

F. The ID Erred in Finding That the Premature Activations Could Not Have Been Due to Negligence.

The ID found that Liberty's premature activations could not have been the result of negligence based on: Liberty's reckless and willful failure to supervise Nourain with intent to insulate management from licensing responsibilities; Nourain's absence from Liberty's weekly Thursday meetings; and alleged disregard by Liberty's management and Nourain of warnings alerting Liberty to premature activations.³⁸ The ALJ concluded from these findings (i) that Liberty could not defend its actions by reliance on experts and counsel, because Liberty allegedly abandoned its licensing responsibilities; and (ii) that due to Liberty's alleged reckless indifference to available data, the premature activations did not result from "simple negligence."³⁹

The ID's conclusion is not supported by the record. As the uncontradicted testimony established, Liberty's principals never encouraged or approved any premature activations.⁴⁰ Furthermore, Liberty had no incentive to violate the law because quicker installations were not vital to customers and Liberty never lost a customer for failing to meet installation deadlines (Tr. 1582:5-11, 1587:13-15 [Price]). Liberty's advertising of its activation of buildings on the front page of *The New York Times* every day is at total odds with efforts to conceal unlawful activity. There is no evidence to support an inference that Liberty's principals failed to supervise Nourain as part of a scheme to provide service sooner or to engage in unlawful conduct.

³⁸ ID ¶¶ 46, 61, 64 n.35, 71 n.37, 73 n.39, 90, 105, 109, 112, 121.

³⁹ ID ¶¶ 43, 49, 54, 58, 64 n.35, 71, 112.

⁴⁰ Tr. 515:13-16, 517:22-24, 519 16-19 [H. Milstein], 1351:16 - 1352:25 [Price], 1624:13-21 [E. Milstein], 1705:16 - 1706:4 [Ontiveros].

The ID's finding of willful failure to supervise cannot be sustained, because there is no proof that Liberty's principals knew about premature activations before late April. Despite repetitive discovery and hearings on this precise issue, no such evidence of earlier knowledge was ever uncovered. At most, the ALJ speculates that based on the sheer number of premature activations, Liberty's principals "must have known" or suspected (ID ¶ 64). The ID erred by supporting its findings by conjecture rather than substantial evidence.

The ID's finding of Liberty's willful or reckless failure to supervise Nourain presumes that before premature activations were discovered in late April 1995, Liberty had reason to believe that Nourain was not performing his duties properly. The record showed just the opposite: Liberty justifiably believed that Nourain was qualified to fulfill his duties without close supervision.⁴¹ In fact, the engineering aspect of his performance was perfect because all buildings were activated without causing any signal interference. As the ALJ himself noted, this was 97% of Nourain's job,⁴² and he did it well. However, the other 3% related to licensing was seriously deficient, and Liberty did not realize this until too late.

Finally, there is no evidence that Nourain's absence from Liberty's weekly Thursday meetings was part of a scheme to obscure his activities. Nourain's absence would take on significance only if Liberty's principals knew that Nourain violated the law and kept him out of

⁴¹ Stern recommended the hiring of Nourain, and Nourain appeared to have the right background and experience in microwave service. Tr. 515:19-21 [H. Milstein], 611:18 - 612:1 [Nourain], 1351:9-11 [Price], 1692:17-20 [Ontiveros]; H. Milstein Dep. 39:20 - 40:1 [L/B 4]; Price Dep. 265:8 - 266:2 [L/B 9].

⁴² The ID irrationally concludes that Liberty's failure to supervise was willful and reckless contrary to the ALJ's own demeanor findings regarding Nourain, demonstrating the difficulty in supervising Liberty's Engineer (ID ¶ 56 n.27).

the Thursday meetings intentionally to avoid knowing about his activities. However, this proceeding yielded no evidence to support the ALJ's conjecture about such a convoluted scheme.

Liberty has never denied the seriousness of its violations and does not seek to do so now. However, the record does not reveal any intentional or willful conduct by Liberty to violate the law. Accordingly, the finding that Liberty's premature activations could not be due to inadvertence is erroneous and should be reversed.

G. The ID Erred in Finding that the Joint Motion Misrepresented Facts

The ID found that Liberty misrepresented facts because of purportedly conflicting accounts in Liberty and the Bureau's Joint Motion and the IAR regarding communications between Stern and Nourain about the licensing process (ID ¶¶ 25, 42 n.24, 50, 130). The ALJ misread the Stern Memorandum as a document "detailing the application process." (ID ¶ 25, 42 n.24, 50). However, the memorandum actually memorialized a meeting between Stern and Nourain; it did not detail the licensing process (TWCV 67, Ex. E).⁴³ The Stern Memorandum also indicated that Nourain said he was already aware of some of the information being transferred to him. These facts are consistent with Stern's testimony, ignored by the ALJ, that Nourain told Stern that he did not need to go into detail since Nourain claimed to be fully familiar with the licensing process (Joint Motion, ¶ 13).⁴⁴ The very text of the Stern

⁴³ Indeed, instead of detailing the licensing proceeding, the Stern Memorandum "strongly recommend[ed] that [Nourain] continue to use a Washington-based attorney for submittal and follow-up [of license applications]" and that details of license modifications "should be checked with your attorney [in] each case."

⁴⁴ Stern was not called by Liberty and was hostile to Liberty. The Joint Motion, as the ID notes at ¶ 120, merely quoted Stern's deposition, and for Liberty to quote a hostile witness accurately cannot be deemed misrepresentation. In addition, Stern testified only by his deposition transcript which was offered into evidence by Time Warner. The ALJ therefore did

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Memorandum is consistent with the testimony. The Joint Motion did not misrepresent these facts.

H. The ALJ Erred in Asserting That Liberty Relied on the IAR

The ID mischaracterizes the Joint Motion when it asserts that Liberty and the Bureau relied on the IAR. According to the ID, Liberty referred to the IAR “five times to show that Liberty will be a candid and reliable licensee in the future (See Joint Motion at 19, 45, 47, 53 and 55)” (ID ¶ 25). However, with the exception of page 19, the IAR is not even mentioned in the Joint Motion, and even that reference merely states that Liberty had appealed the Commission’s confidentiality ruling. The Joint Motion does make reference to the fact that Liberty conducted an internal investigation and that Liberty submitted a copy of the IAR to the Commission (Joint Motion ¶ 40 n.7).⁴⁵ These are statements of undisputed fact; they reveal no reliance on the substance or the contents of the IAR. The ALJ’s contrary findings are simply not supported by the record.

I. The ID Errs In Disqualifying Liberty Rather Than Imposing The Forfeiture Proposed By Liberty And The Bureau.

Absent any supportable evidence of intentionally reckless or deceptive conduct by Liberty, disqualification is inappropriate and inconsistent with Commission precedent.

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not see Stern testify.

⁴⁵ The ALJ also wrongly claims that the Joint Motion deemed the IAR to be “comprehensive” (ID ¶ 29) when no such reference appears in the Joint Motion. Furthermore, the ID erroneously found that the Joint Motion misrepresented Liberty’s discovery of premature activations in the course of on-going litigation involving Time Warner’s petitions to deny. As detailed *supra* at Section III.C, Price and Liberty’s outside counsel realized that violations may have occurred during a conference call on April 27, 1995 to discuss Liberty’s response to Time Warner’s petitions to deny.

Accordingly, the Commission should accept the forfeiture proposed by Liberty and the Bureau -- a forfeiture of unprecedented size for a microwave operator and enormous for a small company like Liberty.

Under established Commission precedent, a willful intent to deceive -- based not on conjecture but on “substantial evidence” -- is required before a licensee may be disqualified.⁴⁶ The intent to deceive must be attributable to the licensee’s principals, not to mere employees. *David A. Bayer*, 7 FCC Rcd 5054, 5056 (1992). Moreover, good faith reliance on counsel and experts is a mitigating factor in evaluating these issues.⁴⁷ Even serious violations of Commission rules involving safety of life have not resulted in disqualification where there was no evidence of an intent to deceive. *See, e.g., Centel Cellular*, 11 FCC Rcd 10800 (1996) (despite the “grave” and “unprecedented” dangers which resulted from a licensee erecting a cellular tower in the flight path of a nearby airport, the Commission imposed a forfeiture rather than a disqualification).

The ID errs in imposing the severe sanction of disqualification, in light of the total absence of proof that Liberty’s principals intended to deceive the Commission. In reaching its conclusion, the ID distinguishes certain cases relied upon by Liberty (ID ¶¶ 112-13), based on unsupportable factual findings that Liberty’s principals intentionally engaged in unauthorized operations and affirmatively sought to conceal Liberty’s actions and knowledge from the

⁴⁶ *Cannon Communications Corp.*, 5 FCC Rcd at 2700 (establishing the “substantial evidence” standard); *Fox River Broadcasting, Inc.*, 88 FCC 2d at 1137; *see also Swan Creek Communications, Inc. v. FCC*, 39 F.3d 1217 (D.C. Cir. 1994); *Telephone and Data Systems, Inc.*, 10 FCC Rcd at 10520.

⁴⁷ The Commission is loath to find lack of candor when the principals have shown good faith reliance on expert counsel or employees. *Character Policy Qualification I*, 102 FCC 2d at 1228; *WPJD, Inc.*, 79 FCC 2d 115 (1980); *see also WEBR, Inc. v. FCC*, 420 F.2d 158, 167 (D.C. Cir. 1969).

Commission. Since the ID's factual findings are wrong, its effort to distinguish the cases is without force.

Even accepting *arguendo* the ID's erroneous factual findings, the proper penalty should be forfeiture and not disqualification. The Commission's discretion to impose forfeitures, but not disqualification, for serious misconduct is most dramatically demonstrated by the recent *US West Communications* decision, 1998 WL 113328 (FCC Mar. 16, 1998), where the Commission imposed a forfeiture of \$1.2 million despite finding intentional manipulation of a spectrum auction and failure to disclose illegal actions in a timely manner (*Id.* at ¶ 39). Similarly, in *Mercury PCS II, LLC*, 12 FCC Rcd 17970 (1997), the Commission recently imposed a \$650,000 forfeiture on a licensee, but not disqualification, for repeated and willful violations that involved utilizing "trailing numbers" to manipulate a spectrum auction for financial gain. The licensee's behavior was intentional and part of a strategy to "game" the Commission's bidding process while evading detection.

Liberty's conduct, unlike that of U S West and Mercury, was not a part of any intentional scheme to defraud the Commission for private financial gain. In light of the less serious nature of Liberty's violation -- even based on the ALJ's characterization -- the forfeiture jointly proposed by the Bureau and Liberty is appropriate.⁴⁸ The extraordinary penalty of disqualification would violate the Commission's obligation to treat similarly situated licensees

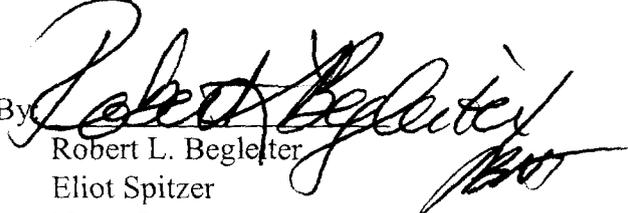
⁴⁸ This is particularly true in light of the Commission's new rules permitting activation upon the filing of a license application and the lack of potential harm to the public stemming from these activations. *See e.g., Centel Cellular*, 11 FCC Rcd 10800 (1996) (regarding serious threat to public safety).

consistently. *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965). By imposing disqualification here, the ALJ abused his direction.

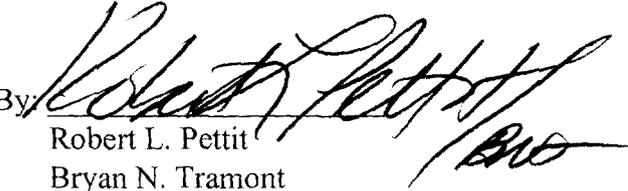
IV. CONCLUSION

For all of the foregoing reasons, the Initial Decision should be reversed consistent with these exceptions and the case remanded with directions to enter findings consistent with the Joint Motion.

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CERTIFICATE OF SERVICE

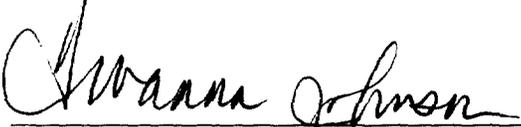
I hereby certify that on this 7th day of April 1998, I caused copies of the foregoing
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