

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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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

REPLY BRIEF

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SUMMARY

Commission precedent mandates that adjudications must be decided on the record before the ALJ. Only those findings of an ALJ that are supported by substantial evidence are entitled to deference. Time Warner's brief demonstrates the extent to which the ID's conclusions are not based on the record. Instead, evidence is ignored and conjecture and speculation are used to fill gaps in the record in a headlong rush to disqualify Liberty – a preordained result that is neither consistent with Commission precedent nor in the public interest.

Liberty has acknowledged from the beginning that it operated microwave paths without FCC authority. Moreover, Liberty has not disclaimed the negligence of its agents but accepted responsibility and agreed to pay \$1,090,000 in forfeitures. Clearly, more vigorous supervision of Liberty's engineer and licensing counsel would have prevented the unauthorized path activations or, at least, brought the problem to the attention of Liberty's principals sooner. However, the fact remains that Liberty simply did not know of the premature activations prior to late April 1995 and, when it did learn of the problem, it promptly reported the information to the Commission as it became available and developed a compliance program to prevent a recurrence. At no time in this process did Liberty intend or attempt to deceive the Commission.

Time Warner unabashedly seeks to use the Commission's processes to put a competitor out of business. To do this, Time Warner strains mightily to prove that Liberty intended to deceive the Commission but finds no support in the record. Accordingly, it resorts to conclusory and non-evidentiary arguments in a vain attempt to demonstrate that Liberty intended to deceive the Commission:

License Applications: According to Time Warner, no disclosure by Liberty is candid or forthcoming. If Liberty delays in disclosing evidence, Time Warner finds an intent to deceive. If Liberty discloses evidence immediately upon discovery, Time Warner finds the disclosure incomplete. If Liberty makes full disclosure, Time Warner claims the disclosure is not repeated with sufficient frequency, and is therefore misleading.

Internal Audit Report: For both Time Warner and the ALJ, submission of an internal audit report with a request for confidential treatment demonstrates a lack of candor, despite the fact that confidential submissions are permitted under FCC rules and encouraged, as a matter of policy, by the Commission and other federal agencies. Moreover, like the ALJ, Time Warner finds that Liberty lacked candor in appealing the Commission's confidentiality decision – a finding that is factually incorrect and runs directly counter to numerous constitutional and statutory rights.

Joint Motion: Time Warner supports the ALJ's finding that Liberty and the Bureau misled the Commission regarding the instructions on the FCC licensing given to its engineer and by failing to disclose the Stern memorandum. Even a cursory review of the Stern memorandum reveals that it does not impart detailed information and that it was outside the scope of the discovery request.

Discovery: Time Warner and the ALJ attempt to manufacture an intent to deceive from minor missteps in a massive and expedited document production.

Disqualification is a harsh penalty and should not be imposed based on an Initial Decision that offers no evidentiary proof of an intent to deceive.

As the Bureau and Liberty have agreed, FCC precedent supports a forfeiture, rather than disqualification, on the record developed in this proceeding. Disqualification in candor cases is typically reserved for egregious cases, in which a licensee's principals knowingly misrepresent or withhold facts for the express purpose of deceiving the Commission. The record in this proceeding demonstrates that Liberty negligently and inadequately supervised the licensing process. When Liberty learned of the problem, however, it made every effort to disclose FCC violations as quickly as possible and to insure that the licensing errors would not recur. Liberty has agreed to pay an enormous forfeiture – the remedy that should be ordered here.

Finally, forfeiture, rather than disqualification, will serve the public interest in this case. While Liberty acknowledges the seriousness of its violations, the unauthorized activations did not result in harmful interference or any safety problems, and the Commission has modified its rules to allow microwave paths to be activated upon filing an application. Moreover, Liberty has introduced much-needed competition to the New York cable market.

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I. Introduction

Time Warner has submitted its brief in support of the ID as part of its ceaseless efforts to forestall competition in this country's largest cable market. Time Warner does not seek authorization to use any of the OFS microwave paths of interest to Liberty, nor is it otherwise affected by Liberty's licensing practices.¹ Nevertheless, it has led the charge to deny Liberty licenses. Time Warner's anticompetitive intent is clear, and its arguments should be considered in that light.

Both Time Warner and the ID have not refuted, and indeed, in material respects, have agreed with, the basic facts advanced by Liberty and the Bureau in the Joint Motion, as confirmed and clarified in the hearing:

- No one in Liberty's management encouraged or directed anyone to activate a building before receiving Commission authorization; Tr. 520:23-25 [H. Milstein], 1626:13-21 [E. Milstein]; Joint Motion ¶¶ 91, 98; Liberty Proposed Findings ¶¶ 74, 75, 77, 78;
- No one in Liberty's management knew about Nourain's defective licensing application practices and faulty assumptions; Tr. 578:17-24 [H. Milstein], 975:18-976:10 [Nourain], 1355:10-1356:10, 1396:16-22, 1575:18-24 [Price], 1692:1-3, 1694:3, 1697:2-10 [Ontiveros]; Joint Motion ¶¶ 30-32, 92; Liberty Proposed Findings ¶¶ 33, 46, 71, 86;
- Nourain performed his job without adequate supervision or control and without a full understanding of the scope of his responsibilities; Tr. 612:19, 657:23-658:8 [Nourain], 1355:10-1356:10, 1396:16-22 [Price], 1691:23-1692:3, 1694:18-22,

¹ Because of Time Warner's predatory conduct (*see e.g., Proposed Social Contract with Time Warner Cable*, Comments of Liberty Cable Co., Inc., File No. 95-336 (filed Sept. 15, 1995)), Liberty commenced an action in the New York Federal court against Time Warner alleging antitrust and other statutory and common-law violations. *Bartholdi Cable Co. v. Time Warner*, Civ. No. 96-2687 (EDNY). Time Warner has filed counterclaims asserting that the regulatory violations at issue were willful and constituted, *inter alia*, unfair competition that injured Time Warner. Time Warner is brazenly using this proceeding as a litigation tool against its competitor in another forum, and Time Warner's tactic should be rejected by the Commission.

1698:13-16 [Ontiveros]; Joint Motion ¶¶ 30-32, 92-95, 98; Liberty Proposed Findings ¶¶ 33-46, 72, 86;

- Nourain believed that the licensing responsibility resided with the law firm of Pepper & Corazzini and was so inattentive that he actually signed blank applications, at the law firm's suggestion, so that the law firm could obtain STAs and licenses; Tr. 629:8-632:8, 710:4-9, 848:20-849:1, 940:7-16, 943:8-944:5 [Nourain], 1099:3-1100:18 [Lehmkuhl], 1821:5-11 [Barr]; Joint Motion ¶¶ 29, 30, 94; Liberty Proposed Findings ¶¶ 34-46, 72;
- Liberty's management first learned of the premature activations in late April 1995; Tr. 517:2-14, 575:16-19 [H. Milstein], 1364:13-1366:2, 1416:18-1419:16 [Price], 1623:5-15, 1624:2-19 [E. Milstein], 1701:13-24 [Ontiveros]; Joint Motion ¶ 36; Liberty Proposed Findings ¶¶ 59, 79, 91, 92, 95, 104, 109, 112, 114, 115, 130; Bureau Proposed Findings ¶¶ 46, 50, 60, 71, 73, 74, 98;
- Liberty's management moved swiftly to investigate the extent of the premature activations with an intent to disclose them to the Commission; Tr. 517:15-520:19, 576:23-579:5, 582:18-586:25 [H. Milstein], 1367:4-1369:4 [Price], 1624:25-1625:21 [E. Milstein], 1798:22-1799:13, 1960:4-9 [Barr]; Joint Motion ¶¶ 36, 95, 98; Liberty Proposed Findings ¶¶ 61, 84;
- Liberty subsequently disclosed the premature activations to the Commission; Joint Motion ¶¶ 38, 42, 96, 97, 98; Liberty Proposed Findings ¶¶ 64, 66, 67;
- Liberty has instituted a compliance program to prevent the recurrence of future violations of applicable law; Tr. 520:13-22 [H. Milstein], 1058:6-18 [Lehmkuhl], 1393:10-1395:4 [Price], 1626:8-12 [E. Milstein], 1701:1-3 [Ontiveros]; Joint Motion 44, 97, 98; Liberty Proposed Findings ¶¶ 65, 69, 84; Bureau Proposed Findings 26, 103;
- The premature activations did not result in interference with any other operator, and the Commission has subsequently modified its rules to permit paths to be activated upon the *filing* of an application – rather than awaiting a license grant; Tr. 1040:9-12 [Lehmkuhl], HDO ¶ 14, n.9.

These facts reveal a negligent licensee that failed to supervise its licensing employees and counsel, but that acted swiftly and decisively to disclose and remedy the violations once they were uncovered. However, these facts do not support a finding that the licensee intentionally misled or withheld information from the Commission. Accordingly, Liberty's actions warrant forfeiture, not disqualification.

Time Warner subjects Liberty's disclosure efforts to an almost incomprehensible standard of review that results in a "Catch 22." If Liberty delays in disclosing information in order to gather key facts, Time Warner asserts that Liberty should be disqualified for delay. If Liberty quickly discloses information as soon as it becomes available, Time Warner asserts that Liberty should be disqualified because the disclosure does not contain additional details. If Liberty discloses facts to the Commission in a timely manner, Time Warner contends that Liberty should be disqualified for failure to repeatedly disclose the information. In the final analysis, however, neither Time Warner nor the ALJ can point to any record evidence of an intent to deceive. Time Warner's and the ID's analysis also reveal another rudimentary failure: Neither pleading discusses the arguments made by the Bureau and Liberty in the Joint Motion. Rather than address the Joint Motion's contentions, the ID and Time Warner just ignore the major assertions altogether in their haste to achieve a predetermined result.²

Moreover, Time Warner's argument that Liberty's violations are so egregious as to justify the ID's denial of licenses is without basis. Liberty was entitled to the authorizations it sought because it met all the technical qualifications of a licensee, and none of the OFS paths that it operated have, would or even could have interfere with anyone's signal. The speculation shared by Time Warner and the ID – that Liberty intended to conceal its activities just to speed up the process of serving customers – is not based on record evidence and, in fact, is contrary to the record. The bankruptcy of this position was routinely demonstrated on the front page of *The New York Times*, where Liberty advertised the addresses of buildings receiving service without authorization, under the watchful eyes of Time Warner. Such publication is not consistent with

² This enthusiasm for a particular result seems aptly illustrated by the ID's aside – "Checkmate? Hardly so!" in response to Liberty's argument regarding the IAR's status. ID ¶ 115.

an intent to deceive. Ultimately, the ALJ's and Time Warner's speculation must be rejected as inconsistent with the record.

II. ALJ Findings Unsupported by Substantial Evidence Are Not Entitled to Deference by the Commission.

While Time Warner states that the ALJ's findings are entitled to deference,³ well-settled Commission precedent requires that factual findings, particularly those used to support disqualification, be based on "substantial evidence."⁴ Conjecture about what Liberty officials "must have known,"⁵ surmise about improbable schemes to conceal,⁶ and manufactured misrepresentations⁷ do not rise to the required level of evidence – particularly when they are directly contrary to the record.

FCC reviewing authorities have not hesitated to reverse ALJ findings which are unsupported by the record evidence. For example, in *Richard Richards*,⁸ the ALJ revoked a low power television station license based, in large part, on findings that a felony drug conviction should be treated as an "egregious" "multiple conviction." The Review Board, in reversing

³ Time Warner Cable of New York and Paragon Communications and Cablevision of New York City - Phase I's Joint Brief in Support of the Initial Decision, WT Docket 96-41 at 6 (filed April 7, 1998) ("TW").

⁴ *Cannon Communications Corp.*, 5 FCC Rcd 2695, 2700 (Rev. Bd. 1990). Disqualification is not "triggered unless [this] substantial evidence clearly reveals serious and deliberate falsehoods." *Id.*

⁵ ID ¶¶ 55, 64; 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, WT Docket No. 96-41 at 6 (filed Apr. 7, 1998) ("TW").

⁶ ID ¶¶ 73, 76, 107, 116, 117, 120, 130; TW at 7, 13, 15, 23.

⁷ ID ¶¶ 81-85; TW at 7-12.

⁸ 10 FCC Rcd 3950, reversing Initial Decision of ALJ Richard L. Sippel, 9 FCC Rcd 3604 (1994).

however, emphasized that the ALJ “finds a pattern of conduct on the basis only of speculation or possibility” and that the ALJ’s conclusions were “[w]ithout any nexus . . . [to] any record evidence whatsoever.” *Id.* at 3956, ¶ 29. As the Review Board correctly found, “[t]his is not sufficient.” *Id.* Similarly, the Review Board found that the ALJ impermissibly ignored record evidence and cited numerous other instances in which the ALJ failed even to acknowledge evidence for which there was “no record contradiction and no impeachment.”⁹

As in *Richard Richards* and as detailed below, the ALJ in the instant case both fails to cite substantial record evidence for his conclusions and wholly ignores substantial record evidence to the contrary.¹⁰ Accordingly, his decision must be reversed by the Commission.

III. Liberty Did Not Intend to Mislead the Commission in its License Applications.

A. The Record Demonstrates that Liberty had no Knowledge of the Premature Activations Prior to April 27, 1995.

Time Warner argues that Liberty either knew of the unlicensed paths prior to April 27, 1995, or that failure to know was the result of “willful and reckless disregard” of information and

⁹ *Id.* at 3957, ¶ 31. See also *James A. Kay, Jr.*, 12 FCC Rcd 2898 (General Counsel 1997), reversing Summary Decision of ALJ Richard L. Sippel, 11 FCC Rcd 6585 (ALJ 1996)(case reversed and remanded where, among other things, ALJ ignored uncontroverted evidence and failed to consider a licensee’s remedial efforts and rehabilitation in making a character evaluation); *Southwestern Broadcasting Corp.*, 12 FCC Rcd 6990 (1997), reversing Summary Decision of ALJ Richard L. Sippel, 11 FCC Rcd 9120 (ALJ 1996); *Georgia Public Telecommunications Commission*, 7 FCC Rcd 2942 (Rev. Bd. 1992); *The Dunlin Group*, 6 FCC Rcd 4642 (Rev. Bd. 1991); *Pleasure Island Broadcasting, Inc.*, 6 FCC Rcd 4163 (Rev. Bd. 1991); *Perry Television, Inc.*, 5 FCC Rcd 1667 (Rev. Bd. 1990).

¹⁰ Indeed, the ALJ’s “report is entitled only to such probative force as it intrinsically commands.” *Lorain Journal Co. v. FCC*, 351 F.2d 824, 828 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). The Commission may reverse the ALJ -- even if the ALJ’s decision is supported by substantial evidence -- so long as there is substantial evidence to support the Commission’s decision. *Id.*; see also *Williams v. Bell*, 587 F.2d 1240, 1246 (D.C. Cir. 1978), (“[T]he existence of substantial evidence favoring the examiner’s decision does not

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the FCC's rules. In doing so, Time Warner urges a finding that is contrary to the ID. While the ID devotes numerous paragraphs to speculation about when Liberty's executive officers knew, the only finding based on evidence and testimony agrees with Liberty's position: "[B]ased on the record after hearing the testimony, it *must be concluded* that the first discovery of the activations by Liberty's executives [sic] officers was due to the Nourain memorandum of April 26. . . ."¹¹ Yet despite this conclusion, both the ID and Time Warner spend numerous pages speculating – without record support – that Liberty “must have known” or “could have known” earlier than April 27, 1995. While Liberty has acknowledged that had Nourain been properly supervised it would have learned of the activations sooner, what “should have” been known simply was not known before late April 1995. Time Warner's and the ALJ's speculation as to earlier knowledge is no substitute for the record evidence and indeed, is no substitute for the ID's own apparent determination that Liberty first learned of the premature activations in late April.

Time Warner has had more than ample opportunity to demonstrate Liberty's knowledge of unauthorized activations prior to April 27, 1995. Exhaustive discovery was conducted in this proceeding, and two extensive hearings were held on the narrow issue of Liberty's knowledge prior to late April.¹² Nevertheless, Time Warner can muster only speculation in support of its theory of earlier knowledge. The Commission, accordingly, should reject Time Warner's

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inexorably imply the absence of substantial support for the conflicting position.”)

¹¹ ID ¶ 73 (emphasis added). *See also* discussion of April 26 Memorandum, *infra*.

¹² Submerged in Time Warner's criticism of Liberty's discovery efforts is a request for still further discovery on the date Liberty first learned of the unauthorized activations. TW at 15 n.7. However, affording Time Warner yet another opportunity to re-litigate its case on this point is neither a good use of the Commission's resources nor the parties' time. Time Warner's discovery effort actually seems aimed at advancing its other interest in this case: obtaining discovery for use in a concurrent antitrust suit.

assertions and reverse the ID to the extent it suggests knowledge of violations before April 27, 1995.¹³

Time Warner points to the same speculation to support its position that Liberty's executives knew or acted recklessly in not realizing that there was a licensing problem, suggesting that Nourain was intentionally excluded from Liberty's weekly installation meetings.¹⁴ This speculation is based on the circular assumption that Liberty's principals had knowledge of premature activations, and thus had a reason to exclude Nourain from staff meetings – the very fact the speculation is offered to prove. In the end, however, Time Warner has nothing to rebut the extensive testimony that Liberty's principals learned of the premature activations in late April.¹⁵

Nor can Time Warner's, or the ID's, speculation support a finding that Liberty's executive officers recklessly or wantonly avoided knowledge of the unauthorized activations. Demonstrating that a licensee flagrantly disregarded the Commission's rules requires a showing that the licensee had "actual knowledge that the conduct constitutes a clear violation of existing law."¹⁶ It is plain that this element is not satisfied in this instances. Prior to April 27, 1995, as the ALJ has apparently found, Liberty had no knowledge that unauthorized activations had

¹³ Time Warner also argues that because Price knew about Time Warner's petitions to deny and that Price knew Liberty continued to activate buildings facilities in 1995, he must have known of the premature activations. The ALJ reached no such conclusion and there is no evidence to support such an assertion.

¹⁴ TW at 6.

¹⁵ Tr. 1364 :13 – 1365:23 [Price], 1796:8 – 1797:7, 1833:10-15 [Barr], 517:5-14 [H. Milstein], 1624:2-5 [E. Milstein].

¹⁶ *Character Policy Statement*, 102 FCC 2d 1179 at n.61 (1986). Significantly, as the elements in the *Character Policy* make clear, "actual knowledge" of illegal conduct is required for a finding of flagrant disregard. Thus, proof of the quantity of violations alone is not, as Time Warner and the ID suggest, sufficient to support a disqualification.

occurred, much less that the activations violated Commission rules. Indeed, absent a finding that Liberty's executives knew of the problems before April 27, 1995, it is irrational to conclude that they "intentionally and with wanton abandon" avoided the knowledge.¹⁷

Time Warner additionally argues that Liberty lacked candor in its testimony regarding initial discovery of the wrongdoing. (TW at 19) The argument is premised on a minor change in testimony that occurred when upon having their memories refreshed *inter alia* with Nourain's April 26 memorandum, Liberty's principals acknowledged that they first learned of unauthorized activations in late April, not early May, as some had initially stated in depositions. Given that the statement is inculpatory in nature – it was in Liberty's interest to demonstrate that it learned of the unauthorized activations at a later date, not an earlier one – the suggestion that it demonstrates lack of candor is simply illogical. Indeed, as the Bureau found, we "can conceive of no purpose the witnesses would have in making such misrepresentations in their deposition testimony."¹⁸ Moreover, the change in testimony was *de minimis*. Liberty's principals testified

¹⁷ ID ¶ 121. In reaching its conclusion on this point, Time Warner seriously misconstrues Commission precedent. In order to support a finding of "wanton disregard" against a licensee, the Commission has consistently required proof that negligence "is so wanton, gross and callous, and in total disregard of . . . obligations to the Commission, as to be equivalent to an affirmative and deliberate intent." *Tipton County Broadcasters*, FCC 63D-81 (Initial Decision (rel. July 15, 1963)), *aff'd*, 2 RR2d 1121 (1964) (evidence of repeated intentional misstatements regarding ownership of station supported by numerous documents showing that control had passed without Commission approval). Typical of these cases is *Golden Broadcasting Systems, Inc.*, 68 FCC 2d 1099, 1106 (1978), where the Commission based a finding of "wanton disregard" on a finding that a licensee's "lack of knowledge of the station's programming, and his responsibilities were all pointed out to him at the 1974 hearings" and were acknowledged by the licensee but that "barely two months thereafter [the licensee] again filed with this Commission an official document replete with . . . misrepresentations concerning the same subject matter scrutinized at the 1974 hearings." The record in this case, which shows that Liberty was negligent in failing to supervise its engineer and outside licensing counsel, but disclosed evidence of rule violations to the Commission as information about those violations became available, is insufficient to support a finding of wanton disregard.

¹⁸ Bureau's Proposed Findings ¶ 95. Indeed, the Constantine Affidavit submitted in
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in 1997 about events that occurred almost two years earlier. Misplacing a disputed event by a little over a week, and then *correcting* that error, establishes Liberty's candor with the Commission.¹⁹

B. Disclosure of the Best Information Available At a Given Point in Time Does Not Demonstrate An Intent to Deceive.

Time Warner and the ALJ take issue with Liberty's May 17 Surreply for failing to disclose more detailed information regarding premature activations.²⁰ As an initial matter, the violation of FCC rules which is the core of this proceeding centers on the fact that paths were activated without authorization. Liberty's disclosure in this respect was entirely complete in that it revealed the rule violations.

Even so, as the record shows, more information was simply not available until well after the Surreply was drafted.²¹ The April 26 Nourain memorandum, upon which Time Warner relies, does not discuss the duration of unauthorized path operation or indicate the paths for which applications were not timely filed,²² and the Pepper & Corrazini inventories prior to the

(...Continued)

September 1995 stated that Liberty learned in late April 1995. TWCV 29.

¹⁹ As the Bureau stated, "Because the time frame is so insignificant, the Bureau does not believe that the variations in testimony alter the facts and circumstances surrounding the unauthorized operations in the Joint Motion." Bureau's Proposed Findings ¶ 98.

²⁰ Time Warner complains that although Liberty disclosed fifteen premature activations in the Surreply, it misled the Commission by not providing further details such as how long the paths had been operating without authorization and the fact that some paths were activated before applications were filed. TW at 8-10, ID ¶¶ 80, 102, 107, 108.

²¹ Tr. 519:22-520:19, 578:3-586:25 [H. Milstein]; 1570:12-1579:12, 1588:2-40, 1591:24 [Price].

²² TWCV 35. The April 26 Nourain Memorandum, on its face, did not address premature activations.

end of April 1995 did not provide adequate information to reveal unauthorized activations.²³ The damaging information that was available to Liberty as a result of the initial accelerated internal audit – which focused on paths then operating without authorization, including 13 unauthorized activations previously unknown to the Commission – was fully disclosed in the Surreply. Time Warner’s assertion that Liberty knew of 93 unauthorized activations at this time is directly contrary to the record evidence that the full extent of unauthorized activations was not revealed until Liberty’s internal investigation was completed in August of 1995.²⁴ Thus, the extent of the violations was unknown – not withheld – when Liberty filed the May 17 Surreply.

Likewise, the ALJ and Time Warner take issue Liberty’s statement that it was “never found to be operating in violation of the Commission’s rules,”²⁵ and the representation, in Price’s declaration, that Liberty had a “pattern and practice” of not activating paths until a license application or an STA request had been granted.²⁶ Both of these statements were made before Liberty knew the full scope of the problem. An intent to deceive cannot be found when a licensee discloses the best available information.²⁷

C. Failure to Repeat Disclosures Does Not Reveal an Intent to Deceive.

Despite Liberty’s disclosures in the May 17 Surreply, both the ID and Time Warner fault Liberty’s failure to disclose unauthorized activations in each subsequent application, amendment

²³ L/B1, TWCV 3, TWCV 4, TWCV 6, TWCV 16.

²⁴ Tr. 519:22-520:19, 578:3-586:25 [H. Milstein]; 1570:12-1579:12, 1588:2-40, 1591:24 [Price].

²⁵ Notably, Time Warner and the ALJ takes this statement out of context, where it was preceded by the phrase “[u]ntil now.” TWCV Ex. 18, at 3.

²⁶ ID ¶¶ 80, 112, 122, 125, 126; TW at 9, 10.

²⁷ Liberty Exceptions to Initial Decision, WT Docket No. 96-41, at 8-10 (filed Apr. 7, 1998) (“Exceptions”).

or other submission to the Commission.²⁸ For example, while Liberty's failure to again report that the path serving 2727 Palisades was activated without authorization in its May 19 STA request – a fact that was disclosed just two days earlier in the May 17 Surreply – may demonstrate that omissions occurred, the error hardly proves an intent to deceive. Where an applicant has already disclosed the information which an applicant is later charged with attempting to conceal, the Commission has consistently found an absence of an intent to deceive.²⁹ Similarly, Time Warner's argument that Liberty's May 26 Reply was misleading because it failed to recount the unauthorized activations contained in the May 17 Surreply is without merit. While such redundant disclosures may, in hindsight, have been wise, Liberty could not have misled the Commission regarding the activation of paths disclosed nine days earlier.³⁰

D. Inadvertence Does Not Create an Intent to Deceive

The ID and Time Warner ignore evidence of Liberty's intent to disclose unauthorized

²⁸ TW at 8-12; ID ¶¶ 79-85.

²⁹ See, e.g., *Calvary Educational Broadcasting Network, Inc.*, 9 FCC Rcd 6412, 6420 (Rev. Bd. 1994); *Valley Broadcasting*, 4 FCC Rcd 2611, 2614-15 (Rev. Bd. 1989); *Intercontinental Radio, Inc.*, 98 FCC 2d 608, 639 (Rev. Bd. 1984); *Superior Broadcasting of California*, 94 FCC 2d 904, 909 (Rev. Bd. 1983). *Vogel-Ellington Corp.*, 41 FCC 2d 1005, ¶¶ 13-14 (1973), the case Time Warner cites on a licensee's continuing duty of disclosure is inapposite. The Review Board granted the assignment sought by the *Vogel-Ellington* applicant based on a showing that the applicant had disclosed the information in previous filings and made remedial disclosure efforts. *Id.* at ¶ 15. Given that Liberty disclosed the unauthorized activation at 2727 Palisades in its May 17 Surreply, the May 19 STA cannot form the basis for an intent to deceive.

³⁰ Time Warner also takes issue with the innocuous statement that the Petitions to Deny Liberty's May 4 STA requests "imperiled" Liberty's contractual obligations, claiming that no peril existed where Liberty had already initiated service to the sites in question. TW at 7, 8, 12. Liberty's contracts provide not only for the initiation of service, but also continuous provision of service to subscribers. TWCV 21, Ex. 2. Since Time Warner's petitions threatened Liberty's ability to provide continuous service to the buildings subject to the May 4 STA requests, there can be no doubt that they imperiled Liberty's service contracts.

activations in its July 17 license applications. TW at 12; ID ¶ 83. Liberty concedes that the microwave paths that were the subject of the license applications were already in operation at the time the applications were filed. However, as Liberty has explained before, the July 17 applications and the July 24 STA requests – which disclosed that the paths were operating – were prepared to be filed simultaneously.³¹ Price signed both the applications and the STA request on July 17, indicating an intent to disclose at that time.³² Unfortunately, the STA requests were filed seven days after the license applications.³³ Thus, Time Warner and the ID may have identified a procedural misstep, but they fail to demonstrate that Liberty intended to deceive the Commission.

E. Liberty Did Not Lack Candor in Its May 4 STA Requests.

Liberty has already admitted that it erred in not disclosing the premature activations in the May 4 STA filing.³⁴ Liberty disclosed all known premature activations 13 days later. As a result of this error, Liberty did not object to an additional \$300,000 forfeiture proposed by the Bureau, which concluded that the error, while “serious,” did not “require[] a denial of the Joint Motion.”³⁵

³¹ Liberty Reply Proposed Findings ¶¶ 22-24.

³² Liberty Reply Proposed Findings ¶ 18; Liberty disclosure was recognized by the Bureau in a letter to Liberty on August 4, 1995. See letter from Howard Davenport to Robert Pettit regarding Liberty Cable Co. Pending Requests for Special Temporary Authority (Aug. 4, 1995).

³³ Liberty Reply Proposed Findings ¶ 22; TWCV 25, TWCV 27.

³⁴ Liberty Reply Proposed Findings ¶ 60.

³⁵ Bureau Proposed Findings ¶¶ 107-112. Contrary to the ALJ’s assertion that Liberty was “willing to pay certain of the additional forfeitures” (ID ¶ 128), Liberty did not object to the additional \$300,000 forfeiture. Liberty’s Proposed Findings of Fact and Conclusions of Law in Reply at 43 (Mar. 10, 1997).

Unmoved by the record, Time Warner, like the ALJ, speculates that Liberty must have intended to deceive the FCC in its May 4 STA request because the request did not disclose that the facilities were already in operation. TW Brief at 7-8. However, Time Warner's argument cites no proof of an intent to deceive. Moreover, it ignores the consistent testimony of the participants in the April 27 conference call that Liberty intended to disclose the violations to the Commission as soon as the scope of the violations could be discerned.³⁶ Time Warner's argument likewise ignores the corroborative testimony of Barr and Lehmkuhl regarding the substantial miscommunications at Pepper & Corazzini, on whom Liberty relied, that preceded filing of the May 4 STA requests. Barr learned of the unauthorized activations in late April, but testified that he failed to convey the information to his associate, Lehmkuhl, the person who prepared the STA requests.³⁷ As a result, Lehmkuhl filed the STAs prior to learning of the premature activations. Tr. 1178:10-16 [Lehmkuhl]. Ultimately, and perhaps most importantly, Liberty did disclose the premature activations on May 17 – 20 days after the first indication that a violation might have occurred.

Additionally, both the ID and Time Warner quibble with particular phrasing in the STA requests, alleging that it is misleading because it is "future oriented." TW at 8; ID ¶ 78. As the discussion above demonstrates, such future-oriented language is appropriate, given that Lehmkuhl did not know the paths in question were activated. In fact, the language of the May 4 STA requests merely tracks other STA requests filed by Liberty. Lehmkuhl Dep. 80:8-14 [L/B

³⁶ Tr. 1367:6 – 1369:4 [Price], 1799:15-20, 1801:20-25, 1863:14 – 1864:2, 1960:4-9 [Barr]. Notably, Rule 1.65 requires disclosure "as promptly as possible and in any event within 30 days, unless good cause is shown . . ." 47 C.F.R. § 1.65; see *Arkansas Educational Television Comm'n*, 6 FCC Rcd 478, 479 (1991).

³⁷ Tr. 1040:22 – 1041:10, 1151:5 – 1159:25, 1178:10-23, 1298:7-14 [Lehmkuhl], 1800:23 – 1801:1 [Barr].

5]. Accordingly, attempts to pick apart the boilerplate language of the STA requests to manufacture an intent to deceive should be rejected.

IV. The ID's and Time Warner's Proposed Treatment of the IAR Unfairly Punishes Liberty and Ignores Substantial Evidence

Time Warner, in support of the ID, states that Liberty's delay in producing the "highly relevant" IAR indicated a "pattern to deprive this proceeding of timely evidence" and therefore undermined Liberty's "reliability for dealing with the Commission in the future" and should result in disqualification. TW Brief 12-13, 15-16; ID ¶¶ 30, 36, 117. However, as Liberty demonstrated at length in its Exceptions: the IAR did not impede discovery in this case; the IAR must be given appropriate evidentiary weight; Liberty has never relied on the Report; and Liberty may not be disqualified for asserting its claim of privilege.³⁸

As the Bureau acknowledged, Liberty's litigation regarding the confidentiality of the IAR did not impair discovery in this case.³⁹ It is well-settled that claims of privilege do not protect "disclosure of underlying facts."⁴⁰ Therefore, Liberty's claims of privilege and appellate litigation did not keep relevant facts out of the hands of Time Warner or the ALJ.

The Commission should also recognize what the ALJ and Time Warner fail to: that the IAR represented the truth as known to Liberty's counsel at the time of its submission and nothing more. The IAR was prepared by Liberty's counsel under a short time frame without the benefit of FCC process. In contrast, this proceeding has spent two years exploring various matters, often in painstaking detail, many of which were not central to the purpose of the investigation, such as

³⁸ For further discussion of these issues, *see* Exceptions at 5-7, 22.

³⁹ Bureau's Consolidated Reply, WT Docket No. 96-41 at 11 (filed Mar. 10, 1997).

⁴⁰ *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981). It should also be noted that Liberty, early in the process, proposed the production of a redacted version of the IAR.

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when Liberty first learned of the premature activations. Therefore, to substitute the IAR for the vast record developed in this case is unfounded as a matter of common sense and law.

Liberty may not be disqualified for exercising its right to appeal the Commission's initial confidentiality finding. See Exceptions at 5-9. Significant public policy concerns are implicated, because disqualifying Liberty for exercising its rights will have a chilling effect on licensees' willingness to disclose violations and provide full descriptions of their conduct. Just as public disclosure of such information may encourage regulated entities to limit the detail and depth of their submission,⁴¹ so will punishment for the mere assertion of confidentiality.⁴² The ID and Time Warner's intention to disqualify a licensee for the assertion of confidentiality would make the FOIA confidentiality rules a shell by discouraging any party from submitting materials under those provisions.⁴³

V. Liberty Was Forthcoming in Cooperating Fully with an Expedited Discovery Schedule.

The ALJ and Time Warner attempt to draw blanket conclusions about Liberty's candor based on the errors which occurred as a result of the extensive and expedited discovery process.⁴⁴

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Exceptions at 8-9.

⁴¹ *Washington Post Co. v. HHS*, 690 F.2d 252, 268 (D.C. Cir. 1982).

⁴² *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Notice of Inquiry, GC Docket No. 96-55, ¶ 30 (rel. Mar. 25, 1996). As the Commission has recognized, "allowing confidential submission [under FOIA, as Liberty asserted] increases the willingness of holders of confidential information to provide that information to the Commission and, even where submission is mandatory, often avoids the burden and delay of invoking such mandatory means."

⁴³ Other agencies have similarly recognized the value of encouraging regulated parties to voluntarily disclose violations. See "EPA May Recommend Not Prosecuting Companies That Uncover, Report Crimes," Vol. 66, U.S.L.W. 2520-2521 (Mar. 3, 1998).

⁴⁴ TW at 12-19; ID ¶¶ 31-34; Liberty produced over 15,000 pages of documents during the
(Continued...)

The few oversights the ID and Time Warner focus on are excusable inadvertences and Liberty's remedial discovery efforts show its intent to be fully forthright with the Commission.⁴⁵ However, the ALJ and Time Warner never address these explanations or subsequent actions – choosing instead to ignore Liberty's assertions in a headlong attempt to reach a predetermined result.⁴⁶

- **February 24 License Inventory** (TW at 15, 17). As Liberty has explained elsewhere, the document was withheld under a mistaken claim of privilege. In the course of reviewing documents for a privilege log, Liberty discovered that the February 24 inventory listed Comsearch -- a third party -- as a recipient and was therefore not privileged. Liberty's immediate response was to produce the inventory on June 17 -- less than one week after Liberty was instructed to prepare the privilege log.⁴⁷

- **April 26th Nourain Memorandum and April 28th Lehmkuhl Inventory**⁴⁸ On January 6, 1997, while preparing for hearing, Lehmkuhl discovered and disclosed to Liberty's trial counsel the April 28 inventory.⁴⁹ Within hours, Liberty's attorneys produced the document, via facsimile, to all parties and commenced an audit of the documents produced by Liberty to determine why the inventory was not located.⁵⁰ The search revealed that the document was not

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one month document discovery period in April 1996. See Order, FCC 96M-53 (rel. Mar. 28, 1996); Joint Motion ¶ 8.

⁴⁵ It should also be noted that little actual evidence was taken on this issue in the hearing, making it a particularly weak basis for finding a lack of candor.

⁴⁶ However, even the ALJ's "findings" in this regard are inconsistent; for example, he holds that it has not conclusively been shown that the withholdings were intentional, a difficult case to make, . . ." ID at ¶ 117. Nonetheless, the ID draws negative inferences from Liberty's conduct despite the acknowledged evidentiary gap.

⁴⁷ Opposition by Bartholdi Cable to the Motion of Time Warner for an Inquiry into the Adequacy of Compliance with Requests for Production of Documents at 5 (filed February 14, 1997) ("Document Production Inquiry Opposition").

⁴⁸ Time Warner makes much of the fact that Lehmkuhl recommended STAs be applied for despite the "seriousness of the situation," suggesting that the "situation" was unauthorized path activations. TW at 18. However, as Lehmkuhl himself testified (Tr. 1160:1 – 1169:12 [Lehmkuhl]), the serious "situation" was the delay in obtaining STA grants which resulted from Time Warner's reflexive filing of petitions to deny.

⁴⁹ Document Production Inquiry Opposition at p. 6.

⁵⁰ *Id.* at 7-10.

among those retrieved from Pepper & Corazzini's offices. Liberty's attorneys subsequently conducted additional searches of Liberty's offices – unearthing previously undiscovered files of Nourain⁵¹ – and Pepper & Corazzini's files. The search turned up the April 26th Nourain memorandum, which Liberty produced, along with other documents, on January 13, 1997.

- **April 20, 1993 Richter Letter**⁵² Time Warner errs in stating that the Richter letter was first disclosed on February 4, 1997. In fact, Liberty submitted the letter to the Commission on August 14, 1995, as part of the IAR. Ultimately, subsequent to cross-examination of Barr, Liberty produced the letter pursuant to the ALJ's order despite the fact that the letter was clearly subject to a claim of privilege.⁵³

VI. The Joint Motion of Liberty and the Bureau Did Not Misrepresent Facts.

In its zeal to bolster the ID, Time Warner supports a conclusion of the ALJ that is obviously erroneous: That Liberty and the Bureau misled the Commission regarding the Stern Memorandum and that Liberty illegitimately withheld that document from production.

The Joint Motion stated that “Stern did not give Nourain a written memorandum detailing the application process.” Joint Motion at 13.⁵⁴ This assertion is supported by the testimony of Stern and Nourain⁵⁵ as well as an examination of the document itself, which never purported to

⁵¹ Nourain testified that his filing system consisted of nothing more than placing documents in filing cabinets until a particular cabinet was full, and then moving on to a new filing cabinet. Document Production Inquiry Opposition at 12, (citing Tr. 926:7 -927:5, 928:12 - 929:2 [Nourain]). Accordingly, the difficulties which arose in searching his files are not surprising.

⁵² TW at 15, 16, 18, 19 (arguing Liberty should be penalized for not producing Richter Letter); ID ¶¶ 31, 35, 117 (same).

⁵³ Liberty elected to forego its right to appeal as of right the ALJ's privilege order. In addition, disclosure of the Richter Letter also risked compromising Liberty's pending appeal regarding the confidentiality of the entire IAR. This disclosure demonstrates Liberty was not stonewalling the proceeding for tactical gain.

⁵⁴ The Joint Motion was accurately quoting the deposition testimony of a hostile witness, Stern, regarding this information transfer. It should also be noted that the ALJ had no opportunity to observe Stern's demeanor; Stern only gave deposition testimony. Therefore, there is no basis for Commission deference to the ALJ regarding Stern's demeanor.

⁵⁵ Stern testified that he did not provide detailed instructions to Nourain. (Stern Dep. 70:14-74:1). Similarly, Nourain testified that he did not receive detailed licensing instructions from Stern. Nourain Tr. 971. Despite the consistent testimony of the persons involved, the ID and

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impart "details" of the licensing process.⁵⁶ Rather than containing any information about exact licensing procedures, requirements, and timeliness, the memo focuses on Liberty's general reliance on counsel in carrying out these processes and the "many ways to carry out the [licensing] process" that were available to Nourain. TWCV Ex. 67, Exhibit E. Moreover, the memorandum specifically refers Nourain to outside counsel for "details" of the licensing process. The lack of detail both in the memo and in discussions between Nourain and Stern also is consistent with Nourain's claims that he was fully familiar with the licensing process. Joint Motion at 13. Thus, by no stretch of the record can it be concluded that Liberty and the Bureau misrepresented facts regarding the Stern Memorandum.⁵⁷

Time Warner also disingenuously argues that "there is no justification for Liberty's failure to have produced the Stern Memorandum until September 1997." Time Warner at 14; ID at ¶ 51. However, Time Warner omits the key fact that the Stern Memorandum *was not within the scope of the discovery request* since the Stern Memorandum was dated June 16, 1992, and document production was limited to documents generated after January 1, 1993.⁵⁸

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Time Warner argue that the Stern Memorandum does "detail[] the application process" and therefore reveals an intent to mislead the Commission in the Joint Motion although they obviously can point to no "details" contained in the memorandum. The finding of an intent to deceive is contradicted still further by the fact that Liberty had submitted the Stern Memorandum as part of the IAR well before the HDO was commenced.

⁵⁶ Certainly, the Stern Memorandum does not detail "the entire FCC application process" as Time Warner. TW Brief at v.

⁵⁷ The Stern Memorandum is only two pages long, some portion of which addresses unrelated issues such as the location of various files (see #3) and the history of Liberty's licensing activity (see #1). As a matter of common sense, the Commission's entire application process and Liberty's policy regarding the role of Pepper & Corazzini, Comsearch and the in-house engineer could not have been detailed in such a short document.

⁵⁸ Liberty's Responses and Objections to the Bureau's First Set of Interrogatories, WT Docket No. 96-41 at 2 (filed Apr. 15, 1996 General Objection 3); Liberty's Responses and

(Continued...)