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## SUMMARY

The Presiding Judge's determination that Liberty is not qualified to be a Commission licensee is strongly supported by the record evidence, and should be affirmed in all respects by the Commission. While the record is replete with multiple instances of Liberty's misconduct, three especially egregious instances alone justify Liberty's disqualification. First, Liberty learned in late April 1995 that it had been operating several facilities without authorization, yet Liberty knowingly filed May 4, 1995 STA requests that both failed to disclose that the subject paths were already operating and that misleadingly stated that the paths would be activated in the future. Second, in a May 17, 1995 Surreply, Liberty misrepresented that Mr. Nourain had illegally activated paths based on an assumption that applications and STA requests for those facilities had been granted within a reasonable time after filing. The Surreply omitted material facts showing that some facilities were activated prior to or shortly after an application had been filed. Also in the Surreply, Liberty misrepresented that it had a "pattern and practice" of awaiting authorization prior to activating paths, despite the fact that Liberty had activated over 90 facilities without awaiting authorization. Third, Liberty moved for summary decision based in part on the misrepresentation that Mr. Nourain was uninformed about the FCC's licensing process. Liberty's withholding of a document that proved otherwise further supports the Presiding Judge's conclusion.

Liberty's actions in this proceeding also evidence an intent to mislead the Commission, rather than an intent to be candid. Liberty inexcusably delayed the production of significant documents, which disclosed that -- contrary to Liberty witnesses's deposition testimony and Liberty's statements in a motion for summary decision -- Liberty principals knew of Liberty's unlawful activations in late April 1995, before filing the May 4 STA requests. Furthermore, the

Presiding Judge justifiably rejected Mr. Price's self-serving testimony, in favor of the abundant record evidence that Liberty either knew it was operating illegally before April 1995, or recklessly disregarded its obligations as a Commission licensee.

The record and legal precedent fully support the Presiding Judge's finding that Liberty lacked candor by failing to produce the Internal Audit Report until the end of the licensing proceeding. Although Liberty waived any attorney-client privilege by giving the Report to the Bureau, it continued to assert the privilege in the proceeding. The Bureau's possession of the Report does not exonerate Liberty, since the Bureau was unable to use it. By keeping the Report out of the proceeding, Liberty was able to mislead the Presiding Judge by making arguments that would have been disproved by the Report. Liberty's tactics in making factual assertions contradicted by the Report justified the Presiding Judge's finding that Liberty would not likely be candid with the Commission in the future. The record evidence proves that Liberty had the requisite intent to deceive the Commission because Liberty intended to perform the act that resulted in a violation of the Commission's Rules.

Finally, the Presiding Judge's issuance of an Initial Decision was procedurally appropriate, as well as approved by Liberty. Liberty cannot claim any prejudice from the procedural turn the case took because Liberty had a full opportunity to present evidence it desired in support of its position. The Presiding Judge correctly held that Liberty failed to meet its burden of proceeding with evidence and its burden of proving that it is qualified to be a Commission licensee.

BEFORE THE  
Federal Communications Commission  
WASHINGTON, DC 20554

In Re Applications of )  
LIBERTY CABLE CO., INC. )  
For Private Operational Fixed ) WT DOCKET NO. 96-41  
Microwave Service Authorizations and )  
Modifications )  
New York, New York )

To: The Commission

**TIME WARNER CABLE OF NEW YORK CITY AND PARAGON  
COMMUNICATIONS, AND CABLEVISION OF NEW YORK CITY - PHASE I'S  
JOINT REPLY TO EXCEPTIONS TO INITIAL DECISION**

Pursuant to Federal Communications Commission ("FCC" or "Commission") Rule 1.277(e) (47 C.F.R. § 1.277(e)) Time Warner Cable of New York City and Paragon Communications ("TWCNYC"), and Cablevision of New York City - Phase I ("Cablevision") (collectively, "TWCV"), hereby file this Joint Reply to Exceptions to Initial Decision filed by Liberty Cable Co., Inc. ("Liberty").<sup>1</sup> See Initial Decision, WT Docket No. 96-41, FCC 98D-1 (rel. Mar. 6, 1998) ("LD"). TWCNYC and Cablevision fully support the decision of the Presiding Judge that Liberty is not qualified to be a Commission licensee, and they urge the Commission to adopt the Initial Decision denying Liberty's pending applications for licenses to provide operational fixed microwave service ("OFS"). See LD, ¶ 124.

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

**I. The Presiding Judge's Conclusion That Liberty Is Unfit To Be A Commission Licensee Is Fully Justified By The Record**

While the record documents numerous instances of Liberty's misconduct, there are three such instances of lack of candor that alone are sufficient to disqualify Liberty as a licensee. More importantly, the facts comprising each of these instances are either admitted by Liberty or are indisputable. First, Liberty admits that on April 27, 1995, its President and others knew that it had at least 15 operating, unlicensed microwave facilities. Liberty's Exceptions, at 10. Despite this knowledge, on May 4, 1995, Liberty filed requests for Special Temporary Authorization ("STA") for these facilities that not only failed to state that they were already operating, but affirmatively suggested to the contrary, arguing that STA was necessary in order to avoid losing customers Liberty was contractually obligated to begin serving. TWCV Ex. 17.

Second, Liberty's purported confession of its unlicensed operations in the May 17, 1995 Surreply also contained material omissions. Not only did it fail to identify all of Liberty's operating, but unlicensed, facilities as of that date, but also it failed to disclose other relevant information Liberty admits knowing at that time. Liberty knew the dates it had filed the applications to license these facilities and when it had turned them on, yet it chose not to share that information with the Commission. TWCV Ex. 34. Instead it sought to excuse its unlicensed operations by saying that its chief engineer, Mr. Nourain, mistakenly assumed that applications and STA requests for the facilities had been filed; and, that after waiting a reasonable time for the Commission to act, he had turned on the new facilities, assuming that they had been authorized. TWCV Ex. 18. In fact, the information Liberty concealed from the Commission showed that some of the facilities had been activated before an application for them had been filed and that others had

been activated only a few weeks after an application had been filed. This excuse that Mr. Nourain had assumed that activation of these facilities had been authorized when he turned them on was a misrepresentation made possible by the withholding of relevant information.

Third, Liberty moved for summary decision in the hearing, in part, based on the argument that its unlicensed operations were the result of Mr. Nourain's not having been informed about the workings of the FCC's licensing process. See Joint Motion for Summary Decision, July 15, 1996 ("Joint Motion"). The principal factual support for this was Liberty's assertion that Mr. Nourain did not receive a written memorandum from Joe Stern, the engineering consultant who set up Liberty's microwave system, "detailing the application process." Joint Motion, at 13. In fact, Mr. Nourain had received such a document. This misrepresentation was made possible by Liberty's failure to produce the document in discovery. Like another highly relevant document not produced in discovery, this memorandum was attached to an "Internal Audit Report" (the "Report") Liberty had given *ex parte* to the Wireless Telecommunications Bureau (the "Bureau") in 1995, but which the Bureau was powerless to use in the licensing hearing because of Liberty's spurious assertions of privilege (which were rejected by every decision-maker that heard them, including the D.C. Circuit). TWCV Ex. 67.

A. Liberty knowingly filed material false statements with the Commission.

The Presiding Judge found that by late April 1995, Liberty knew it had been operating unlicensed microwave facilities, but decided not to reveal that fact to the Commission in requests for STA it filed on May 4, 1995. See TWCV's Joint Brief, at 7;<sup>2</sup> LD., ¶ 73. Liberty admits these

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<sup>2</sup>TWCV's Joint Brief in Support of the Initial Decision, filed April 7, 1998, is cited as "TWCV's Joint Brief, at \_\_\_\_."

facts but contends that the Presiding Judge “ignored uncontroverted evidence that Liberty always intended to make appropriate disclosures once the facts were verified.” Liberty’s Exceptions, at 4. Liberty further argues that Commission Rules only required Liberty to notify the Commission of its unlawful operations within 30 days of their discovery, and that Liberty’s disclosure in the May 17, 1995 Surreply satisfied this obligation. Liberty’s Exceptions, at 11 & n.22; see 47 C.F.R. § 1.65(a). These arguments are legally and factually wrong.

Not only does the record evidence fail to support Liberty’s claim that it “always intended to make appropriate disclosures,” but also it shows that Liberty concealed its illegal operations until it realized that it had no other choice but to disclose them. Liberty maintains that upon discovering that it was unlawfully operating several microwave facilities, its “immediate reaction was to find out what happened and to disclose its findings to the Commission.” Liberty’s Exceptions, at 1. Despite this claimed “immediate reaction,” Liberty’s immediate *action* after “learning of its unlawful operations in late April 1995” (Liberty’s Exceptions, at 10), was to file STA requests for the illegal facilities that falsely told the Commission that Liberty would lose customers if STA was not granted, implying that the facilities were not operating. TWCV Ex. 34. Liberty did not need to await the results of an “internal audit” to know that the facilities for which it was seeking STA were already in operation.<sup>3</sup> TWCV Exs. 14, 34. Liberty’s counsel did not even begin work on a document to disclose the unauthorized operations until after it received a TWCNYC pleading,

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<sup>3</sup>Liberty’s counsel admitted that, except for the fact that these facilities were operating illegally, there was no other reason to file STA requests immediately. Barr, Tr. 1861-62. Thus, if Liberty needed to verify which facilities were operating illegally, it could have waited for the results of an audit before it filed the requests. There was no immediate danger of losing customers, because the customers were being served, albeit by illegal means. The only immediate danger was that Liberty’s illegal operations would be discovered and brought to the Commission’s attention, which, in fact, is what happened.

dated May 5, 1995, charging Liberty with the operation of two unauthorized microwave facilities. Barr, Tr. 1902-03. Thus, Liberty's claimed "reaction" of disclosing its findings of illegal operations to the Commission only happened after TWCNYC had already brought them to the Commission's attention.

Liberty's eventual disclosure of its unauthorized activations in the May 17 Surreply does not exonerate Liberty's lack of candor in its May 4 or May 19 STA requests. Although Commission Rule 1.65(a) allows applicants a maximum of 30 days to *amend* an application with corrected information, the Rule does not relieve an applicant of its duty to ensure that an application is truthful and accurate when made. Thus, there is no 30-day "safe harbor" period during which applicants may make false, misleading, or incomplete statements to the Commission without penalty. 47 C.F.R. § 1.65(a). Liberty filed May 4 and May 19 STA requests that omitted to say what Liberty knew *at that time* -- that it was seeking authorization for facilities that were already operational and misleadingly implied that these facilities would be activated in the future. TWCV Ex. 34; see TWCV's Joint Brief, at 7-8. This is not a case where an applicant learned of a false statement in an application after it had been filed. Rather, it is a case of applications with false statements that the applicant knew were false *when they were filed*. This evidence of Liberty's *actions* after learning of its unlawful activations shows an intent to mislead regardless of its witnesses' self-serving after-the-fact testimony, which the Presiding Judge properly rejected.

Despite the fact that its Report revealed over 90 instances of unlicensed operations during a three-year period, Liberty disagrees with the Presiding Judge's finding that it continued to mislead the Commission in its May 17, 1995 Surreply by misrepresenting that it had a "pattern and practice" of awaiting Commission authorization prior to activating a new microwave facility.

Liberty's Exceptions, at 11; TWCV Ex. 67. Liberty had the burden of proving that it did not intend to mislead the Commission when it made this indisputably false statement of fact.<sup>4</sup> Id., ¶ 98; see Hearing Designation Order and Notice of Opportunity for Hearing, 11 FCC Rcd 14133, ¶¶ 30(3), 34 (1996) ("HDO"). The only evidence Liberty presented to meet this burden was its President's (Mr. Price) self-serving testimony that he believed the Surreply to have been accurate at the time he verified it. Liberty's Exceptions, at 11 (citing Price, Tr. 1502). He contradicted even this testimony and admitted the intentional misrepresentation when he testified that he knew, when he executed the declaration supporting the Surreply, that Liberty's *actual* pattern and practice differed from Liberty's stated policy of always complying with the Commission's regulations, a distinction not made in that document. Price, Tr. 1579-81. Moreover, substantial evidence indicates that Liberty likely knew of its rampant unlawful operations well before the initiation of the internal audit. See *infra* Part I.C.; see also TWCV's Joint Brief, at 20-24; Id., ¶¶ 105-06. The Presiding Judge properly exercised his discretion by giving no weight to Mr. Price's self-serving and contradictory testimony. Standard Broadcasting, Inc., 7 FCC Rcd 8571, n.18; (Rev. Bd. 1992); West Central Ohio Broadcasters, Inc., 6 FCC 2d 18, ¶ 4 & n.2 (1966).

Liberty further objects to the Presiding Judge's finding that Liberty misled the Commission because it failed to disclose detailed information about additional unauthorized facilities in the May 17 Surreply. Liberty's Exceptions, at 11. Liberty argues that this finding presumes that Liberty knew of more unlawful activations than those disclosed in the May 17 Surreply. Id. Since Liberty did not complete its comprehensive internal audit until August of 1995, Liberty claims that

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<sup>4</sup> It is indisputable because Liberty's own Report showed a total of 93 microwave facilities that were activated without authorization from 1992 to 1995. TWCV Ex. 67, Exhibit B. Of these, 32 were activated *before* an application had been filed. Id.

it could not have known of unlawfully activated facilities other than those revealed in the Surreply. Liberty's Exceptions, at 12. The Presiding Judge's finding that Liberty omitted material information from the Surreply does not require him to have found that Liberty knew of other unauthorized paths. What was false and misleading about the Surreply was Liberty's argument that the unlicensed operations were the result of its engineer's mistaken assumption that applications for the facilities had been filed and authorization (either STA or grant) had been received. This argument is based on factual premises that are contradicted by the concealed information. The concealed information shows that Liberty did not wait a sufficient amount of time for the Commission to have acted on an application or STA request before turning on a facility, and that some of the facilities had been activated before an application had ever been filed. The withholding of these facts allowed Liberty to make a deceptive and misleading argument. See TWCV Exs. 34, 35; TWCV's Joint Brief, at 8-9.

B. Liberty unjustifiably delayed production of significant documents.

Liberty disputes the Presiding Judge's finding that Liberty lacked candor with the Commission because it produced a number of decisionally significant documents so late in the proceeding that they could not be used in discovery, and their use in the hearing was compromised. Liberty's Exceptions, at 13. Liberty claims that this finding "ignores the record and fails even to discuss Liberty's explanation for the late production of these documents." Id. Liberty also asserts that once it learned of mistakes in its document production, "it candidly acknowledged them and produced the documents in question immediately." Id.; see also id. at ii. This is not accurate.

In fact, the delayed production of critical documents made possible the factual misrepresentations that lay at the core of the Joint Motion for Summary Decision. The Joint

Motion relies on two principal contentions: (1) that Liberty was forthright in its dealings with the Commission; and (2) that mis-communication and ignorance were the cause of Liberty's unlicensed operations which were, in any event, limited in scope. In depositions, all of Liberty's principals testified that their knowledge of Liberty's unlicensed operations came as a result of TWCNYC's May 5 filing, which was made *after* Liberty's May 4 STA requests. Thus, Liberty could argue that its principals were not aware of the false and misleading nature of the statements in those requests. The production of the April 26 Nourain memorandum and the April 28 Lehmkuhl inventory made this story untenable, because those documents showed that Liberty's principals knew about the company's unlicensed operations before May 4. Consequently, Liberty's witnesses all changed their testimony at the hearing to conform to the new evidence that was now in the record. Secondly, the Stern memorandum to Mr. Nourain (which was circulated to Liberty's other managers) and Ms. Richter's 1993 letter (the "Richter letter") to Mr. McKinnon (which was circulated to Mr. Price and Mr. Nourain) clearly instruct Mr. Nourain and Liberty on the workings of the FCC licensing process, undermining the claim that this mishap was the product of simple ignorance on Mr. Nourain's part.

Liberty attempts to justify the late production of Michael Lehmkuhl's February 24, 1995 microwave license inventory (L/B Ex. 1), as well as other license inventories, by stating that it mistakenly asserted the attorney-client privilege. According to Liberty, it produced the documents "as soon as Liberty's attorneys realized the mistake" while preparing a privilege log. Liberty's Exceptions, at 14. This misleading assertion omits material facts in the record. It took two orders from the Presiding Judge to get Liberty to produce complete copies of these inventories. First, the Presiding Judge ordered Liberty to generate a privilege log, even though the Bureau's document

request had called for one and Liberty had not objected. See Order, WT Docket No. 96-41, FCC 96M-153 (rel. June 13, 1996); see also Order, WT Docket No. 96-41, FCC 96M-152 (rel. June 11, 1996). In response to this order, Liberty produced heavily-redacted copies of the license inventories to TWCV with the privilege log. Second, TWCNYC finally received complete versions of the inventories after the Presiding Judge granted TWCNYC's Motion for an order mandating their production. Memorandum Opinion and Order, WT Docket No. 96-41, FCC 96M-164 (rel. June 27, 1996). Thus, the record shows that Liberty's production of these inventories was "voluntary" in only the most technical sense.

The Presiding Judge properly evaluated the record evidence and Liberty's explanations regarding Liberty's belated production of other significant documents. Liberty produced Mr. Nourain's April 26, 1995 memorandum on the first day of hearings and produced Mr. Lehmkuhl's April 28, 1995 inventory one week prior to the commencement of hearings. See TWCV Exs. 34, 35. According to Liberty, it produced these documents immediately after they were discovered. Liberty's Exceptions, at 14. However, Liberty was unable to explain why these documents, which were found in Liberty's files, were overlooked during the initial review of files in April 1996. Similarly, Liberty had no explanation for neither producing the April 20, 1993 Richter letter nor identifying it in the privilege log. See TWCV Ex. 51. Liberty's silence on this issue is particularly noteworthy, given that the Richter letter had been the subject of a telephone conversation in July 1995 between Liberty's FCC licensing counsel and its New York counsel and then had been attached to the Report furnished *ex parte* to the Bureau in August 1995. This, of course, was the same Report that concurrently was the subject of litigation in the D.C. Circuit over the Commission's denial of Liberty's privilege and other claims for confidentiality. Liberty argues that

since the Bureau had the letter as an attachment to the Report, Liberty was not “hiding documents.” Liberty’s Exceptions, at 14. This is a cynical argument, at best. Liberty exerted an inordinate amount of effort to keep the Report and its attachments out of the licensing proceeding. The Bureau was powerless to disclose any part of the Report. See infra Part II.

Liberty’s justification for failing to produce Mr. Stern’s (Liberty’s microwave consultant) June 12, 1992 memorandum to Mr. Nourain is equally unconvincing. See TWCV Ex. 67, Exhibit E. Liberty asserts that the Stern memorandum was not responsive to document requests because it was dated prior to January 1, 1993, the discovery cut-off date.<sup>5</sup> Liberty’s Exceptions, at 14. However, Liberty produced over 200 documents dated prior to January 1, 1993, including a February 1992 memorandum drafted by Mr. Price, which Liberty introduced as an exhibit in support of its position. L/B Ex. 2; see TWCNYC’s Second Supplemental Proposed Findings of Fact and Conclusions of Law, November 19, 1997, ¶ 40. Interestingly, copies of the Richter letter, the Stern memorandum and the Price memorandum were all attached to the Report. Of these three documents, Liberty chose to voluntarily produce only the self-serving Price memorandum.

- C. Liberty either knew that it was illegally operating microwave facilities prior to April 1995, or recklessly disregarded its obligations as a Commission licensee.

The Presiding Judge rejected Liberty’s position that no one at Liberty knew prior to April 1995 that it was operating unlicensed facilities. See I.D., ¶¶ 39-40, 46, 52-53, 55, 64-65, 69-70, 105-106 & n.37. Liberty argues that the Presiding Judge overlooked evidence and discredited

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<sup>5</sup>The Bureau’s document requests asked for documents dated after January 1, 1991. Request for the Production of Documents by Liberty Cable Co., Inc., April 3, 1996, at 2. Liberty has previously stated that pursuant to a stipulation, the document requests only required production of documents dated after January 1, 1993. See Opposition by Liberty to Motion of TWCNYC to Place Documents in Evidence, to Take Additional Discovery and to Compel Discovery Responses, October 15, 1997, at 9. No such stipulation was ever filed in the proceeding.

testimony to arrive at that conclusion. Liberty's Exceptions, at 15-18. However, as TWCV's Joint Brief discusses, the record shows Liberty likely knew it had unlawfully operated microwave facilities before April 1995. TWCV's Joint Brief, at 20-24. Moreover, at a minimum, Liberty's failure to use available information and its failure to supervise Mr. Nourain reflects Liberty's disregard of its licensing obligations. *Id.* In rejecting Liberty's claim of ignorance, the Presiding Judge properly exercised his discretion to evaluate the credibility of witnesses and to discredit testimony not found to be credible.

There is substantial evidence that shows that Liberty learned that it was operating unlicensed facilities in the spring of 1993, as the result of Ms. Richter's work with Mr. Nourain in preparing a license inventory. *See* TWCV's Joint Brief, at 20-21. Liberty claims that the Presiding Judge ignored "unrebutted evidence" that Mr. Nourain never looked at the inventories and that the inventories were not useful for determining which paths were licensed.<sup>6</sup> Liberty's Exceptions, at 16. However, Mr. Nourain himself contradicts this assertion. He testified that he reviewed the March 1993 draft inventory (Nourain, Tr. 2224-26) and that the inventory revealed which facilities were licensed. Nourain, Tr. 2226-27, TWCV Ex. 58.

Even though unsupportable, Liberty's argument overlooks the larger significance of the joint efforts of Mr. Nourain and Ms. Richter as they prepared the license inventory in 1993. As the

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<sup>6</sup> It is ironic that Liberty chastises the Presiding Judge for "disregarding unrebutted evidence," *i.e.*, Mr. Nourain's testimony, when its counsel invited the Presiding Judge to do just that with respect to another portion of Mr. Nourain's hearing testimony. Letter of February 6, 1997 from Eliot Spitzer and Robert Begleiter ("Liberty does not rely on the testimony of Behrooz Nourain given in this proceeding with respect to when he initially became aware of premature service. Mr. Nourain vigorously adheres to the truthfulness of his testimony. However, in this candor hearing, we are uncomfortable with the accuracy of his recollection"). Having impeached its own witness through its counsel, it is at the least unusual for Liberty to chastise the Presiding Judge for not having credited that witness's testimony.

two witnesses describe it, they were comparing operating versus licensed facilities in March 1993. Ms. Richter based the March 1993 draft inventory on licenses and information received from Mr. Nourain. Nourain, Tr. 2218-19. Mr. Nourain was able to discern which microwave paths were no longer necessary by looking at Liberty's licenses. Nourain, Tr. 2221-22. Therefore, Ms. Richter relied on Mr. Nourain to inform her about which microwave paths were licensed, but were not being used by Liberty. Richter, Tr. 2021; Nourain, Tr. 2019-20. On March 16, 1993, Ms. Richter discussed with Mr. Nourain whether particular microwave paths were active or dormant. Richter, Tr. 2018-21; TWCV Ex. 60. Mr. Nourain received the draft license inventory on March 16, 1993, and he reviewed it. Nourain, Tr. 2224-26; TWCV Ex. 58.

Events, documented in contemporaneous recordings, that occurred immediately after Ms. Richter and Mr. Nourain finished the inventory show that the process revealed new and alarming information about the status of Liberty's compliance with FCC Rules -- that Liberty had operated unlicensed facilities. First, as a matter of fact, Liberty did have operating, unlicensed facilities in March 1993. TWCV Ex. 67, Exhibit B. Second, on two occasions -- April 2, 1993 and April 13, 1993 -- Ms. Richter and Mr. Nourain had telephone conversations about what she described in her billing sheets as "construction and operation of paths that have not been granted" and "construction of unauthorized stations." TWCV Ex. 61; Richter Tr. 2037. Just a week after the second of these conversations (on April 20), Ms. Richter wrote a letter to Liberty's chief operating officer, telling him about conversations that she had had with Mr. Nourain that gave her "pause" and then setting forth in detail "the parameters within which construction and operation of new paths and new stations is permissible" under the Commission's Rules. TWCV Ex. 51. Ms.

Richter testified that the letter was intended to be a “wake-up call” to Liberty’s management.

Richter, 2046, 2060-61.

Despite these highly suggestive circumstances, the Presiding Judge did not find that Ms. Richter knew of unlicensed Liberty operations in 1993. I.D. at n.37.<sup>7</sup> Rather, because the letter was reviewed by Mr. Price the Presiding Judge found only that it was a warning to Liberty about the possibility of unlicensed operations if it continued its present pattern of activity, and that the warning was ignored. TWCV Ex. 51; I.D., ¶¶ 69-72, 105. The only evidence contradicting this conclusion was Mr. Price’s self-serving testimony that the letter was not a warning but merely a recommendation that the company apply for STA. Price, Tr. 2173. The Presiding Judge found that Mr. Price’s testimony about the letter was evasive and not credible. He properly accorded it no weight. See Standard Broadcasting, Inc., 7 FCC Rcd 8571, at n.18.

The Presiding Judge had other problems with Mr. Price’s testimony, most notably regarding when he first learned of unauthorized activations. Although Liberty claims this was error, the Presiding Judge’s action in rejecting Mr. Price’s testimony is fully justified by Mr. Price’s prior inconsistent statements on the matter. I.D., at n.33; Liberty’s Exceptions, at 17. Mr. Price impeached himself. Mr. Price testified in his deposition that he learned that Liberty had been operating unlawfully on a variety of dates ranging from January through May 1995, but always as a result of some pleading filed at the FCC by TWCNYC. See L/B Ex. 9 (Price Deposition, 5/28/96, at 93-96). By contrast, Mr. Price’s hearing testimony was that he initially learned from Mr.

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<sup>7</sup> Thus, Liberty’s exception that the Presiding Judge disregarded Ms. Richter’s testimony that she was unaware of any unauthorized activations when she wrote the April 20 letter is contrary to the Presiding Judge’s findings themselves. See Liberty’s Exceptions, at 15-16. The Presiding Judge did not take issue with Ms. Richter’s testimony on this point.

Nourain's April 26, 1995 memorandum that Liberty had a problem with unlicensed operations. Price, Tr. 1418-19. The only explanation Mr. Price offered for this change was the fact that he had recently reviewed the April 26, 1995 memorandum (Price, Tr. 1362-63, 1373, 1416-17), which Liberty belatedly produced on January 13, 1997, the first day of hearings.

Similarly, Mr. Price failed to explain why he did not discover Liberty's unlicensed operations from a February 1995 license inventory, but was easily able to make such a discovery from an April 26, 1995 memorandum. Liberty's *post hoc* rationalization for Mr. Price's conduct is not probative evidence. See Liberty's Exceptions, at 17. The April 26, 1995 memorandum from Mr. Nourain states: "in order to turn on current customers the Special Temporary Authority (STA) is being filed by our FCC Attorney, Pepper & Corazzini for the following paths." TWCV Ex. 35. About this, Mr. Price testified:

I took it from the face of reading this that our own people -- that anyone reading this would be aware we had a problem. So I presume while this didn't say specifically that we were providing unauthorized service, it didn't take a great genius to figure that out just from the face of the document.

Price, Tr. 1373. Given that the memorandum does not say that the listed paths were already operating, to arrive at his conclusion that "we had a problem," Mr. Price must have had a working knowledge of which paths were activated. On the other hand, although Liberty had unlicensed, operating facilities when it received the February 24, 1995 license inventory, Mr. Price claimed that when he received this inventory, which failed to list these facilities as "licensed" but listed them as "pending," he did not conclude that Liberty was operating unlicensed at that time. L/B Ex. 11 (Price Deposition, 8/1/96, at 174-78). The Presiding Judge's rejection of Mr. Price's self-serving testimony that he neither suspected nor knew of unauthorized activations before April

1995 is entirely justified by the record and the fact that Liberty has the burden of proof. See Eve Ackerman, 6 FCC Rcd 5277, ¶ 8 (1991).

D. Liberty has the burden of establishing its qualifications to be a Commission licensee.

Liberty claims that the Presiding Judge ignored “uncontroverted” testimony by finding that Liberty intentionally withheld relevant information from the Commission and deliberately delayed producing significant documents. Liberty’s Exceptions, at 4-5, 9-13. Liberty also asserts that the Presiding Judge “disregarded” testimonial and documentary evidence in deciding that Liberty likely knew of unlawful activations prior to April 1995, and acted with reckless disregard for its obligations as a Commission licensee. Liberty’s Exceptions, at 15-21. Not only do these arguments fall in the face of overwhelming, mostly undisputed, evidence; but also they fall because it is Liberty, not TWCV nor the Bureau, that has the burden of proof. HDO, ¶ 30(4). Liberty had to prove that it did not intend to mislead the Commission through misrepresentations and nondisclosures regarding the pending applications. See TeleSTAR, Inc., 2 FCC Rcd 7352, ¶ 9 (1987). The Presiding Judge has the right to disregard any witness’s testimony that is not believed. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 512 (1984). Uncorroborated, self-serving testimony does not qualify as probative evidence and is insufficient to meet the burden of proof. Standard Broadcasting, Inc., 7 FCC Rcd 8571, at n.18; Eve Ackerman, 6 FCC Rcd 5277, at ¶ 8. If there is conflicting testimony and no reason to believe one version over the other, the Presiding Judge should resolve the issue *against* the party having the burden of proof. West Central Ohio Broadcasters, Inc., 6 FCC 2d 18, at ¶ 4 & n.2 (citing J. Botti Enterprises, 3 FCC 2d 370 (1966)).

**II. The Presiding Judge's Conclusions Regarding The Internal Audit Report Were Appropriate, And Fully Supported By The Record Evidence And Legal Precedent.**

- A. The Presiding Judge correctly determined that Liberty's failure to produce the Report to TWCV and the Presiding Judge, prior to being ordered to do so by the D.C. Circuit, is further evidence of Liberty's lack of candor.

The Presiding Judge's finding that Liberty "strategically" withheld the Report under a waived assertion of privilege (see I.D., ¶ 30) is supported by the evidence, and is a further demonstration of Liberty's manipulation of the claim of privilege in connection with the Report. Liberty's claim that, "[f]ar from being hidden, the [Report] has been in the possession of the Bureau and the Commission since August 14, 1995" shows a complete disregard for the record evidence and an utter lack of conscience on Liberty's part. Liberty's Exceptions, at 7-8. Neither TWCV nor the Presiding Judge had the Report until September 1997, when Liberty's appeals of the Commission's denial of "confidential treatment" were finally exhausted. The Bureau had the Report, but the D.C. Circuit stay of the Commission's disclosure order prevented the Bureau from using the Report in the hearing.

In its nearly successful attempt to keep the Report out of the hearing, Liberty was able to argue until October, 1997, (1) that there was no evidence that it knew about unlicensed operations before April 1995;<sup>8</sup> (2) that the 19 unlicensed facilities identified in the HDO were an exception to Liberty's usual "policy and practice;" and (3) that Mr. Nourain received no written instruction about FCC licensing procedures and therefore made innocent mistakes. Making these arguments, Liberty moved for summary decision in 1996. Thus, Liberty was able to make certain arguments and assertions that it knew were false, with confidence that evidence disproving those would not

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<sup>8</sup> Oddly, Liberty continues to make this argument, even though the Report, which is an admission, says otherwise. Liberty's Exceptions, at 15-8; TWCV Ex. 67, at 15.

be available to the Presiding Judge and could not be used by the only other party who had it -- the Bureau. The Presiding Judge properly viewed this failed attempt, in conjunction with the other evidence, as an instance of lack of candor. Contrary to Liberty's suggestion, the Presiding Judge did not penalize it for the exercise of its procedural rights to appeal the Commission's rejection of its request for confidential treatment; rather he penalized Liberty for making false assertions that were disproved by the Report, that was in Liberty's possession.

Liberty knew that, by submitting the Report *ex parte* with a request for confidentiality, a decision on that request would require a certain amount of time to resolve no matter how frivolous its claim was. In doing this, Liberty was able to reap the benefits of having submitted the Report to the decision-maker while keeping the Report from its adversaries, TWCV, in the licensing process and depriving them of the opportunity to use the Report in furtherance of their oppositions to Liberty's requests for STA and their petitions to deny Liberty's license applications. Liberty enjoyed the benefits of this manipulation for the two years it took to exhaust all possible appeals of the Bureau's initial denial of Liberty's request for "confidential treatment." Bartholdi Cable Co. v. FCC, 114 F.3d 274 (D.C. Cir. 1997).

After the Commission issued the HDO, Liberty continued its spurious privilege claims to block any discovery relating to the Report. For example, after having simultaneously asserted and waived the privilege by giving the Report to the Bureau in 1995,<sup>9</sup> Liberty vehemently resisted producing the Report in the hearing, or complying with any discovery requests pertaining thereto, even though by that time both the Bureau and the full Commission had wholly rejected Liberty's

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<sup>9</sup> See, e.g., In re Subpoenas Duces Tecum, 738 F.2d 1367, 1369 (D.C. Cir. 1984); In re Sealed Case, 676 F.2d 793, 818 (D.C. Cir. 1982).

privilege claims. See Liberty Cable Co., 11 FCC Rcd 2475, ¶ 18 (1996). Despite its refusal to make any discovery related to the Report, Liberty repeatedly referenced information contained in the Report in its Joint Motion. See, e.g., Joint Motion, at 19, 45, 47, 53, 55; see also I.D., ¶ 25.

Only after all these appeals and petitions for rehearing of the Commission's denial of its privilege claims were exhausted did Liberty deliver the Report to TWCV and the Presiding Judge -- after the hearing was finished and the parties had submitted their proposed findings and conclusions. Notwithstanding that the D.C. Circuit held that its privilege claim was waived and that the Report itself was produced in the hearing, Liberty still objected to responding to any discovery about the Report, even pertaining to its factual foundation. In opposing TWCNYC's motion to compel, Liberty threatened to delay resolution of the hearing by continuing to litigate application of the attorney-client and work-product privileges through interlocutory appeals; and such litigation, Liberty warned, "could indefinitely delay this proceeding." Liberty's Opposition to TWCNYC's Motion, October 15, 1997, at 16-17 & n.48. Although he initially granted TWCNYC's Motion for discovery related to the Report, the Presiding Judge ultimately reversed himself, and no background information or foundation for the Report was discovered or made part of the record. See Order, WT Docket No. 96-41, FCC 97M-177 (rel. Oct. 24, 1997); Order, WT Docket No. 96-41, FCC 97M-185 (rel. Nov. 10, 1997).

Thus, Liberty's manipulation of its sham assertion of privilege proved very successful. Liberty delayed production of the Report until the case was virtually over. The Report and all but one of the documents attached to it were unavailable during the examination of witnesses either in discovery or at the hearing. Had they been available, the examination of witnesses about such matters as their "discovery" of unlicensed operations, the truthfulness of statements they made to

the Commission about the extent of Liberty's unlicensed activity, the amount of information given Mr. Nourain about compliance with FCC licensing requirements, and other matters covered by the Report would have been very different. It is therefore more than disingenuous for Liberty to now contend that its appeal to the D.C. Circuit of the denial of its privilege claims originally made in 1995 "did not foreclose any relevant inquiry into the facts." Liberty's Exceptions, at 8.

Moreover, now that the Presiding Judge has concluded that Liberty strategically withheld the Report in an effort to impede the hearing from proceeding (I.D., ¶ 30), Liberty responds with the misleading claim that, "[f]ar from being hidden, the [Report] has been in the possession of the Bureau and the Commission since August 14, 1995." Liberty's Exceptions, at 7-8. Liberty further asserts that "[t]he information contained in the [Report] was available to the Bureau during its investigation, at all times during discovery, and during the hearing." Id. at 8. The implications of this claim, that Liberty discharged its obligations in the hearing by furnishing the Bureau a copy of the Report that the D.C. Circuit stay barred the Bureau from disclosing and that the Bureau was somehow remiss in not using the Report, are entirely unwarranted.

First, the fact that the Bureau had the Report as of August 14, 1995 does not mean that the Presiding Judge had the Report, that TWCV had the Report, or that the Report was available for the Bureau to use in the hearing proceeding. See Tr. 22-23. In fact, Liberty made its determination to deny TWCV access to the Report and keep it out of the hearing very clear from the outset of this proceeding:

We never said we're giving you this confidential report. Give us the applications or grant us the stays. We never said that. . . We've given it to enforcement. We've opened up all of the embarrassing aspects of this. We gave it to assist them. And now we're being told you've got to give it to our primary, really our only competitor. . . [W]e are waiting for word from the D.C. Circuit as to whether or not we're going to have to turn this over.