWCV Ex. 39; Lehmkuhl, Tr. 1271-73. Similarly, Liberty did not disclose that 2727 Palisades was operating without authorization in July 12 and July 24, 1995 amendments to the May 19 STA request. TWCV Exs. 40, 43; Lehmkuhl, Tr. 1277-80.

4. May 26, 1995 Reply to Opposition

In a paper filed on May 26, 1995, Liberty missed yet another opportunity to remedy the misstatements and omissions in its May 4 STA requests. The Presiding Judge found that Liberty’s May 26, 1995 reply in support of its May 4 STA requests was “repetitious in its failure to disclose significant information.” *I.D.*, ¶ 82; *see* TWCV Ex. 19. The reply fails to say that the STA requests related to facilities that were already operating and continues the misleading implication that the facilities that were the subject of the May 4 STA requests were inactive. TWCV Ex. 19; Barr, Tr. 1929-21. It argues that STA was necessary because “a number of Liberty’s contractual obligations are imperiled as a result of Time Warner’s filings.” TWCV Ex.

19, at 3. In fact, Liberty's contractual obligations were not "imperiled" because Liberty was already serving these buildings with unauthorized microwave links. TWCV Ex. 17; H. Milstein, Tr. 517-18; E. Milstein, Tr. 1623-24; Price, Tr. 1362-64.

5. July 17, 1995 license applications

On July 17, 1995, Liberty applied for licenses for facilities to serve four locations (1295 Madison Avenue; 38 E. 85th Street; 430/440 E. 56th Street; and 380 Rector Place). TWCV Ex. 25. The record evidence supports the Presiding Judge's conclusion that Liberty concealed the fact that the facilities serving these addresses were already operating. ID., ¶ 83. Mr. Nourain knew in June 1995 that the four facilities that are the subject of the July applications were operating illegally. Nourain, Tr. 872-73. Messrs. Price and E. Milstein were informed of that fact on or about June 16, 1995. Nourain, Tr. 874. Therefore, when the applications for them, signed by Mr. Price, were filed on July 17, 1995, Liberty knew that the facilities were operating but did not disclose that fact.⁵

B. Liberty lacked candor in the hearing.

If anything, once the Commission designated the captioned applications for a hearing, Liberty's efforts to minimize the scope and seriousness of its transgressions intensified. The Presiding Judge found that during the hearing, Liberty showed an intent to mislead the Commission by deliberately omitting highly relevant documents from the Joint Motion. ID.,

⁵Liberty's lack of candor is further demonstrated by its failure to supplement a previous response to the Bureau's first section 308(b) request. On June 16, 1995, Liberty responded to the Bureau's request for detailed information about Liberty's unauthorized activations. TWCV Ex. 21. Liberty's response disclosed the unauthorized facilities that were listed in the May 17, 1995 Surreply. Id. Liberty failed to supplement this response upon learning that it had activated four additional paths without authorization, even though it had this knowledge just days after it had submitted the response.

¶ 117. Indeed, the Joint Motion itself was based on testimony that Liberty knew was false. In addition, Liberty's unjustifiable withholding of significant documents indicated a "pattern to deprive this proceeding of timely evidence." See id. The Presiding Judge also found that Liberty delayed producing relevant evidence revealing that its witnesses had testified falsely in their depositions. See id., ¶ 36. Based on the record evidence, the Presiding Judge concluded that Liberty lacks "reliability for dealing with the Commission in the future with honesty, completeness, and in full compliance with the regulations." Id., ¶ 117.

1. Liberty's Joint Motion for Summary Decision was based on testimony that it knew was false.

A key argument in the Joint Motion is that Liberty's unlicensed operations were, at worst, the result of the negligent conduct of its chief engineer, Behrooz Nourain, who, Liberty said, had been inadequately trained and supervised. Liberty argued in the Joint Motion that it should not be disqualified from receiving a Commission license, in part because Mr. Nourain performed his job "without a full understanding of the scope of his responsibilities." Joint Motion, at 45. The Presiding Judge held that this argument was based on a statement Liberty knew to be false. Id., ¶ 50. In the Joint Motion, Liberty acknowledged that after Liberty hired Mr. Nourain, Mr. Stern met with Mr. Nourain to explain the license application process.⁶ Joint Motion, at 13. However, Liberty stated that "Stern did not give Nourain a written memorandum detailing the application process." Id. (citing Stern Deposition, 6/5/96, at 73); see also id. at 45 ("Thus, Nourain was neither told in writing, nor orally, of the procedure to follow for licensing"); Id., ¶ 50. In fact, Liberty had in its possession such a memorandum addressed to

⁶Joseph Stern was a consultant that preceded Mr. Nourain as the person responsible for Liberty's licensing. Joint Motion, at 9; H. Milstein, Tr. 515; Price, Tr. 1350.

Mr. Nourain, but failed to produce it in discovery. That memorandum was attached to the Report that Liberty was withholding under an invalid claim of privilege. See TWCV Ex. 67, Exhibit E. In addition, the document reveals that Mr. Nourain's testimony that he did not receive detailed licensing instructions from Mr. Stern is false. See Nourain, Tr. 971. Moreover, Mr. Stern sent copies of the memorandum to Messrs. Price, McKinnon, and Ontiveros so they knew that Mr. Nourain had been properly instructed. The memorandum explicitly informed Mr. Nourain of the importance of keeping track of the licenses and of communicating with attorneys throughout the licensing process. TWCV Ex. 67, Exhibit E. Thus, in the Joint Motion, Liberty knowingly misrepresented the fact that Mr. Nourain had not received a "written memorandum detailing the application process," and built one of its principal arguments on that misrepresentation.

There is no justification for Liberty's failure to have produced the Stern memorandum until September 1997, over a year after the Joint Motion had been filed. Liberty submitted the Report and its attachments to the Bureau on August 14, 1995. Of the four documents attached to the Report, Liberty produced only one during normal discovery and belatedly produced another after the January 1997 hearing, in compliance with the Presiding Judge's Order. Liberty withheld the other two documents until it was compelled by the D.C. Circuit to produce the entire Report and its attachments in September 1997. Not coincidentally, the one document attached to the Report that Liberty did produce in discovery supported Liberty's position in the hearing; the belatedly produced document and one of the withheld documents undermined that position.

2. Liberty delayed production of highly relevant documents.

The Presiding Judge concluded that Liberty “deliberately withheld significant documentary evidence concerning activations,” noting that key documents that were responsive to document requests and relevant to the licensing proceeding were withheld until “discovered in the course of the hearing, reviewed *in camera*, ordered to be produced, testified to in depositions, [or] presented as exhibits [during the hearing].” LD, ¶ 30. Liberty’s intentional delay in producing these documents is strongly supported by record evidence. The significance of these documents is indicated by the material difference between Liberty principals’ deposition testimony and their hearing testimony, given after many of the documents were produced.

The Report

Liberty “strategically withheld [the Report] under a waived assertion of the attorney-client privilege.” LD, ¶ 30. Liberty withheld the Report and its attachments, until all discovery and testimony had been completed, thereby keeping the Report from the proceeding until it was no longer usable as a discovery tool.⁷ The Report was eventually produced to TWCV and the

⁷Although initially granting TWCNYC’s motion for discovery regarding the Report, the Presiding Judge reversed his decision at a November 5, 1997 hearing. See supra p. 4. In the LD, the Presiding Judge stated that the Report raised substantial questions about the knowledge of Messrs. Nourain and McKinnon and Ms. Richter concerning Liberty’s activations. LD, ¶ 30. The Presiding Judge explained that discovery on those questions was not possible without “further interminable delays and interlocutory appeals.” Id. The Report’s findings contradict Liberty’s defense that its principals and outside counsel were unaware of the premature activations until late April 1995. Liberty Supplemental Proposed Findings and Conclusions, June 11, 1997, ¶ 40; see Order, WT Docket No. 96-41, FCC 97M-177, at 2 (rel. Oct. 24, 1997). If the Commission decides to remand this case to the Presiding Judge, TWCNYC requests that the Presiding Judge also be ordered to grant TWCNYC’s motion for discovery concerning the Report so that the Presiding Judge can conclusively determine whether Liberty’s principals and outside counsel had knowledge of premature activations prior to April 1995.

Presiding Judge on September 16, 1997, after extensive litigation over Liberty's claim of attorney-client privilege, in which Liberty's claim was denied.

The Report is highly relevant to this proceeding for several reasons. First, in the Joint Motion, Liberty relied on the Report. See Joint Motion, at 19-20, 44-45, 47, 53, 55. Second, Liberty has touted the Report as a "comprehensive, precise and accurate" assessment of the facts surrounding Liberty's premature microwave activations. TWCV Ex. 29, ¶ 6; Tr. 2362, 2377, 2381. According to Lloyd Constantine (Liberty's counsel who oversaw production of the Report), the investigating attorneys had "complete access to Liberty's books and records and an unfettered and unlimited opportunity to interview all Liberty personnel, officers, and outside-retained counsel." TWCV Ex. 29, ¶ 5. Third, the Report attached documents not produced during discovery that are highly relevant to the hearing: 1) Mr. Stern's June 1992 memorandum instructing Mr. Nourain about licensing procedures (TWCV Ex. 67, Exhibit E), and 2) Jennifer Richter's April 20, 1993 letter warning Liberty of the possibility of unlicensed operations (the "Richter letter"). TWCV Ex. 67, Exhibit F. Finally, the Report is relevant, as well as materially significant, because it discloses that Liberty has activated 93 unauthorized paths since 1992, a considerably greater number than the nineteen unauthorized paths listed in the HDO and it concludes that Mr. McKinnon, Liberty's Executive Vice President and Chief Operating Officer, Messrs. Nourain and Ontiveros, and Ms. Richter most likely knew of unlicensed operations well before April 1995. TWCV Ex. 67, at 11, 13, 15 and Exhibit B; ID., ¶ 27.

February 24, 1995 Inventory

During the first four months of 1995, when Liberty illegally activated many of the facilities covered by the captioned applications, its lawyers gave it a license inventory that clearly

indicated that these facilities were unlicensed. L/B Ex. 1. Liberty delayed producing this inventory under a facially invalid claim of attorney-client privilege. The inventory's first page indicated that it had been sent to two persons other than the client, thus precluding any claim that it was a confidential attorney-client communication.⁸ *Id.* The memorandum was addressed to Messrs. Price and Nourain. By comparing the inventory with Liberty's Weekly Reports, which described the status of installations (TWCV Ex. 14; H. Milstein, Tr. 530-31; Ontiveros, Tr. 1699-1701; Price, Tr. 69), it could be determined that Liberty had activated facilities that had "pending" license applications. L/B Ex. 11 (Price Deposition, 8/1/96, at 174-78).

April 26, 1995 Memorandum

One of the two documents not produced in discovery that conclusively shows that Liberty's May 4 STA requests contain known misrepresentations and omissions is the April 26, 1995 memorandum, which was written by Mr. Nourain. After speaking with Messrs. E. Milstein and Price about Liberty's microwave activations, Mr. Nourain wrote the memorandum at Mr. Milstein's request. Nourain, Tr. 819-21; TWCV Ex. 35. This document was produced on January 13, 1997, the first day of the hearings. The memorandum listed all applications for which requests for STA would be filed. Nourain, Tr. 822. At the time Mr. Nourain drafted the memorandum, he knew that all but two of the microwave facilities it listed had been activated. *Id.* at 826-29; TWCV Exs. 30, 35. Significantly, Mr. Price testified at the hearing that he first learned of Liberty's unauthorized activations from this memorandum. Price, Tr. 1362-64, 1373.

⁸Liberty produced the February 24 inventory on June 27, 1996, after the Presiding Judge's *in camera* review and after all scheduled depositions had been completed. See Order, WT Docket No. 96-41, FCC 96M-164 (rel. June 27, 1996).

April 28, 1995 Inventory

After Mr. Nourain says he discovered that Liberty had unlicensed microwave facilities that were already operating, he asked Mr. Lehmkuhl to prepare a memorandum regarding the status of Liberty's license applications. Nourain, Tr. 648. On April 28, 1995, Mr. Lehmkuhl drafted such a memorandum, which also included an inventory of Liberty's licenses. TWCV Ex. 34; Nourain, Tr. 648. The April 28 inventory confirmed to Messrs. Nourain and Price that Liberty was operating microwave facilities without licenses. Nourain, Tr. 749-50; Price, Tr. 1385-86. This document also was not produced in the ordinary course of discovery, but on January 6, 1997, one week before the hearing. Moreover, in the narrative accompanying the inventory, Mr. Lehmkuhl advised that although the Commission was unlikely to grant any STA requests because of TWCNYC's pending petitions to deny, they should nevertheless be filed due to the "seriousness of the situation." TWCV Ex. 34. This could only be a reference to the fact that Liberty was operating unlicensed facilities.

Ms. Richter's April 20, 1993 Letter

In addition to the written instructions to Mr. Nourain that the Joint Motion says he never received, the other document attached to the Report, but neither produced in normal discovery nor identified in a log of documents withheld under a claim of privilege, was a letter to Liberty's management from its legal counsel, Jennifer Richter, dated April 20, 1993. This letter was a warning to Liberty's management that proved prophetic. The letter states in part:

Behrooz and I have had several discussions recently regarding when it is permissible for Liberty to construct and operate new microwave paths and stations, and when it is not. Some things were revealed during these conversations that gave both Behrooz and I pause. In order to ensure that everything Liberty does is in strict accordance with the rules, and to ensure that your competitors are given no ammunition against you, I am writing this letter to