

VII. The Sanctions Proposed By Liberty And The Bureau Are Consistent With Commission Precedent And The Public Interest.

Liberty has never denied the seriousness of its violations and does not seek to do so now; in fact, it has agreed with the Bureau to pay forfeitures totaling \$1,090,000.⁵⁹ This remedy is fully consonant with applicable FCC precedent and the public interest.

The Commission's consistent precedent is that "total disqualification will occur only if a willful intent to deceive is discerned."⁶⁰ Indeed, a finding of this "intent to deceive [is] an essential element of a misrepresentation or lack of candor showing."⁶¹ Conduct that does not rise to the level of a willful intent to deceive, even if it "may be characterized as 'carelessness [or]

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Objections to the Bureau's Request for Production of Documents, WT Docket No. 96-41 at 2 (filed Apr. 15, 1996); 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 3 n. 2 (filed Feb. 14, 1997). Time Warner further contends that "not coincidentally" Liberty produced some documents which were helpful to its position, while withholding those that purportedly undermined Liberty's position. TW at 14. Again, this is untrue. Where facts or even documents contained in the IAR were subject to proper discovery requests, those documents and facts were produced. The production proceeded despite the possibility of harm to Liberty's confidentiality litigation. For example, Price's memorandum to McKinnon (Attachment D to the IAR) – deemed helpful to Liberty by Time Warner – was also outside the initial discovery request and therefore not produced. Yet, when Liberty was ordered to produce the document (in the course of the Price deposition at the end of May 1996) Liberty did so immediately. Thus, rather than revealing a pattern of noncompliance, Liberty's conduct showed that it took its discovery obligations seriously and attempted to balance those obligations with its legitimate appellate claims.

⁵⁹ Of this, \$80,000 was attributed to Liberty's unauthorized hardwire connections. The ALJ has accepted this forfeiture. Memorandum Opinion and Order, FCC 97 M-154 (rel. Sept. 11, 1997).

⁶⁰ *Fox River Broadcasting, Inc.*, 88 FCC 2d 1132, 1137 (Rev. Bd. 1982), *aff'd* 93 FCC 2d 127 (1983) ("lack of care in making . . . statements" to the FCC does not support a finding of misrepresentation or lack of candor); *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 (Initial Decision 1995).

⁶¹ *Swan Creek*, 39 F.3d at 1222.

exaggeration, puffing and slipshoddiness' or 'faulty shading of recollection' falls short of the degree of scienter historically required by the Commission for disqualifying. . . ."⁶² Failure to provide information or the submission of incorrect information, even if done because of carelessness, inadvertence, or gross negligence, does not warrant disqualification unless accompanied by an intent to deceive.⁶³ Similarly, the faulty recollection of a witness does not deserve disqualification unless the witness exhibits an intent to deceive.⁶⁴ Even the most serious violations of Commission rules, involving safety of life, have not resulted in disqualification where licensees have not intended to deceive the Commission.⁶⁵

As demonstrated above, the ALJ's and Time Warner's arguments that Liberty's principals intended to deceive the Commission are wholly unsupported by the extensive record. Liberty's licensing procedures were fraught with problems, and supervisors its were negligent in their management of the employees and agents responsible for licensing. However, in the thousands of pages of documentary and testimonial evidence, neither the ALJ nor Time Warner

⁶² *Fox River* at 1137-38.

⁶³ See *Pinelands, Inc.*, 7 FCC Rcd 6058, 6065 (1992); *Abacus Broadcasting Corp.*, 8 FCC Rcd 5110, 5112 (Rev. Bd. 1993); *Fox River*, 88 FCC 2d at 1137-38; *Broadcast Associates of Colorado*, 104 FCC 2d 16, 19 (1986).

⁶⁴ *Old Time Religion Hour, Inc.*, 95 FCC 2d 713, 719 (Rev. Bd. 1983); *Maria M. Ochoa et al.*, 7 FCC Rcd 6569, 6571 (Rev. Bd. 1992); *Grenco, Inc.*, 39 FCC 2d 732, 737 (1973); *Telephone and Data Systems, Inc.*, 10 FCC Rcd at 10520-21; *Daytona Broadcasting Co., Inc.*, et al., 97 FCC 2d 212, 233-34 (Rev. Bd. 1984), modified, 101 FCC 2d 1010 (1985); *Capitol City Broadcasting Co., et al.*, 8 FCC Rcd 1726, 1734 (Rev. Bd. 1993), modified, 8 FCC Rcd 8478 (1993); *Joseph Bahr, et al.*, 10 FCC Rcd 32, 33 (Rev. Bd. 1994) (intent may be inferred from a motive to deceive, but this motive must be supported by the facts; baseless speculation or innuendo is insufficient).

⁶⁵ For example, in *Centel Cellular*, the Commission found that a licensee erected a cellular tower in the flight path of a nearby airport without alerting the FAA and with improper lighting, creating an ongoing air hazard for approximately five months. 11 FCC Rcd 10800 (1996). Despite the "unprecedented" and "grave" dangers of this behavior, the Commission imposed a \$2 million forfeiture, but no disqualification. *Id.*

is able to present an iota of direct evidence that Liberty intended to deceive the Commission. To the contrary, both the ALJ and Time Warner are left to infer an intent to deceive. Yet, as demonstrated above and in Liberty's Exceptions, these inferences without fail are not only unsupported by the record but are directly contrary to substantial record evidence.

In similar situations, the Commission has consistently found that a forfeiture, rather than disqualification, is the appropriate remedy. For example, in *MCI Telecommunications Corp.*,⁶⁶ the Commission declined to revoke any licenses and imposed a \$10,000 forfeiture despite numerous instances of premature construction or activation, failure to notify the Commission of unresolved frequency disputes, false statements that frequency coordination had been "successfully accomplished," and failure to disclose that sites were on government-owned land.⁶⁷ The Commission's determination was based on a finding that these numerous missteps resulted from sloppiness and lack of knowledge and not from an intent to deceive.⁶⁸

In many respects, this case is similar to *David A. Bayer*,⁶⁹ where the Commission imposed a \$505,000 forfeiture, but not disqualification, for a licensee that operated cellular towers with improperly installed equipment intentionally designed to increase the coverage area and made numerous false statements about the towers. As in *Bayer*, there is no evidence that Liberty's principals knew of the misconduct; in fact, the uncontroverted evidence⁷⁰ is that they

⁶⁶ *MCI Telecommunications Corp.*, 3 FCC Rcd 509 (1988).

⁶⁷ *Id.* at 511-12.

⁶⁸ *Id.* at ¶¶ 35-43, 46-51.

⁶⁹ 7 FCC Rcd 5054, ¶¶ 1, 7.

⁷⁰ In *Bayer*, the Commission found that while certain evidence "suggest[ed] the possibility of scienter by management, there are explicit statements, under oath and subject to criminal prosecution if false, disavowing any such knowledge." *Id.* at ¶ 13.

did not.⁷¹ As in *Bayer*, there is no evidence that Liberty's principals ever "suggested, encouraged or instructed" its engineering employees to violate the Commission's rules;⁷² again, the uncontroverted evidence is that they did not.⁷³ As in *Bayer*,⁷⁴ Liberty relied on expert engineering advice.⁷⁵ As in *Bayer*,⁷⁶ Liberty investigated all of its facilities, voluntarily reported the results of that investigation to the Commission, and instituted compliance measures.⁷⁷ Liberty submits that on this record, as in the *Bayer* case, disqualification is unwarranted.

The Commission's practice of imposing forfeitures, but not disqualification, for serious misconduct is most recently and dramatically demonstrated in two Commission cases involving intentional manipulation of the FCC's auction rules. In *US West Communications, Inc.*, the Commission imposed a forfeiture of \$1.2 million against US West, but not disqualification, despite a finding that officers of two Commission licensees willfully and intentionally manipulated a spectrum auction and lied to federal investigators about the violation.⁷⁸ Similarly, in *Mercury PCS II, LLC*, the Commission imposed a \$650,000 forfeiture, but not disqualification, for repeated and willful violations of the Commission's anti-collusion rules that

⁷¹ Tr. 519:8 – 520:25 [H. Milstein], 1363:6 – 1364:25, 1416:18 – 1419:16 [Price], 1623:5-7, 1624:5-13 [E. Milstein].

⁷² 7 FCC Rcd 5054, ¶ 11.

⁷³ Tr. 520:23-25 [H. Milstein], 1626:13-21 [E. Milstein].

⁷⁴ 7 FCC Rcd 5054, ¶ 14.

⁷⁵ Tr. 515:16-25 [H. Milstein], 1350:19-1351:11 [Price]. As indicated above, Liberty also relied on expert FCC licensing counsel. Tr. 513:7-24, 515:19 [H. Milstein], 1348:11-12 [Price].

⁷⁶ 7 FCC Rcd 5054, ¶ 15.

⁷⁷ Tr. 517:15 – 520:22, 576:23 – 579:5, 582:18 – 586:25 [H. Milstein], 1367:4 – 1369:4, 1393:15 – 1395:9 [Price], 1625:5 – 1626:12 [E. Milstein].

⁷⁸ *US West Communications, Inc.*, 1998 WL 113328, ¶ 39 (Mar. 16, 1998).

involved utilizing “trailing numbers” that manipulated a spectrum auction.⁷⁹ The Commission found that the licensee violated Commission rules by colluding with other bidders in three separate markets, and in thirteen different bids, and in so doing affected other bidders’ behavior to the licensee’s advantage.⁸⁰ The licensee’s behavior was intentional and part of a complex strategy to “game” the Commission’s bidding process while evading detection.⁸¹

In *US West* and *Mercury PCS II*, despite clear findings of intentional violation of the Commission’s rules, despite the fact that licensee officers lied to federal investigators, and despite the fact that the wrongdoing had significant adverse consequences, the Commission did not disqualify the licensees. To disqualify Liberty, with no evidence of intentional violation of Commission rules, with no evidence of an intent to deceive, and with substantial evidence to the contrary would be woefully inconsistent.⁸²

A remedy short of disqualification is particularly warranted here, where the record reflects that Liberty relied on expert engineering and legal counsel. At every step – in the original licensing of the microwave paths, in the STA applications, in the response to the discovery of the violations – Liberty was guided by and relied on those whom it had every reason to believe were expert in FCC licensing and disclosure requirements.⁸³ At no step in the process does the record reflect that Liberty was advised that what it was doing violated any Commission

⁷⁹ *Mercury PCS II, LLC*, 12 FCC Rcd 17970 (rel. Oct. 28, 1997).

⁸⁰ *Id.* at ¶¶ 17-22.

⁸¹ *Id.*

⁸² *See Melody Music v. FCC*, 345 F2d 730 (D.C. Cir. 1965).

⁸³ The ALJ’s conclusion that Liberty ignored a warning from its legal counsel is wholly unsupported by any form of evidence and is, in fact, contrary to the testimonial and documentary evidence in this case. *See Exceptions* at 15-19.

requirement. While Liberty fully understands that such reliance does not absolve it from ultimate responsibility – and, indeed, it has been forthright in accepting responsibility and agreeing with the Bureau to a substantial penalty – the proper remedy under consistent Commission and judicial precedent is not disqualification. As the D.C. Circuit has found, “good-faith reliance on counsel [is] sufficient to avoid disqualification for character reasons.”⁸⁴

Moreover, the proposed forfeiture is in the public interest. As the Commission is aware, Liberty has been a pioneer in bringing competition to the cable television services market through use of 18 GHz facilities. *See* HDO ¶ 22. Indeed, until recently, Liberty represented the only competition faced by New York's monopoly cable provider, Time Warner. Although Liberty provided Time Warner with an unfortunate amount of ammunition, Time Warner has prosecuted this case for the unabashed purpose of driving a competitor out of the market. It has no other interest or purpose in this case. If the ID stands, Time Warner will have succeeded.

In addition, while Liberty fully acknowledges that its actions constituted “premature activations” at the time there were committed, the overwhelming bulk of those actions would not be considered “premature activations” now (or violate any Commission rule). In fact, the Commission has changed its rules to allow microwave paths to be activated upon the filing of an application. In this regard, it is also significant that Liberty’s conduct did not cause interference with any other microwave operator; nor was the public welfare threatened. And, Liberty’s extensive compliance program assures that the company will follow the Commission’s rules.

⁸⁴ *See also Triad Broadcasting Co.*, 96 FCC 2d 1235, ¶ 20 (1984); *Abacus Broadcasting Corp.*, 8 FCC Rcd 5110, 5113-15 (Rev. Bd. 1993); *WEBR, Inc. v. FCC*, 420 F.2d 158, 167-68 (D.C. Cir. 1969); *David A. Bayer*, 7 FCC Rcd at 5054 (1992); *Professional Radio, Inc.*, 2 FCC Rcd 6666, 6667 (1987).

For the foregoing reasons, the public interest is served by the granting of Liberty's licenses as proposed herein.

VIII. CONCLUSION

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

Respectfully submitted,

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Dated: April 22, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April 1998, I caused copies of the foregoing
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