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Before the
FEDERAL COMMUNICATIONS COMMISSION
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Application of)	WT Docket No. 96-41	
)		
LIBERTY CABLE CO., INC.	)	File Nos.:	
	)	708777	WNTT370
For Private Operational Fixed	)	708778, 713296	WNTM210
Microwave Service Authorization	)	708779	WNTM385
and Modifications	)	708780	WNTT555
	)	708781, 709426, 711937	WNTM212
New York, New York	)	709332	(NEW)
	)	712203	WNTW782
	)	712218	WNTY584
	)	712219	WNTY605
	)	713295	WNTX889
)	713300	(NEW)
)	717325	(NEW)

To: The Commission

EXCEPTIONS TO INITIAL DECISION

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SUMMARY

The Initial Decision (“ID”) disqualifying Liberty Cable Company, Inc. (“Liberty”) as a licensee should not be sustained, because it is rife with legal error and leads to a grossly unfair and improper result, unsupported by Commission precedent.

Perhaps most disturbing is the ALJ’s decision to explicitly punish Liberty for withholding from the ALJ an Internal Audit Report (“IAR”), which -- under the law, this Commission’s regulations, and an order of the Court of Appeals -- Liberty had the right to withhold pending appeal. The ALJ’s punishment of Liberty for exercising its rights is unwarranted and unjustified by any precedent. The ID certainly cites none.

The material factual findings are plainly arbitrary, capricious and wrong. The ID misconstrues testimony and documents. Neither Liberty nor the Wireless Telecommunications Bureau (“Bureau”) misrepresented anything in their Joint Motion; nor is there the slightest bit of evidence that the relatively few documents that Liberty produced late -- an understandable result of the size of the production and the speed in which it was ordered to be conducted -- were withheld for any reason other than inadvertence.

The ID’s speculation, unsupported by *any* direct testimony, that Liberty was not candid with the Commission should be rejected. The ID finds lack of candor where none could have existed. It finds, for example, that Liberty lacked candor in failing to reveal unauthorized service in certain STA (special temporary authority) applications when the evidence shows that the Chief of the Bureau, the Chief of the Microwave Branch, the Bureau’s Enforcement Division and Time Warner were already told in writing that certain paths had been erroneously activated. In addition, the ID’s conclusion that outside counsel informed Liberty in 1993 of premature

activation is astounding since the ID fails to mention that Liberty's counsel herself testified that she was unaware of any unauthorized operations. The ALJ credited Richter in all other respects but ignored her testimony that she did not know about premature activations.

The ID's finding that Liberty directed its outside counsel not to reveal the premature activations as part of a general scheme to withhold information from the Commission seriously ignores uncontroverted evidence that, at all times, Liberty intended to disclose its violations to the Commission once all the facts were discovered and verified.

Liberty did negligently activate 93 microwave paths without proper authorizations. Liberty has neither denied this fact nor sought to conceal it. It was Liberty that showed its responsibility by not billing subscribers for service over unauthorized paths. It was Liberty that instituted an effective compliance program which has prevented any recurrence of premature activations. It was Liberty that pointed out mistakes in its document production and then moved immediately to correct them. It was Liberty that agreed with the Bureau to pay an immense forfeiture. This record of responsibility should be to Liberty's credit. These factors, in addition to Liberty's effective cure of the violations, make disqualification an overly harsh and unwarranted penalty, especially given the total lack of any evidence that Liberty intended to deceive the Commission. Imposition of such a penalty would be contrary to Commission precedent and an abuse of discretion.

Based on the foregoing, the ID's disqualification of Liberty as a licensee, and all findings of fact and conclusions of law in support thereof, should be reversed. The matter should be remanded to the ALJ with instructions to enter findings consistent with the Joint Motion.

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EXCEPTIONS TO INITIAL DECISION

Pursuant to 47 C.F.R. § 1.276, Liberty hereby appeals and submits its exceptions to the Initial Decision (“ID”) of Administrative Law Judge Richard L. Sippel.¹

I. STATEMENT OF THE CASE

This case concerns Liberty’s qualifications to hold 15 licenses used to provide wireless cable television service.² In late April 1995, Liberty’s principals first discovered that Liberty may have violated the Commission’s rules by prematurely activating a number of microwave paths. Liberty’s immediate reaction was to find out what happened and to disclose its findings to the Commission. On May 17, 1995, Liberty disclosed a total of 15 paths that were operating without authorization.³ Liberty then engaged its outside counsel to conduct a fuller audit to determine the scope and cause of the premature activations and to cure the problem to ensure against future violations. Liberty’s counsel embodied their conclusions in an internal audit

¹ *Liberty Cable Co., Inc.*, FCC WT Docket No. 96-41 (rel. Mar. 6, 1998). This pleading is timely filed within two business days of the Office of General Counsel’s oral denial of Time Warner’s Motion to Exceed the page limits. 47 C.F.R. § 1.48(b).

² Liberty is a microwave operator that provides the technical backbone for wireless cable television services in New York City and Northern New Jersey. The company uses 18 GHz microwave frequencies opened up by the Commission for the purpose of increasing competition for delivery of video programming. Liberty, directly or indirectly, has competed head-to-head against the monopoly cable franchisees in New York City and Northern New Jersey, Time Warner and Cablevision, parties herein. At the time in question, Liberty was required to receive advance authorization from the Commission before activating a microwave path, although the Commission has since amended its rules to allow 18 GHz operators to begin operation upon the filing of an application. *Liberty Cable Co., Inc., Hearing Designation Order and Notice for Opportunity for Hearing*, 11 FCC Rcd 14133, 14137-38 n.9 (1996) (“HDO”).

³ Liberty did so in a Surreply to a Time Warner May 5, 1995 reply pleading which revealed that two of Liberty’s sites may have been prematurely activated. In the Surreply, Liberty not only acknowledged these two instances of unauthorized service but came forward with 13 more.

report (“IAR”) which Liberty submitted to the Commission’s Wireless Telecommunications Bureau (the “Bureau”) on August 14, 1995, pursuant to the Commission’s confidentiality rules. The IAR disclosed to the Commission a total of 93 premature activations.

At the same time, Liberty instituted a compliance program to prevent the recurrence of unauthorized operations. There has been no allegation that Liberty has unlawfully activated a single path since April 1995.

Liberty’s request for confidentiality for the IAR was ultimately denied and the Commission directed Liberty to make the IAR public, including to Time Warner and other competitors of Liberty. *Liberty Cable Co., Inc.*, 11 FCC Rcd 2475 (1996). Liberty appealed to the D.C. Circuit on February 1, 1996 and sought an emergency stay of the Commission’s order. On April 24, 1996, the D.C. Circuit granted the stay, noting that Liberty’s appeal “presents serious questions regarding the applicability of the attorney-client and work product privileges.” *Liberty Cable Company, Inc. v. FCC*, No. 96-1030 (D.C. Cir. 1996). Six weeks after Liberty appealed to the D.C. Circuit, the Commission issued its HDO.⁴

On July 15, 1996, after discovery had been completed regarding the cause of the premature activations, the Bureau and Liberty submitted a Joint Motion for Summary Decision (“Joint Motion”) in which Liberty stated its agreement to pay a forfeiture of \$790,000.⁵ Only

⁴ The ALJ acknowledged that the D.C. Circuit stay order precluded discovery of the IAR and that the Bureau had already reviewed it. *Memorandum Opinion and Order*, FCC 96M-116 (rel. May 15, 1996).

⁵ The forfeiture was comprised of \$710,000 for the premature activations and \$80,000 for Liberty’s hardwire interconnections. The ALJ granted the Joint Motion in part on the hardwire interconnections and accepted Liberty’s \$80,000 proposed forfeiture. *Memorandum Opinion and Order*, FCC 97M-154 (rel. Sept. 11, 1997). The ALJ found that Liberty did not lack candor in failing to disclose timely its hardwire interconnections. *ID* at ¶¶ 15.

(Continued...)

after the filing of the Joint Motion did this proceeding focus on the issue of when Liberty's principals first learned of the premature activations. Over the course of the next year, several rounds of discovery and hearings were conducted on this issue. Despite the ALJ's indulgence, no evidence was found to establish that Liberty's principals discovered unauthorized operations before late April 1995.

On June 3, 1997, the D.C. Circuit upheld the Commission's denial of confidentiality for the IAR. After rehearing *en banc* was denied on September 10, 1997, Liberty provided a copy of the IAR to the ALJ on September 16, 1997. Time Warner sought yet another round of discovery relating to the IAR, which the ALJ ultimately denied on November 10, 1997. At that point, the record was closed.

On March 6, 1998, the ALJ issued this ID which disqualified Liberty as a licensee.⁶ The ID is flawed in a number of key respects. The ALJ relies heavily on Liberty's withholding of the

(...Continued)

However, the ID also mistakenly states that the Bureau recommended an \$1.85 million increase in the forfeiture. ID at ¶ 128, nn. 17 and 62. The error flows from ALJ Sippel's unexplained conclusion that the statement "The Bureau believes that the additional [74 premature activations] revealed in the Audit Report may warrant an increase in the forfeiture amount assessed against Liberty" in a supplement to the Bureau's proposed findings of fact was actually a specific request for an additional forfeiture. ID at n.17 (*citing Bureau's Supplemental Proposed Findings of Fact and Conclusions of Law Regarding the Audit Report* (filed Nov. 19, 1997) at 12). The ID contains no calculation or explanation for this leap of logic. Moreover, since no issue was designated as to those 74 activations, *see* 47 C.F.R. § 1.221, those licenses cannot form the basis for an increased forfeiture.

⁶ The ALJ's decision was a partial denial of Liberty and the Bureau's Joint Motion. However, an initial decision is not appropriate following the denial of a motion for Summary Decision. Under the Commission's rules, "[i]f some of the issues only (including no dispositive issue) are decided on a motion for summary decision, or if the motion is denied, the presiding officer *will* issue a memorandum opinion and order, interlocutory in character, and the hearing *will* proceed on the remaining issues." 47 C.F.R. § 1.251(e). The ALJ by immediately issuing

(Continued...)

IAR pending its appeal in finding that Liberty lacked candor and could not be trusted to deal truthfully with the Commission in the future. In so finding, the ID ignores the fact that the Commission had the full IAR and its attachments since August 14, 1995, well before the HDO. The ALJ also found that on April 27, 1995, Peter Price, Liberty's President, directed outside counsel not to reveal immediately to the Commission that premature activations may have occurred. In doing so, the ALJ ignored uncontroverted evidence that Liberty always intended to make appropriate disclosure once the facts were verified. The ID also distorts an April 20, 1993 letter from Liberty's licensing counsel, Jennifer Richter, (the "Richter Letter"), to read as a "clear warning" that premature activations had occurred when even the letter's author stated that no such warning was presented in the letter. Indeed, she testified that she did not know of any premature activations. Based on these and many other errors detailed below, the ID cannot be sustained and should be reversed.

II. ISSUES PRESENTED

1. Whether the ID erred as a matter of law by penalizing Liberty for exercising its constitutional and statutory right to appeal the Commission's ruling regarding the confidentiality of the IAR.
2. Whether the ID erred in finding that Liberty's judicial appeal of the Commission's ruling on Liberty's confidentiality claim may form the basis for a finding that Liberty lacked candor before the Commission.
3. Whether the ID is arbitrary, capricious, contrary to law and not supported by substantial evidence in the record in finding that Liberty:
 - deliberately withheld information and evidence with an intent to deceive;

(...Continued)

this initial decision violated the clear mandate of the Commission's procedures to hold a hearing on the remaining issues.

- intentionally delayed and withheld production of documents;
 - misrepresented facts in the Joint Motion;
 - knew about premature activations before late April 1995; and
 - willfully, not negligently, initiated transmissions without the proper FCC authorizations.
4. Whether the ID erred as a matter of law by disqualifying Liberty as a licensee, instead of imposing the substantial forfeiture agreed to by Liberty, where there has been no evidence that Liberty intended to deceive the Commission.

III. ARGUMENT

A. **The ID Erred by Penalizing Liberty for Exercising its Constitutional and Statutory rights.**

The ID is replete with statements that Liberty's confidentiality and privilege assertions relating to the IAR, and the judicial appeal of the Commission's ruling on those issues, represented a pattern of lack of candor before the Commission and that, therefore, Liberty could not be trusted by the Commission to be candid in future.⁷ However, the ALJ's negative conclusion is wrong both as a matter of fact and of law.

Liberty may not be punished, as the ID clearly does, for the exercise of its procedural rights. No precedent of this agency supports the proposition that Liberty's duty of candor required either a waiver of its privilege claims or foregoing an appeal of an adverse Commission ruling. Such a finding would be flatly inconsistent with Liberty's constitutional rights to due

⁷ For example, the ID states that Liberty had "no excuse for withholding" the IAR (ID at ¶ 26); that Liberty keep the IAR "out of this proceeding as long as possible" (ID at ¶ 27); and that the IAR "was strategically withheld" (ID at ¶ 30). Moreover, the ID states that Liberty used the assertion of confidentiality and privilege with respect to the IAR "as a tool to keep highly relevant information from timely consideration in this proceeding" and that "Liberty withheld significant documentary evidence to such an extent that Liberty is not to be trusted to make full disclosure in the future." ID at ¶ 116.

process,⁸ well-established rules of federal civil procedure,⁹ the right of judicial appeal embodied in the Communications Act (47 U.S.C. § 402), and FCC rules which permit the submission of confidential materials (47 C.F.R. § 0.459). The Commission could not have constitutionally conditioned the outcome of the HDO proceeding on a waiver of Liberty's appellate rights.¹⁰ Yet, using the ID's logic, the very fact that Liberty did not waive those rights necessarily meant that Liberty lacked candor. This result effectively nullifies Liberty's constitutional and statutory rights and must be reversed.

The ID also explicitly penalizes Liberty by drawing negative inferences from its assertion of attorney-client privilege. ID ¶¶ 116, 117. This violates the established rule that negative inferences may not be drawn against a party properly asserting the privilege.¹¹ Moreover, the ID

⁸ While the right of appeal is not guaranteed in all judicial or administrative proceedings, where, as here, appellate procedures are available, such processes must comport with due process. *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966) (“once established, [appellate processes] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.”). At minimum, due process proscribes unequal access to appellate processes. *Douglas v. California*, 372 U.S. 353, 357-8 (1963). See *Ohio Adult Parole Authority v. Woodard*, 1998 WL 129931, *12 (U.S. Mar. 25, 1998); *Griffin v. Illinois*, 351 U.S. 12, 24 (1956). Accordingly, the ALJ may not burden Liberty's right to appeal by imposing the sanction of a lack of candor finding for the exercise of a constitutional right.

⁹ See *NL Indus., Inc. v. Commercial Union Ins. Co.*, 144 F.R.D. 225, 233 n.11 (D.N.J. 1992) (“Since privileges serve an important part in the preservation of law and the administration of justice they cannot be disregarded lightly.”) (citations omitted).

¹⁰ Such a requirement would be analogous to the doctrine of unconstitutional conditions. Under this doctrine, the government may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government where the action taken has little or no relationship to the benefit. See *FCC v. League of Women Voters*, 468 U.S. 364 (1984); *Sherbert v. Verner*, 374 U.S. 398, 404-405 (1963).

¹¹ *Parker v. Prudential Ins. Co.*, 900 F.2d 772, 775 (4th Cir. 1990); *THK America, Inc. v. NSK, LTD.*, 917 F. Supp 563, 566 (N.D. Ill. 1996); *A.B. Dick Co. v. Marr*, 95 F. Supp. 83, 100-01 (S.D.N.Y. 1950).

states that “the predictive probability for future withholding of significant information” can be inferred from Liberty’s assertion of the attorney-client privilege.¹² The ALJ’s reliance on the Commission’s character policy statements is inapposite because the Commission never suggested that appeal of a privilege issue amounts to “an adjudication of misconduct,” or involves misconduct at all.¹³ ID at ¶ 117 and n.57. That the Commission’s character qualifications policy does not classify the assertion of privilege and confidentiality claims as “misconduct” is not surprising, given that the Commission’s rules expressly provide for confidential submissions under 47 C.F.R. § 0.459 and subsequent appeals as of right to the D.C. Circuit.

B. The ID Erred In Finding That Liberty Could Not Be Trusted To Be Candid Because It Did Not Disclose the IAR.

The finding that Liberty lacks candor because it “strategically” asserted its privileges “as a tool to keep highly relevant information from timely consideration. . .” is baseless. ID ¶¶ 30, 117. Far from being hidden, the IAR has been in the possession of the Bureau and the

¹² ID at n.57. It should be noted that the assertion of a privilege does not somehow create a void in the record or render it incomplete, as the ALJ appears to believe. To the contrary, an administrative agency is bound to act “upon the record presented and such matters as properly may receive its attention through ‘official notice.’” *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 529-30 (1946); *see also Butz v. Economou*, 438 U.S. 478, 513 (1978). The goal, as recognized by the Commission, is to provide the decision maker with the fullest possible access to the facts in dispute, consistent with applicable privileges. *See, e.g., Fox Television Stations, Inc.*, 10 FCC Rcd 2954, 2955 (1995) (citing *Hickman v. Taylor*, 329 U.S. 495, 501 (1947) for the proposition that “generally speaking, trial practice favors disclosure of the issues and facts consistent with recognized privileges”) (emphasis supplied). Accordingly, a record constructed from all evidence not subject to a privilege is legally complete.

¹³ *Character Policy Statement II*, 5 FCC Rcd 3252 (1990) (“an adjudication of misconduct raises serious questions as to whether the applicant before the FCC is possessed of the requisite prosperity to obey the law”); *Character Policy Qualification I*, 102 FCC 2d 1179 (1986).

Commission since August 14, 1995. The information contained in the IAR was available to the Bureau during its investigation, at all times during discovery, and during the hearing. Indeed, the Bureau had the IAR for 11 months before the Joint Motion was made. Liberty's appeal thus could not have been a "tool" to hide facts.

There is no basis for the implication that Liberty brought its appeal to manipulate the hearing proceeding. The ID does not consider the fact that the confidentiality request and appeal were commenced before the HDO was even issued. Any chance that the appeal would be decided before the proceeding was well advanced, or over, was negated by the Commission's timing in issuing the HDO and its decision to expedite this proceeding. By virtue of these facts ignored by the ALJ, there is no basis to find that Liberty manipulated the proceeding or lacked candor based on its decision to appeal.

The ID is also wrong in finding that the appeal actually "ke[pt] highly relevant information" from the proceeding. The appeal did not foreclose any relevant inquiry into the facts.¹⁴ For its part, the Bureau acknowledged 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 IAR."¹⁵ Remarkably, the ALJ "disagree[d] totally" with the Bureau's conclusion -- based, apparently, on the fact that the discovery process did not replicate the contents of the IAR. ID at ¶ 117. The ID also ignores the fact that Liberty offered to produce a redacted version of the IAR or to produce it pursuant to a confidentiality

¹⁴ *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981).

¹⁵ See Bureau's Consolidated Reply, WT Docket No. 96-41 at 11 (filed Mar. 10, 1997).

agreement.¹⁶ Under these circumstances, the finding that Liberty attempted to keep the information from the proceeding is without foundation.

Finally, the ID seems to suggest a finding that Liberty abused process (ID ¶ 117). However, no conclusion of abuse of process can be sustained because this issue was never designated pursuant to 47 C.F.R. § 1.221. The ID's conclusion is also belied by the D.C. Circuit's stay order which found that Liberty's appeal raised serious questions and met the stringent standards required for a stay pending court review. *Liberty Cable Company, Inc. v. FCC*, No. 96-1030 (D.C. Cir. April 24, 1996). Although Liberty ultimately lost the appeal, nowhere did the Court indicate that Liberty's appeal was frivolous or in bad faith.

C. The ID Erred in Finding that Liberty Deliberately Withheld Information and Evidence from the Commission With an Intent to Deceive.

The ID premises its lack of candor finding on the alleged existence of an elaborate scheme by Liberty -- yet the evidence does not support this conclusion. In essence, the ALJ finds that on April 27, 1995, Price directed Liberty's outside counsel not to disclose to the Commission that premature activations may have occurred in order to hide that fact; that in furtherance of this scheme, Liberty made a series of misleading filings from May 4, 1995 through and including the Joint Motion, and that Liberty intentionally delayed and withheld production of significant documents during discovery (ID ¶¶ 111, 116, 117, 120, 122, 124, 130). None of these factual findings is supported by the record and, accordingly, the ID should be reversed.

¹⁶ See *Liberty's Opposition to Time Warner's Motion to Place Documents in Evidence*, WT Docket No. 96-41 at 12 n.30 (filed Oct. 15, 1997) and documents cited therein. Both offers were refused.

The uncontroverted evidence reveals that Price and Liberty's outside counsel first became aware of potential premature activations during the April 27, 1995 conference call¹⁷ (Tr. 1364:13 - 1365:23 [Price], 1796:8 - 1797:7, 1833:10-15 [Barr]).¹⁸ The parties to that conference call agreed to disclose the violations to the Commission once the facts were gathered and verified (Tr. 1367:11 - 1369:3 [Price], 1801:20-25 [Barr]). Liberty immediately initiated an accelerated audit to determine the extent of the unauthorized operations, and on May 17, 1995, Liberty disclosed to the Commission a total of 15 paths which were operating without authority (Constantine Affidavit (TWCV 29), ¶ 3; May 17 Surreply (TWCV 18)).¹⁹ Liberty's Chairman then ordered a fuller investigation into the extent and cause of the activations and directed counsel to develop a compliance program (Constantine Affidavit (TWCV 29), ¶ 4; Tr. 520:17-19 [H. Milstein]). The investigation's results were embodied in the IAR and disclosed to the Commission on August 14, 1995 (TWCV 67; TWCV 33). Liberty also instituted the compliance program developed by outside counsel (Tr. 520:17-19; Bureau Proposed Findings, ¶ 103).²⁰

¹⁷ The purpose of the conference call was to discuss Liberty's response to Time Warner's petitions to deny which by late April 1995 had effectively held up the grant of authorizations to Liberty. Tr. 1365:9-11 [Price]; 1797:3-19, 1804:6-24 [Barr].

¹⁸ Cites to the hearing transcripts take the form "Tr." followed by a page and line number separated by a colon, with the last name of the witness in brackets. Cites to deposition transcripts take the form of "[Witness] Dep. [page number]:[line number]." References to "TWCV" are to the exhibits entered into evidence by Time Warner and Cablevision. References to "L/B" are to exhibits entered into evidence by Liberty and the Bureau.

¹⁹ By ignoring the undisputed fact of this initial audit, the ALJ wrongly found that Liberty did not commence an internal investigation until June 1995 (ID ¶ 75).

²⁰ In licensee qualification proceedings, failure to take into account subsequent remedial activity can be reversible error. See *Southwestern Broadcasting Corp.*, 12 FCC Rcd 6990-91 (1997); *Richard Richards*, 10 FCC Rcd 3950, 3958 (1995).

The ID wrongly infers an intent to deceive based on (i) Liberty's failure to notify the Commission immediately on April 27, 1995 that premature activations may have occurred; and (ii) Liberty's failure to disclose the premature activations in its May 4, 1995 STA requests. In hindsight, the better course of action undoubtedly would have been to inform the Commission of the suspected violations immediately.²¹ However, the Commission's rules and precedent do not require immediate disclosure, particularly when the evidence shows that Liberty was investigating the violations with the goal of making a complete disclosure to the Commission.²²

The ID finds that Liberty misled the Commission in the May 17 Surreply (i) by stating that Liberty had a "pattern and practice" of awaiting Commission authorization before activating paths; and (ii) by failing to disclose "detailed information about additional paths" which Liberty had prematurely activated. The ID's finding is wrong because it disregards uncontroverted evidence that Liberty believed the May 17 Surreply to be true when submitted.²³ (Tr. 1500: 17-1502:9 [Price], 1178:10-16 [Lehmkuhl], 1923:13-18 [Barr]). Furthermore, the finding presumes without evidence that Liberty's principals knew about more than 15 premature activations on May 17 and deliberately withheld these facts from the Commission. The uncontroverted

²¹ For this reason, Liberty did not object to the Bureau's request to increase the forfeiture by another \$300,000. Liberty Reply Proposed Findings ¶ 60.

²² See 47 C.F.R. § 1.65(a) (licensees are required to disclose "as promptly as possible and in any event within 30 days"). See *Arkansas Educational Television Comm'n*, 6 FCC Rcd 478, 479 (1991) (47 C.F.R. § 1.65(a) not violated by failure to disclose immediately where licensee was taking corrective action and attempted to notify Commission within 30 days.) The evidence revealed that Liberty disclosed the premature activations on May 17, 1995, within 30 days of discovery.

²³ A willful intent to deceive -- based not on conjecture but on "substantial evidence" -- is required before a licensee may be disqualified. *Cannon Communications Corp.*, 5 FCC Rcd 2695, 2700 (Rev. Bd. 1990) (establishing "substantial evidence" standard).

evidence reveals that by May 17, Liberty had only done an accelerated audit of which paths were operating without authority and was weeks away from completing the more extensive audit that revealed additional violations which were then disclosed to the Commission on August 14.²⁴ These undisputed facts are inconsistent with an intent to deceive the Commission.

The ID improperly disqualifies Liberty based on failure to disclose its premature activations in subsequent pleadings. After the May 17 Surreply disclosed that Liberty had prematurely activated multiple microwave paths, the failure to repeat this fact in every filing thereafter may reveal a failure to disclose but certainly does not show an intent to deceive. A disqualifying lack of candor or misrepresentation must be accompanied by an intent to deceive.²⁵ No such intent can be found after May 17, since the Commission was already apprised of the unlicensed paths.

²⁴ The ID erroneously states that “[a]t no time did Liberty supplement its June 16 response to the Section 308 letter to reveal the 4 additional unauthorized activations.” (ID ¶ 85.) This finding ignores the evidence. As the Chief of the Bureau’s Enforcement Division wrote on August 4, 1995, “[d]uring the pendency of our review of this matter, [Liberty] has disclosed four additional instances in which it activated microwave OFS paths prior to filing for or receiving proper authorization from the [Commission]. See, [STA requests] dated July 24, 1995.” (TWCV 27.)

²⁵ *Cannon Communications Corp.*, 5 FCC Rcd at 2700; *Fox River Broadcasting, Inc.*, 88 FCC 2d 1132, 1137 (Rev. Bd. 1982), *affirmed and clarified*, 93 FCC 2d 127 (1983); *see also Swan Creek Communications, Inc. v. FCC*, 39 F.3d 1217 (D.C. Cir. 1994); *Telephone and Data Systems, Inc.*, 10 FCC Rcd 10518, 10520 (1995) (Initial Decision).

D. The ID Erred in Finding That Liberty Intentionally Delayed and Withheld Production of Documents

The ID found lack of candor based on Liberty's late production of several documents (ID ¶¶ 111, 116, 117, 120, 122, 124, 130).²⁶ This finding ignores the record and fails even to discuss Liberty's explanation for the late production of these documents.²⁷

Discovery was commenced in this case on a highly expedited basis and was initially set to be completed within three months of the issuance of the HDO (*Order*, FCC 96M-36 (rel. March 15, 1996)). In this short space of time, Liberty produced over 15,000 pages of documents and made numerous witnesses available for deposition. Under these rushed circumstances, errors occurred. However, the record reveals that when Liberty learned of these mistakes, it candidly acknowledged them and produced the documents in question immediately.²⁸

The documents were either produced late by inadvertence or had been disclosed to the Commission well before the HDO commenced. The February 24 Lehmkuhl Inventory and other license inventories were initially withheld based on mistaken privilege designations. Liberty's

²⁶ The ALJ pointed to the inventories prepared by Michael Lehmkuhl, Esq. dated February 24, 1995 (the "February 24 Lehmkuhl Inventory") and April 28, 1995 (the "April 28 Lehmkuhl Inventory"), the April 26, 1995 memorandum from Nourain to Edward Milstein (the "April 26 Nourain Memorandum"), the Richter Letter, the IAR and the June 16, 1992 Memorandum from Stern to Nourain ("Stern Memorandum") (TWCV 67, Ex. E).

²⁷ See Opposition by Bartholdi Cable Co., Inc. to the Motion of Time Warner Cable of New York City and Paragon Cable Manhattan and Cablevision of New York City - Phase I for an Inquiry into the Adequacy of Compliance by Liberty Cable Co., Inc. with Requests for Production of Documents in this Proceeding, WT Docket No. 96-41 (filed Feb. 14, 1997).

²⁸ The ALJ acknowledged Liberty's swift reaction. "And I want to note for the record that . . . the availability or the discovery of an additional document was communicated to me immediately Friday afternoon after we had finished the proceeding. And so counsel was certainly on top of the situation in terms of getting the information and also of course as to the other two parties in this case." Tr. 495:12-18.

attorneys discovered this fact only upon the preparation of a privilege log in June 1996. As soon as Liberty's attorneys realized their mistake, they produced the documents to the parties. As for the April 26 Nourain Memorandum and the April 28 Lehmkuhl Inventory, they were discovered shortly before the January 1997 hearings.²⁹ Liberty's Feb. 14, 1997 Opposition at 6-11. Liberty's attorneys immediately produced these documents. Despite the ID's implication, Liberty obtained no strategic advantage from this late production. Finally, the Stern Memorandum was not responsive to document requests because it was dated June 16, 1992, and thus outside the January 1, 1993 discovery cut-off date.³⁰ In any event, this document and the Richter Letter were attachments to the IAR and already in the Commission's and Bureau's possession well before the HDO was issued. Liberty cannot seriously be accused of hiding documents which the Commission already possessed.³¹

²⁹ The ALJ claims that the Joint Motion was misleading because it did not mention "key evidence" such as the April 26 Nourain Memorandum and the April 28 Lehmkuhl Inventory. ID ¶ 120. Since these documents were not even discovered until six months after the Joint Motion was filed, Liberty could not possibly discuss them in the Joint Motion. The ALJ's finding lack of candor based on failure to mention the documents is unfair and improper.

³⁰ Liberty's Responses and Objections to the Bureau's First Set of Interrogatories, WT Docket No. 96-41 at 2 (filed April 15, 1996 General Objection 3); Liberty's Responses and Objections to the Bureau's Request for Production of Documents, WT Docket No. 96-41 at 2 (filed April 15, 1996); Liberty's Feb. 14, 1997 Opposition at 3, n.2.).

³¹ The ID wrongly relies on two other "circumstances" allegedly showing Liberty's "predisposition" not to disclose facts timely. ID ¶ 101. However, neither of these circumstances can support a finding of an intent to deceive. In the case of the delayed reporting of hardwiring, the ALJ already found "no deliberative intent on Liberty's part to mislead the Commission in failing to timely report." Memorandum Opinion and Order, 97M 154, at ¶ 55 (rel. Sept. 11, 1997. With regard to the transfer-of-assets issue, the Bureau conducted a Section 308(b) investigation and in open court specifically declined to support an enlargement of the HDO to consider this allegation. Tr. 356: 6-19. [Statement of Weber, J.].

E. The ID Erred in Finding that Liberty's Principals Knew of Premature Activations Before April 1995

The ID wrongly concludes that Liberty's principals "must have known" about the premature activations before April 1995. This finding is based on pure conjecture because there is no competent proof that Liberty's principals -- Howard Milstein, Edward Milstein, and Price³² -- discovered premature activations before April 1995.

The ALJ cannot properly support his speculation that Liberty's principals first learned about premature activations before April 27, 1995 based on allegedly "clear warnings" and "readily available data" contained in Richter's license inventories, Lehmkuhl's license inventories and the Richter Letter (ID ¶ 121). The record demonstrates that these "warnings" were neither clear nor readily available. Indeed, the author of the Richter Letter herself testified that she had no knowledge of unauthorized operations at Liberty when she wrote the letter. Accordingly, the ID has no basis to conclude that anyone at Liberty discovered premature activations before April 1995 based on these documents.

ID blatantly disregards the record in finding that the Richter Letter alerted Liberty to premature activations before late April 1995. The testimony adduced by Time Warner and the ALJ from Richter, the author of the letter, established that: she was not aware or informed of any

³² In addition, the ID wrongly asserts that McKinnon was a principal of Liberty (ID ¶ 52). McKinnon had no ownership interest in the company and -- despite his title -- had no role in setting corporate policy for the company. Instead, he served as a day-to-day administrator, a role that should not rise to the level of principal. In fact, as he testified, his duties consisted only of "tactical things" such as "day-to-day operations, answering the phones, installing the cable, activating new buildings, [and] processing of bills." McKinnon I Dep. 5;16-19 (June 5, 1996) (TW/CV 41). Liberty did not identify McKinnon as a principal. See Liberty's Supplemental Proposed Findings of Fact and Conclusions of Law (June 11, 1997) at ¶¶ 49-54. Liberty's Reply to Supplemental Proposed Findings of Fact and Time Warner's Conclusions of Law (June 23, 1997) at ¶ 8.

premature activations (Tr. 2044:22-25, 2060:5-15 [Richter]); the text of the Richter Letter never stated that premature activations had occurred (Tr. 2060:5 - 2061:3 [Richter]; TWCV 51); the purpose of the Richter Letter was to prevent potential violations, not to tell Liberty of any actual violation (Tr. 2042:23 - 2044:25, 2060:10-15 [Richter]); and that in response to the letter, Price spoke with Richter and asked her to file for STAs to ensure against any unlawful operations (Tr. 2061:20 - 2062:23 [Richter], 2170:17 - 2171:14 [Price]. Contrary to Richter's express testimony, the ALJ found that: the Richter Letter was a warning that premature activations had occurred; the tone of the Richter Letter was designed to preserve client relations and to give Liberty a subtle hint that it had violated the law (ID n.37); and Price ignored the letter's warning and recklessly continued to be oblivious to regulatory requirements.³³ Each of these findings is directly rebutted by Richter's own testimony, yet the ID ignores the record and wrongly concludes that Liberty was on notice regarding the premature activations.

Neither Richter's nor Lehmkuhl's license inventories warned Liberty about premature activations. The ID disregards unrebutted evidence that: Richter's inventories were not useful for the purpose of ascertaining licensing status; Nourain never looked to Richter's inventories for that purpose; and even if he had consulted her inventories, he would still have no clue as to what paths were or were not licensed.³⁴ As for the February 24 Lehmkuhl Inventory, the multiple

³³ ID ¶¶ 49, 54, 55, 61, 70, 71, 90, 109, 112, 121.

³⁴ Tr. 2225: 13-18, 2241: 7- 18 [Nourain]. As the Bureau noted, "Although Ms. Richter prepared a license inventory for Mr. Nourain to review in March 1993, based upon the testimony regarding that inventory, the only thing that *is* clear is that the inventory *is unclear* as to which paths are licensed and which are not." Bureau Supp. Prop. Find., ¶ 17 (emphases in original). The Bureau further noted that the lengthy examination by Time Warner of Richter regarding her inventories did not assist in deciphering the status of Liberty's applications. *Id.* The ID ignores this key fact.

rounds of discovery and hearings did not yield any proof that anyone learned of or suspected premature activations based on that inventory. The ALJ makes the unfounded leap that because this document “should have” put Liberty on notice, it “must have” provided knowledge of premature activations before late April 1995 (ID ¶¶ 40, 73, 105, 121). Such conjecture should be rejected.

The ALJ discredited Price's testimony regarding when he first learned about premature activations because, according to the ALJ, “[t]here is an unexplained inconsistency in the significance” Price gave to the April 26 Nourain Memorandum versus the February 24 Lehmkuhl Inventory (ID ¶ 40). The explanation is clear from the documents themselves.

The April 26 Nourain Memorandum was a two-page document which on its face alerted Liberty's principals to a problem: “[E]nclosed please find a copy of paths that were delayed for Licensing [sic] due to emission designator changes.” (TWCV 35.)³⁵ In the April 26 Nourain Memorandum, most of the buildings were listed on the same page. By contrast, the February 24 Lehmkuhl Inventory was a dense, multi-page document listing numerous buildings and technical information that would mean little to Price, who was not an engineer (L/B 1). The inventory’s cover memorandum made no reference to any problems. In February 1995, the premature activations had not yet been discovered, and Price had no reason to believe that Nourain was not performing his licensing tasks properly. Accordingly, since the inventory raised no problems to be resolved, Price had no reason to closely scrutinize it for indications that something was amiss. In hindsight, Price should have paid more attention to the inventory; however, such *post hoc*

³⁵ By late April 1995, Liberty had grown concerned about the delays which Time Warner's petitions to deny had caused. Tr. 1365:9-11, 1372:4-9, 1386:3-7 [Price], 1797:3-19, 1804:6-24 [Barr]; TWCV 36.

reasoning is no substitute for what the record shows: Liberty's principals were not aware of premature activations before late April 1995 and had no reason to treat the February 24 Lehmkuhl Inventory as any kind of warning sign.

The ID's finding that Liberty's principals knew about premature activations before late April 1995 is also unsupportable because:

- The ALJ ignored consistent testimony that Liberty discovered premature activations in late April or early May 1995, and that the hearing confirmed April 27, 1995 as the date of first discovery (H. Milstein Dep. 28:7-18 [L/B/ 4]; Nourain Dep. 76:18 - 77:1 [L/B/ 7]; Price Dep. 187:3 - 188:15, 189:19 - 190:2 [L/B 9]; E. Milstein Dep. 41:10-19 [TWCV 46]). Even accepting *arguendo* that Liberty's witnesses modified their testimony, as the Bureau noted, the change was *de minimis* and carried no decisional significance (Bureau Proposed Findings ¶ 98).³⁶
- The ID speculated that Price might have known about premature activations before late April 1995 because Nourain did not operate in a vacuum and provided "essential input" into the activation decisions (ID at ¶ 55).³⁷ Yet, the evidence showed that Nourain did operate in a vacuum and was located apart from Liberty's midtown administrative offices and that he had a "disassociated *modus operandi*." (ID ¶¶ 21, 43, 49, 56-60.)
- The ID drew the inference that Price had "probable knowledge or suspicion" of unlawful activity based on the IAR's account of Nourain telling Price that Liberty's time frame for installation "might not" allow time to get authorizations (ID ¶¶ 30, 54). The ID's conjecture is rebutted by the uncontroverted evidence in this proceeding showing that none of Liberty's principals knew about premature activations before April 27, 1995.

³⁶ As the Bureau found, Liberty's advertising its activations of buildings -- including those involved in the HDO -- on the front page of *The New York Times* was conduct wholly inconsistent with any inference of an intent to deceive or to hide activations. Bureau Proposed Findings at ¶ 97.

³⁷ The notion that Nourain had any "essential input" into the decision to activate paths is without support.