

Begleiter, Tr. 16-17; see also Tr. 22.<sup>10</sup> Thus, Liberty's specific intent was that the Report be kept away from TWCNYC, and out of the hearing proceeding.

Second, the Bureau was precluded from citing to, quoting from, or in any way using the Report in connection with this proceeding, because the Report was protected from disclosure by a stay from the D.C. Circuit pending Liberty's appeal from the Commission's confidentiality decision. See Bartholdi Cable Co. v. FCC, No. 96-1030 (D.C. Cir. Apr. 24, 1996) (order granting Liberty's motion for a stay). Third, Liberty threatened the Presiding Judge with a possible citation for contempt under the D.C. Circuit's stay order if he ordered *any* discovery related to the Report. Liberty's argument that the Commission had access to the Report all along simply cannot be countenanced in light of Liberty's repeated attempts to keep the Report out of the hearing proceeding, and its successful efforts to prevent any discovery related to the Report.

- B. The Presiding Judge was permitted to make adverse inferences regarding Liberty's future conduct based on its use of the Report in the proceeding.

The Presiding Judge determined that "[a]ll adverse findings and conclusions in this proceeding as a result of withholding evidence are solely attributable to Liberty." Id., ¶ 117. The Presiding Judge also found that, because the Report was produced before the record was closed in this proceeding, no adverse inferences could be made regarding substantive facts because those facts are now a part of the public record. Id. at n.57. However, "the predictive probability for future withholding of significant information will be inferred." Id. The adverse inference the

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<sup>10</sup> As an incidental matter, the quoted statement misrepresents the record. The Report was submitted voluntarily in response to a letter from the Bureau requesting information, pursuant to 47 U.S.C. § 308(b) "Re: Liberty Cable Co. Pending Requests for Special Temporary Authority." TWCV Ex. 28. The 308(b) request also directed Liberty to serve the other parties with a copy of the response. Id. It is clear that this was a licensing matter from the beginning.

Presiding Judge drew was not about the contents of the Report itself, which ultimately were known, but about Liberty's conduct in using the confidentiality request for the Report to manipulate the Commission's processes. Id. From Liberty's conduct vis-a-vis the Report, the Presiding Judge inferred that Liberty was unlikely to be candid with the Commission in the future. Id. Liberty objects to this and cites authority holding that no adverse *factual* inference should be drawn against a party who validly asserts the attorney-client privilege. Liberty's Exceptions, at 6 n.11. Liberty's argument is misdirected. What the Presiding Judge focused on here was Liberty's conduct before him, after the assertion of the privilege. It took advantage of the unavailability of the Report (a situation that it created) to make arguments based on assertions of fact that it knew were false and that, but for the unavailability of the Report, would have been impossible to make without contradiction. The Presiding Judge is certainly entitled to take into account a party's conduct in the proceeding when making predictions about that party's future dealings with the Commission. The cases cited by Liberty do not even speak to that question.

- C. Even if the Presiding Judge erred with regard to his findings concerning the Report, such error is harmless.
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Even if the Presiding Judge erred in finding that Liberty's handling of the Report gives rise to the adverse inference that Liberty will likely withhold significant information from the Commission in the future (see I.D., at n.57), that finding is only a small part of the total basis for the Presiding Judge's decision that Liberty lacks the requisite candor and credibility to be a Commission licensee. Thus, if the Commission determines that the Presiding Judge erred in this regard, such error is harmless and does not warrant reversal of the ultimate conclusions of the Initial Decision. See, e.g., Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970) ("[n]or will the court upset a decision because of errors that are not material, there being

room for the doctrine of harmless error”); Braniff Airways, Inc. v. Civil Aeronautics Bd., 379 F.2d 453, 465 (D.C. Cir. 1967) (harmless error principle announced for general jurisprudence is applicable to the review of agency decisions); see also 5 U.S.C. § 70; 28 U.S.C. § 2111.

### **III. The Record Shows That Liberty’s Violations Of The Communications Act And The Commission’s Rules Were Intentional.**

Liberty argues that the Presiding Judge’s finding that its unlicensed operations were not just the result of simple negligence is not supported by the record. Liberty’s Exceptions, at 19. Liberty bases this assertion on the fact that “Liberty’s principals never encouraged or approved any premature activations,” and “Liberty had no incentive to violate the law because quicker installations were not vital to customers.” Id. Liberty, therefore, believes that it cannot be found to have intentionally violated the Communications Act or the Commission’s Rules because the record does not show that it affirmatively intended to violate the Commission’s Rules or policies. See Liberty’s Exceptions, at 21. As an initial matter, Liberty’s recent assertion that “quicker installations were not vital to customers” is rather stunning in light of what it told the Commission repeatedly in STA requests filed for the facilities identified in the HDO and others in 1995:

Liberty must be able to convert buildings to its own cable service in rapid fashion, ordinarily within a thirty day time period. . . . If Liberty cannot meet its customers’ demands, its customers may -- and likely will -- terminate their contracts with Liberty. . . .

TWCV Ex. 38.

This argument also is based on a false legal premise -- that some specific intent is required for a violation. Liberty does not have to have “intended to violate” the Commission’s Rules; it just has to have intended the act that is the violation of those Rules. See 47 U.S.C. § 312(f)(1). The knowing or “willful”

commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States.

Id. (emphasis added); see also H.R. Rep. No. 97-765, 97th Cong., 2d Sess. 51 (1982) (“willful means that the licensee knew he was doing the act in question, regardless of whether there was an intent to violate the law”). The Commission has repeatedly held that the willful violation of Commission regulations does not mean that the licensee intended to violate the law, but rather, that he knew he was doing the act that resulted in such violations. See, e.g., Paging Network of Los Angeles, Inc., 10 FCC Rcd 12213, ¶ 9 (1995); Esaw Indus, Inc., 9 FCC Rcd 2693, ¶ 4 (1994); Capitol Radiotelephone Inc., 8 FCC Rcd 6300, ¶ 11 (1993); Virginia RSA 6 Cellular Limited Partnership, 7 FCC Rcd 8022, ¶ 4 (1992). Moreover, a determination of a party’s intent is a factual question that can be inferred from reasonable inferences in the record. See California Public Broadcasting Forum v. FCC, 752 F.2d 670, 679 (D.C. Cir. 1985); Capitol City Broadcasting Co., 8 FCC Rcd 1726, 1734 (Rev. Bd. 1993).

In this case, Liberty has admitted that it activated 93 microwave paths without authorization. E.g., Liberty’s Exceptions, at iii. The record also is replete with evidence that Liberty knew that it was activating microwave paths without Commission authorization when it did so and that it affirmatively mis-stated certain facts and omitted certain others in filings with the Commission. See Nourain, Tr. 676; Price, Tr. 2166. Thus, the Presiding Judge’s determination that Liberty intentionally violated the Commission’s Rules was correct. E.g., I.D., ¶¶ 121, 124-25. Denial of Liberty’s applications was, therefore, entirely warranted. See, e.g., Fox River Broadcasting, Inc., 88 FCC 2d 1132, 1137 (Rev. Bd. 1982); I.D., ¶¶ 123-24.

#### IV. The Presiding Judge's Initial Decision Was Procedurally Appropriate.

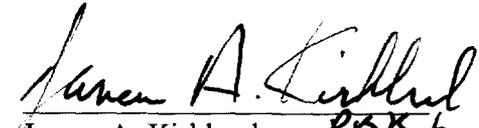
Liberty has the temerity to argue that an initial decision is not appropriate following the denial of a motion for summary decision. Liberty's Exceptions, at n.6 (citing 47 C.F.R. § 1.251(e)). However, given the unique procedural turns that this proceeding took -- which largely benefitted Liberty -- an initial decision was not only appropriate, but was approved by Liberty.

In April 1997, the Presiding Judge issued an order saying that "it is most probable that the Joint Motion for Summary Decision would have to be denied," but that "the Joint Motion will remain under advisement and it will be the subject of a ruling in an initial decision." Order, WT Docket No. 96-41, FCC 97M-64 (rel. Apr. 21, 1997). That order further announced that, "[i]n order to complete the record for initial decision," the hearing testimony would be opened up to include evidence on issues other than candor and credibility that were designated in the HDO. Id. In response to this order, the parties were asked to submit status reports on the readiness of the record for initial decision. Liberty and the Bureau filed a Joint Status Report on the Readiness of the Record for Initial Decision, dated April 30, 1997 ("Joint Status Report"), in which they expressly represented that "with the exception of the issues subject to additional discovery per the [order released April 21, 1997], *the record is ready for initial decision.*" Joint Status Report, ¶ 1 (emphasis added). Thus, Liberty not only never objected to the Presiding Judge's stated intention to issue an initial decision following the closing of the record and his ruling on the Joint Motion, but affirmatively declared that the record would be ready for initial decision following receipt of the additional evidence that was mentioned in the April 21, 1997 order. Accordingly, the Presiding Judge issued an order declaring that, "[i]n the initial decision, the Presiding Judge will take

appropriate official notice of the record that has been compiled in connection with the Joint Motion." Order, WT Docket No. 96-41, FCC 97M-79, at n.4 (rel. May 6, 1997).

Finally, if any procedural error was made, reversal is not required unless that error was prejudicial. See Chrysler Corp. v. FTC, 561 F.2d 357, 362 (D.C. Cir. 1977); 5 U.S.C. § 706. Liberty has not shown how it was prejudiced in any way from the procedural turn that this proceeding took, nor can it. The Presiding Judge gave it every opportunity to introduce evidence on any issues designated in the HDO, and it declined to do so, saying, it "will stand on the current record in this proceeding, including the Joint Motion for Summary Decision filed on July 15, 1996." Joint Status Report, ¶ 2. Since any error that may have been made -- and TWCV does not concede that there was any error -- cannot be proven to have been prejudicial to Liberty, reversal is unwarranted on procedural grounds.

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**CERTIFICATE OF SERVICE**

I, Debra A. McGuire, hereby certify that a copy of the foregoing 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, was served, via facsimile or hand delivery, this 22<sup>nd</sup> day of April, 1998 upon the following:

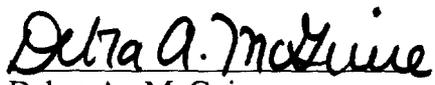
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