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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of)	WT DOCKET NO. 96-41	
)		
LIBERTY CABLE CO., INC.	)	File Numbers:	
	)	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

**WIRELESS TELECOMMUNICATIONS BUREAU'S
CONSOLIDATED REPLY**

Daniel B. Phythyon
Chief, Wireless Telecommunications Bureau

Gary P. Schonman
Chief, Compliance and Litigation Branch

Katherine C. Power
Mark L. Keam
Attorneys

Federal Communications Commission
2025 M Street, N.W., Suite 8308
Washington, D.C. 20554
(202) 418-0569

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SUMMARY

The Bureau believes the *Initial Decision of Administrative Law Judge Richard L. Sippel*, WT Docket No. 96-41, FCC 98D-1 (rel. Mar. 6, 1998) ("*I.D.*"), properly concluded that Bartholdi Cable Company, Inc. (formerly Liberty Cable Co., Inc.) ("Liberty"), should be denied the captioned fifteen applications for authorization to provide operational fixed microwave service. Based on the substantial record evidence developed from almost two years of the instant proceeding, and based on the Presiding Judge's personal assessment of the credibility and demeanor of numerous witnesses, the *I.D.* properly found that Liberty lacked the requisite character qualifications to receive these Commission licenses.

The Bureau further believes the *I.D.* properly denied the Joint Motion by Bartholdi Cable Co., Inc., and the Wireless Telecommunications Bureau for Summary Decision, filed on July 15, 1996, which sought to resolve the designated issues with a substantial monetary forfeiture to be assessed against Liberty, coupled with the grant of licenses. Therefore, the Bureau disagrees with the various arguments asserted in Liberty's Exceptions to Initial Decision. In particular, the Bureau believes that Liberty mischaracterizes the *I.D.*'s criticism of its conduct relating to the internal audit report, and we believe that Liberty did withhold information and evidence from the Commission and from the instant proceeding, and that Liberty must have known of the violations prior to the date to which it testified.

Finally, the Bureau fully supports the Joint Brief in Support of Initial Decision, filed by Time Warner Cable of New York City and Paragon Communications and Cablevision of New York City - Phase I.

TABLE OF CONTENTS

	<u>Page</u>
SUMMARY	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
I. PRELIMINARY STATEMENT	1
II. COUNTERSTATEMENT OF THE CASE	1
III. ARGUMENTS	7
<u>A. LIBERTY'S EXCEPTIONS.</u>	7
1. Liberty Mischaracterizes The <i>I.D.</i> 's Criticism Of Liberty's Conduct Pertaining To Production Of The Report.	7
2. Liberty Deliberately Withheld Information And Evidence With An Intent To Deceive.	10
3. Liberty Intentionally Delayed Production And Withheld Documents From The Proceeding.	12
4. Liberty Principals Knew Of Premature Activations Of Microwave Paths Before April 27, 1995.	14
5. Liberty's Premature Activations Of Microwave Paths Were Due To More Than Negligence.	17
6. The <i>I.D.</i> Did Not Misconstrue The Evidence Relating to Joseph Stern.	18
7. The <i>I.D.</i> Properly Imposed Disqualification As A Sanction Against Liberty Rather Than A Monetary Forfeiture.	20
<u>B. TIME WARNER AND CABLEVISION'S JOINT BRIEF.</u>	20
IV. ULTIMATE CONCLUSION	22

TABLE OF AUTHORITIES

Cases and Agency Decisions

<i>Abacus Broadcasting Corp.</i> 7 FCC Rcd 6004 (I.D. 1992), <i>aff'd</i> , 8 FCC Rcd 5110 (Rev. Bd. 1993)	20
<i>Avondale Indus., Inc. v. Director, OWCP</i> 977 F.2d 186 (5th Cir. 1992)	21
<i>Centel Cellular</i> 11 FCC Rcd 10800 (1996)	20
<i>Communist Party of U.S. v. Subversive Activities Control Bd.</i> 277 F.2d 78 (D.C. Cir. 1959), <i>aff'd</i> , 367 U.S. 1 (1961)	21
<i>David A. Bayer</i> 7 FCC Rcd 5054 (1992)	20
<i>Director, OWCP v. Jaffe N.Y. Decorating</i> 25 F.3d 1080 (D.C. Cir. 1994)	21
<i>Greater Boston Television Corp. v. FCC</i> 444 F.2d 841 (D.C. Cir. 1970), <i>cert. denied</i> , 403 U.S. 923 (1971), <i>reh'g denied</i> , 404 U.S. 877 (1971)	10
<i>In re Liberty Cable Co., Inc., Hearing Designation Order and Notice of Opportunity for Hearing</i> 11 FCC Rcd 14133 (1996)	2, 22
<i>In re Liberty Cable Co., Inc., Initial Decision of Administrative Law Judge Richard L. Sippel</i> WT Docket No. 96-41, FCC 98D-1 (rel. Mar. 6, 1998)	<i>passim</i>
<i>In re Liberty Cable Co., Inc., Memorandum Opinion and Order</i> WT Docket No. 96-41, FCC 97M-154 (rel. Sept. 11, 1997)	5
<i>In re Liberty Cable Co., Inc., Memorandum Opinion and Order</i> WT Docket No. 96-41, FCC 97M-63 (rel. Apr. 21, 1997)	4

<i>In re Liberty Cable Co., Inc., Memorandum Opinion and Order</i> WT Docket No. 96-41, FCC 96M-265 (rel. Dec. 10, 1996)	3
<i>In re Liberty Cable Co., Inc., Order</i> WT Docket No. 96-41, FCC 96M-188 (rel. July 29, 1996)	2, 3
<i>MCI Telecommunications Corp.,</i> 3 FCC Rcd 509 (1988), <i>as supplemented</i> , 4 FCC Rcd 7299 (1988), <i>appeal</i> <i>dismissed sub nom., TeleSTAR, Inc. v. FCC</i> , 901 F.2d 1131 (D.C. Cir. 1990)	20
<i>Mercury PCS II, LLC</i> 12 FCC Rcd 17970 (1997)	20
<i>Oil Shale Broadcasting Co. (KWSR)</i> 68 FCC 2d 517 (1978)	20
<i>RKO General, Inc. v. F.C.C.</i> 670 F.2d 215 (D.C. Cir. 1981), <i>cert. denied</i> , 102 S. Ct. 1974 (1982).	12
<i>RKO General, Inc.</i> 4 FCC Rcd 4679 (Rev. Bd. 1989)	21
<i>US West Communications</i> 1998 WL 113328 (FCC March 16, 1998)	20

Statutes and Regulations

47 C.F.R. § 1.17	6, 11
47 C.F.R. § 1.65	6, 11, 17
47 C.F.R. § 1.277(c)	1

WIRELESS TELECOMMUNICATIONS BUREAU'S CONSOLIDATED REPLY

I. PRELIMINARY STATEMENT

1. The Wireless Telecommunications Bureau ("Bureau"), pursuant to Section 1.277(c) of the Commission's Rules,¹ hereby submits its consolidated replies to the Exceptions to Initial Decision ("Exceptions") filed by Bartholdi Cable Company, Inc. (formerly known as Liberty Cable Co., Inc.) ("Liberty") on April 7, 1998, and Joint Brief in Support of Initial Decision ("Joint Brief"), filed by Time Warner Cable of New York City and Paragon Communications (collectively, "Time Warner"), and Cablevision of New York City - Phase I ("Cablevision") on April 7, 1998. The failure of the Bureau to comment on any argument in the exceptions should not be construed as a concession on the Bureau's part as to the correctness or accuracy of that argument.

II. COUNTERSTATEMENT OF THE CASE

2. Liberty is a multichannel video provider which utilizes the Commission's 18 GHz operational fixed microwave service to compete with Time Warner's and Cablevision's cable franchises in New York City. In March 1996, the Commission designated Liberty's captioned fifteen pending microwave applications for a hearing to determine (1) whether Liberty violated provisions of the Communications Act of 1934, as amended (the "Act"), and Commission Rules by operating hardwire interconnection of buildings without obtaining a cable franchise; (2) whether Liberty violated the Act and Commission Rules by activating

¹ 47 C.F.R. § 1.277(c).

microwave paths without first obtaining Commission authorization; (3) whether Liberty lacked candor in its dealings before the Commission; and (4) whether Liberty is qualified to be and remain a Commission licensee.²

3. Early in this proceeding, on July 15, 1996, the Bureau joined Liberty in filing a motion for summary decision.³ The Joint Motion sought to resolve the designated issues and impose a substantial forfeiture on Liberty. Based on the total weight of the evidence that was admitted into the record *as of that time*, the Bureau believed that grant of the Joint Motion would serve the public interest.

4. Thereafter, Liberty produced a significant piece of evidence that pertained to one of the designated issues,⁴ and upon Time Warner's motion, the Presiding Judge called for an additional round of depositions to be conducted of certain Liberty witnesses.⁵ Although, by this point, the Bureau had joined Liberty in moving for summary decision, as a result of the new testimony, the Bureau developed some suspicions about Liberty's candor which we disclosed to the Presiding Judge.⁶ From reviewing the Bureau's pleading and other recent

² *Hearing Designation Order and Notice of Opportunity for Hearing*, FCC No. 96-85, WT Docket No. 96-41 (rel. Mar. 5, 1996) ("*H.D.O.*").

³ Joint Motion by Bartholdi Cable Co., Inc., and the Wireless Telecommunications Bureau for Summary Decision (July 15, 1996) ("Joint Motion").

⁴ L/B Ex. 1, TWCV Ex. 65 (Memorandum from M. Lehmkuhl, Esq., Liberty Counsel, to P. Price, Liberty's President, B. Nourain, Liberty's Chief Engineer, and T. Courtney, Comsearch (Feb. 24, 1995) ("Lehmkuhl memorandum")).

⁵ *Order*, FCC 96M-188 (rel. July 29, 1996).

⁶ *See generally* Wireless Telecommunications Bureau's Supplemental Comments on Discovery After the Filing of the Joint Motion for Summary Decision (Oct. 22, 1996) ("Bureau's Supplemental Comments").

developments of the proceeding, the Presiding Judge determined that "it is deemed necessary to make independent findings of credibility and candor" with respect to certain Liberty witnesses on the narrow question of when they first learned that the company had activated its microwave paths without Commission authorization.⁷ The Presiding Judge's *Order* calling for a "mini" hearing to be held in January 1997 included the following discussion:

The Bureau's Supplemental Memorandum raises questions with respect to the candor of Liberty's President. The Bureau states:

- A. [T]he Bureau has some concerns that Mr. Price may not have been fully candid in this deposition.
- B. Mr. Price claimed that he had not seen the Lehmkuhl Memo. Based upon the fact that the memo was prepared pursuant to Mr. Price's request and that he is a named recipient, it is not entirely credible that he did not receive it.
- C. [I]t also seems likely that because Mr. Price is the one who initially requested that such inventories be created, and because the document represented some significant work for which Liberty was billed by its FCC counsel, Mr. Price would have also reviewed the document itself.⁸

During the mini hearing, some of Liberty's witnesses provided testimony under oath that conflicted with their deposition testimony. In a brief filed after this mini hearing, the Bureau

⁷ *Memorandum Opinion and Order*, FCC 96M-265 (rel. Dec. 10, 1996).

⁸ *Id.* at 1-2 (citing from the Bureau's Supplemental Comments at 3-4) (footnote omitted). *See also I.D.* ¶ 16.

"stop[ped] short of concluding that any witness actually lied under oath,"⁹ and continued to support the pending Joint Motion.

5. At the conclusion of the January hearing, another piece of highly relevant evidence¹⁰ was fortuitously "discovered" by Liberty. Additionally, Liberty filed a request to essentially modify the hearing testimony of one of its witnesses¹¹ as well as a letter withdrawing its reliance on the testimony of another key Liberty witness.¹² In light of the cumulative effect of these developments, the Presiding Judge subsequently ordered a second mini hearing to be held in May 1997.¹³ This hearing focused on Liberty's candor and credibility prior to and during this proceeding, as well as circumstances surrounding its premature microwave activations. In its supplemental proposed findings of fact following the second mini hearing, the Bureau indicated its decline in the level of support for Liberty's motion by stating that the question of Liberty's basic qualifications was a "close call" based

⁹ Wireless Telecommunications Bureau's Consolidated Reply to Proposed Findings of Fact and Conclusions of Law of Time Warner Cable of New York City and Paragon Communications, and Cablevision of New York City - Phase I, and Proposed Findings of Fact and Conclusions of Law of Bartholdi Cable Company, Inc. (Mar. 10, 1997) at 4.

¹⁰ TWCV Exs. 51, 67 Att. F (Letter from J. Richter, Esq., Liberty Counsel, to B. McKinnon, Liberty Executive Vice President (Apr. 23, 1993) ("Richter letter")).

¹¹ Liberty's Motion to Correct Hearing Transcript (Feb. 26, 1997).

¹² Letter from R. Begleiter, Esq., Liberty Counsel, to Hon. R. Sippel, Administrative Law Judge (Feb. 6, 1997).

¹³ *Memorandum Opinion and Order*, FCC 97M-63 (rel. Apr. 21, 1997).

on the record *developed up to that time*. Nevertheless, the Bureau refrained from completely withdrawing its support of the pending Joint Motion.¹⁴

6. On September 11, 1997, the Presiding Judge issued a partial ruling on the Joint Motion, accepting Liberty's position concerning the designated issues relating to hardwire interconnection of buildings, and assessing a forfeiture penalty of \$80,000 to resolve Liberty's admitted violations of the Act in this regard.¹⁵

7. On November 5, 1997, the Presiding Judge received Liberty's controversial internal audit report ("Report") into the evidentiary record.¹⁶ Thereafter, on March 6, 1998, the Presiding Judge issued the *Initial Decision ("I.D.")*, resolving the remaining designated issues adversely to Liberty.¹⁷ The *I.D.* found Liberty unqualified to be a licensee and denied the captioned fifteen microwave applications. The *I.D.* also denied the Joint Motion, stating,

It is clear that summary decision no longer is suitable as the procedure for terminating this case. The issues on premature activations and related misrepresentations cannot be summarily decided because of their dependency on credibility and candor issues that permeate Liberty's non-disclosures, inadequate disclosures and explanations made in related testimony.¹⁸

Because the Bureau is a joint movant, the *I.D.*'s denial of the Joint Motion is an adverse decision against the Bureau. However, because the Bureau's support of Liberty's position in

¹⁴ Wireless Telecommunications Bureau's Reply to Time Warner's Supplemental Proposed Findings of Fact and Conclusions of Law (June 23, 1997) at 7.

¹⁵ *Memorandum Opinion and Order*, FCC 97M-154 (rel. Sept. 11, 1997).

¹⁶ The Report was offered into evidence as TWCV Ex. 67 without objections on November 5, 1997. Tr. 2353-57.

¹⁷ *Initial Decision of Administrative Law Judge Richard L. Sippel*, WT Docket No. 96-41, FCC 98D-1 (rel. Mar. 6, 1998).

¹⁸ *Id.* ¶ 17.

the Joint Motion has noticeably declined since the filing of the Joint Motion, the Bureau filed neither exceptions to, nor a brief in support of, the *I.D.* With this Consolidated Reply, the Bureau withdraws our support of the Joint Motion.¹⁹

8. As discussed below, the Bureau believes that the *I.D.* properly analyzed the record evidence and that the Presiding Judge acted within his discretion in concluding that Liberty is basically unqualified to be a Commission licensee. Therefore, the Bureau's Consolidated Reply disagrees with the various arguments asserted in Liberty's Exceptions to the *I.D.* The Bureau argues that Liberty mischaracterizes the *I.D.*'s criticism of Liberty's conduct pertaining to production of the Report because the Bureau believes that the Presiding Judge was critical of Liberty's overall pattern and practice of belatedly disclosing highly relevant information. In fact, the Bureau agrees Liberty should be found to have violated Sections 1.17 and 1.65 of the Commission's Rules for withholding information and evidence from the Commission and from the instant proceeding.

9. The Bureau also argues that the Presiding Judge justifiably inferred from the record evidence that, because of Liberty's business plans which depended on rapid activation of service, and the abundant warnings provided to Liberty principals against premature

¹⁹ The Bureau has previously stated that

Unlike both Liberty and Time Warner, the Bureau has no stake in the outcome of this proceeding. The Bureau's only mandate is to see that the public interest is served. Therefore, although the Bureau had joined Liberty in the Joint Motion for Summary Decision, if new evidence demonstrated that the basis for that Joint Motion was unfounded, then the public interest would dictate that the Bureau withdraw its support for the Joint Motion.

activations, someone at Liberty must have been aware of the violations prior to the time that Liberty alleges it learned of them. The Bureau also agrees with the *I.D.*'s conclusion that Liberty recklessly disregarded the Commission's Rules and regulatory procedures, and that such misconduct could not have been the result of mere inadvertence, as Liberty claimed. Finally, the Bureau states its reasons for agreeing with Time Warner and Cablevision's Joint Brief in support of the *I.D.*

III. ARGUMENT

A. LIBERTY'S EXCEPTIONS

1. **Liberty Mischaracterizes And Confers Undue Weight To The *I.D.*'s Criticism Of Liberty's Conduct Pertaining To Production Of The Report.**

10. In its Exceptions, Liberty argues that the *I.D.* "erred as a matter of law by penalizing Liberty for exercising its constitutional and statutory right to appeal the Commission's ruling regarding the confidentiality" of the Report.²⁰ Specifically, Liberty argues that the Judge punished Liberty by finding that Liberty lacked candor when it was merely exercising its procedural rights to appeal that are well established in the Constitution, Federal Rules of Civil Procedure, the Communications Act, and Commission's Rules.²¹ Liberty also asserts that the *I.D.* wrongly drew negative inferences from Liberty's assertion of attorney-client privilege in its appeal of the Report.²² In a related argument, Liberty also

²⁰ Exceptions at 4.

²¹ *Id.* at 5-6.

²² *Id.* at 6.

claims that the *I.D.* "erred in finding that Liberty could not be trusted to be candid because it did not disclose the [Report]."²³

11. First, the Bureau disagrees with Liberty's arguments because Liberty mischaracterizes the *I.D.*'s criticism of its conduct involving production of the Report. While Liberty broadly reads the *I.D.* as standing for the proposition that "Liberty's duty of candor required either a waiver of its privilege claims or foregoing an appeal of an adverse Commission ruling,"²⁴ the Bureau believes that the *I.D.* did not disqualify Liberty simply because it asserted the privilege or because Liberty appealed the Commission's ruling to the Court of Appeals. Rather, the *I.D.* can be read as concluding that Liberty's conduct relating to the production of the Report was part of its consistent pattern and practice of withholding relevant evidence from the proceeding.²⁵ As discussed below, the *I.D.* criticized Liberty for tardiness in producing not only the Report, but other highly relevant documents as well, and the Presiding Judge merely noted that Liberty's withholding of the Report in this proceeding as a result of the appeal litigation fits into this overall pattern of tardiness which negatively reflected on Liberty's trustworthiness.²⁶

²³ *Id.* at 7.

²⁴ *Id.* at 5.

²⁵ *See, e.g., I.D.* ¶ 103 ("Serious questions of candor arise with regard to the willful withholding of highly significant evidence."); ¶ 117 ("Liberty's withholding of the Audit Report until after all discovery and testimony were completed was part of the pattern to deprive this proceeding of timely evidence.").

²⁶ *Id.* ¶ 117 ("The conduct of Liberty in withholding the Lehmkuhl and Nourain memoranda, the Richter letter, the Stern memorandum and in shielding the Audit Report from this proceeding until mandated by the Court of Appeals adversely reflects on Liberty's reliability for dealing with the Commission in the future with honesty, completeness and in full compliance with the regulations.").

12. Second, the Bureau disagrees that the "*I.D.* is replete with statements" concerning the confidentiality and privilege assertions relating to the Report which are "wrong both as a matter of fact and of law."²⁷ Rather, the Bureau believes that the Presiding Judge's findings in the *I.D.* simply noted what was clear to all the litigants in this proceeding -- that "there was a motivation to utilize litigation in order to keep it out of this proceeding as long as possible."²⁸ Furthermore, the Presiding Judge's observation that the Report "was strategically withheld under a waived assertion of the attorney-client privilege,"²⁹ and that Liberty's raising of untimely legal arguments "succeeded in keeping the Audit Report from this proceeding until the very end when it was too late to use it as a discovery tool,"³⁰ are indeed accurate statements that reflect upon the outcome of Liberty's conduct. Beyond these pointed observations, however, the Presiding Judge relied on and utilized the Report and information contained therein for precisely what it is -- the most credible and reliable evidence that explained the events which led to the designated issues.³¹

13. Finally, the Bureau also disagrees with Liberty's arguments because Liberty confers undue weight to the Presiding Judge's comments concerning its conduct involving

²⁷ Exceptions at 5.

²⁸ *I.D.* ¶ 27.

²⁹ *Id.* ¶ 30.

³⁰ *Id.* ¶ 116. The Presiding Judge explained that Liberty's assertion of attorney-client privilege for the Report "was not waived in the context of an understandable inadvertent disclosure to a third-person. The privilege was never raised in the first instance before the Commission and therefore was waived to assert in appellate court." *Id.* n.55.

³¹ See, e.g., *id.* ¶¶ 25, 27 ("The Audit Report was highly relevant evidence. . . . It is certainly far more comprehensive than the Joint Motion.").

production of the Report as being relevant to the ultimate conclusion reached by the *I.D.* Even assuming *arguendo* that the Presiding Judge may have extended beyond his discretion in drawing a negative inference from Liberty's decision to exercise its procedural rights, the Bureau believes that any such observation by the Presiding Judge does not affect the proper conclusion reached by the *I.D.* that Liberty should be disqualified. Because of the overwhelming amount of record evidence that supports the *I.D.*'s conclusion, the Bureau believes that the Presiding Judge's improper reliance, if any, on Liberty's privilege assertion is harmless error.³²

2. Liberty Deliberately Withheld Information And Evidence With An Intent To Deceive.

14. Liberty contends that the Presiding Judge wrongly inferred that Liberty had an intent to deceive the Commission from several factors: Liberty's failure to disclose the premature activations to the Commission as soon as it discovered them on April 27, 1995; the misstatements Liberty made in documents filed with the Commission from May 4 until July 17, 1995; and from Liberty's intentional failure to produce significant documents during discovery.³³ Liberty argues that the Presiding Judge was wrong because the evidence shows that Liberty did timely reveal its premature violations to the Commission, preliminarily in its

³² See *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971), *reh'g denied*, 404 U.S. 877 (1971) (The court will not "upset a decision because of errors that are not material, there being room for the doctrine of harmless error.").

³³ See generally Exceptions at 9-12.

Surreply,³⁴ and more extensively in its Report. Further, according to Liberty, the responsible principals and agents all testified that they believed the statements made in the documents between May 4 and July 17 were true when they made them. Liberty states its belief that the circumstances show that it could not have intended to deceive the Commission.³⁵

15. The Bureau agrees with the Presiding Judge that Liberty's intentions and beliefs do not substitute for the duty in Section 1.65 of the Commission's Rules to come forward with accurate and complete information *as promptly as possible*,³⁶ and the prohibition in Section 1.17 of the Commission's Rules against making misrepresentations or material omissions to the Commission.³⁷ Liberty could have informed the Commission, even informally, of its premature activations when it alleges it learned of them on April 27, 1995. Further, the principals' stated belief, without verification, in its May 17, 1995 Surreply, that they had a "pattern and practice of compliance"³⁸ (when even a cursory check would have found otherwise), and Liberty's claim that its representations in its requests to the Commission for Special Temporary Authority ("STA") to activate certain paths³⁹ (when Liberty *knew* that the paths were already in service) are two vivid examples of Liberty's reckless disregard for the truth.

³⁴ TWCV Ex. 18 (Liberty's Surreply filed on May 17, 1995).

³⁵ Exceptions at 12.

³⁶ See 47 C.F.R. § 1.65.

³⁷ 47 C.F.R. § 1.17. See *I.D.* ¶¶ 97-102.

³⁸ TWCV Ex. 18 at 2-3.

³⁹ See, e.g., TWCV Ex. 17 (Liberty's Request for Special Temporary Authority filed on May 5, 1995) at 5.

16. As the Court of Appeals has acknowledged,

[T]he Commission must rely heavily on the completeness and accuracy of the submissions made to it, and its applicants in turn have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate. This duty of candor is basic, and well known.⁴⁰

The Bureau thus believes that the Presiding Judge was within his authority to determine that Liberty's behavior detailed in the *I.D.* showed a lack of candor and an intent to conceal the unauthorized activations.⁴¹

3. Liberty Intentionally Delayed Production And Withheld Documents From The Proceeding

17. The Presiding Judge identified the following as important documents which Liberty withheld:⁴² the Richter letter; the Lehmkuhl memorandum; a June 16, 1992 memorandum from Joseph Stern;⁴³ an April 26, 1995 memorandum from Behrooz Nourain;⁴⁴ and an April 28, 1995 memorandum from Mr. Lehmkuhl listing Liberty microwave licensing inventories.⁴⁵ Liberty complains that the Presiding Judge ignored the record and failed to

⁴⁰ *RKO General, Inc. v. F.C.C.*, 670 F.2d 215, 232 (D.C. Cir. 1981), *cert. denied*, 102 S. Ct. 1974 (1982).

⁴¹ *I.D.* ¶¶ 100, 122.

⁴² *Id.* ¶¶ 16-19.

⁴³ TWCV Ex. 67 Att. C (Letter from J. Stern, Stern Telecommunications Corporation, to B. Nourain, Liberty's Chief Engineer (June 16, 1992) ("Stern memorandum")).

⁴⁴ TWCV Ex. 35 (Memorandum from B. Nourain, Liberty's Chief Engineer, to E. Milstein, Liberty's Co-Chairman (Apr. 26, 1995) ("Nourain memorandum")).

⁴⁵ TWCV Ex. 34 (Memorandum from M. Lehmkuhl, Esq., Liberty Counsel, to B. Nourain, Liberty's Chief Engineer (Apr. 28, 1995)).

consider Liberty's reasons for its delay in producing these documents.⁴⁶ According to Liberty, the date of the Stern memorandum was beyond the discovery cutoff date of January 1, 1993, and mistaken privilege claims were involved with the Richter letter and the Lehmkuhl memorandum. Liberty also asserts that unintentional oversight was responsible for the delay in disclosing the April 28, 1995 Lehmkuhl inventory and the Nourain memorandum.⁴⁷

18. The Bureau believes that Liberty's arguments lack substance and merit. For example, while Liberty argues that the Stern memorandum was not produced because it predated the January 1, 1993 discovery cutoff date, Liberty did produce a memorandum from its President, Peter Price, dated February 26, 1992,⁴⁸ which was helpful to its case. Clearly, the date of the Stern memorandum alone does not fully explain Liberty's decision to withhold that relevant document. Regarding the Lehmkuhl memorandum, it should have been readily apparent to Liberty that the document was not privileged, given that the first page clearly indicated that the materials had been provided to a third party (Comsearch).⁴⁹ This information clearly precluded a claim of confidentiality. As to the Richter letter, when it "surfaced" during cross-examination of a Liberty witness, Liberty claimed an attorney-client privilege, which the Presiding Judge denied. Finally, the Bureau believes that Liberty's excuse for failing to submit the April 28, 1995 Lehmkuhl inventory and the Nourain memorandum due to oversight is not credible.

⁴⁶ Exceptions at 13.

⁴⁷ *Id.* at 13-14.

⁴⁸ L/B Ex. 2; TWCV Ex. 67 Att. D (Memorandum from P. Price, Liberty's President, to B. McKinnon, Liberty's Executive Vice President (Feb. 26, 1992)).

⁴⁹ *See supra* n.4.

19. The relevance of these documents is indisputable. The inventories contained data which was important to use in the determination of which activations were premature, and which were not. The Richter letter and Stern memorandum warned Liberty of the need to use care in its activations. Mr. Nourain's April 26, 1995 memorandum was key to determining when Mr. Price learned of the unlawful activations which led to Liberty's realization of its licensing violations. The Presiding Judge summarized that "[a]lthough it has not conclusively been shown that the withholdings were intentional, *a difficult case to make*, the completeness of Liberty's evidentiary production was seriously tainted and remains deeply suspect.⁵⁰ Given the significance and importance of these documents, the Bureau agrees with the Presiding Judge that Liberty's explanations are not satisfactory.

4. Liberty Principals Knew Of Premature Activations Of Microwave Paths Before April, 27, 1995

20. Liberty also maintains that the Presiding Judge had no support for his determination that Liberty's principals -- Howard and Edward Milstein, and Peter Price -- knew before April 1995, that Liberty was providing unauthorized service.⁵¹ Liberty also disputes that the Richter letter (with attached inventories) and the Lehmkuhl memorandum were clear warnings or readily available data which made Liberty aware of its premature activations.⁵²

⁵⁰ *I.D.* ¶ 117 (emphasis added).

⁵¹ Exceptions at 15.

⁵² *Id.*

21. The Bureau disagrees. We note that significantly, the Presiding Judge observed, "[t]he only evidence offered to negate knowledge [of the premature activations] are self-serving denials of Liberty's principals, agents and employees."⁵³ Without a "smoking gun" to explain more than 93 premature activations, the Presiding Judge looked to documentary evidence and testimony other than denials as basis for his determination that Liberty (specifically, Mr. Price) had such knowledge before April 27, 1995.

22. The Presiding Judge devoted a good deal of analysis to the Richter letter.⁵⁴ Given the clear language in the letter⁵⁵ and Price's background as a business executive trained in the law, the Presiding Judge justifiably found it was unreasonable for Mr. Price to "have missed the cautionary message that Richter was providing."⁵⁶ As to Ms. Richter's testimony during the second "mini" hearing that she did not know of any premature operations, the Bureau believes the *I.D.* properly interpreted her letter as a warning about the future, that "there *would be* illegal activations under the system of checks and balances used at Liberty," and not

⁵³ *I.D.* ¶ 64.

⁵⁴ *Id.* ¶¶ 34, 56, 59-60, 65-72, 90, 106, 120.

⁵⁵ The opening paragraph of the letter reads:

Behrooz Nourain and I have had several discussions recently regarding when it is permissible for Liberty to construct and operate new microwave paths and stations, and when it is not. Some things were revealed during these conversations that gave Behrooz and I pause. In order to ensure that everything Liberty does is in strict accordance with the rules, and to ensure that your competitors are given no ammunition against you, I am writing this letter to detail the parameters within which construction and operation of new paths and new stations is permissible.

TWCV Exs. 51, 67 Att. F at 1.

⁵⁶ *I.D.* n.37.

an admission that she knew of existing violations.⁵⁷ Therefore, her testimony conforms to the Presiding Judge's finding.

23. In the *I.D.*, the Presiding Judge also carefully analyzed the testimony of the engineering work needed for activations, and determined that it was a "highly labor intensive" process, and that it could not be done in a vacuum, but it had to be coordinated with the marketing process. It was also too expensive a process for it to make business sense to do otherwise.⁵⁸ The Bureau therefore believes that the Presiding Judge reasonably inferred that the person at Liberty in charge of decisions of when to activate must have known of Mr. Nourain's haphazard activations. Proper business sense also dictated that the multitudes of licensing inventories received from its communications counsel would not have been ignored by Liberty. However, assuming *arguendo* that they were, the Bureau supports the Presiding Judge's reasonable inference that "[s]uch evidence establishes that Mr. Price was willfully and recklessly failing to utilize available information that would readily detect premature activations as early as April 1993."⁵⁹ Therefore, the Bureau believes that there is a well-founded basis for the Presiding Judge's determination that Liberty's principals knew of premature activations based on reliable documentary evidence and the Presiding Judge's assessment of the credibility and demeanor of Liberty's witnesses.

⁵⁷ *Id.* ¶ 72 (emphasis added). The Presiding Judge personally observed Ms. Richter's live testimony on May 28, 1997, which she provided in Washington. Shortly after sending the April 23, 1993 letter, Ms. Richter, for reasons unrelated to this proceeding, resigned from the law firm serving as Liberty's communications counsel, and moved away from the area.

⁵⁸ *I.D.* ¶ 55; *see also* Nourain, Tr. 677-84.

⁵⁹ *I.D.* ¶ 61.

5. Liberty's Premature Activations Of Microwave Paths Were Due To More Than Inadvertence

24. Liberty claims that the Presiding Judge erred by finding that Liberty's premature activations were due to more than inadvertence,⁶⁰ and it denies that a scheme existed to encourage or approve premature activations.⁶¹

25. The Bureau disagrees with Liberty's argument. The record is replete with evidence that Liberty repeatedly and willfully ignored its regulatory obligations. As the *I.D.* properly pointed out, there is ample evidence in the record which indicates Mr. Price failed to use available information, such as the Richter letter⁶² and Liberty's regular internal weekly "Installation Progress Reports,"⁶³ Mr. Price ignored Mr. Nourain's direct request to discuss the Richter letter;⁶⁴ Mr. Price was evasive in his testimony on key matters;⁶⁵ Mr. Nourain's activations that were not just premature, but *haphazard* premature activations (*i.e.*, turning on service before applications even filed) as detailed in the Report;⁶⁶ Liberty admitted to violating Section 1.65 of the Commission's Rules pertaining to the four additional paths "discovered" in June 1995;⁶⁷ and Liberty made other misleading disclosures in its requests to the Commission

⁶⁰ Exceptions at 21.

⁶¹ *Id.* at 19.

⁶² Price, Tr. 2193.

⁶³ *Id.* at 168-69.

⁶⁴ *Id.* Tr. 2191, 2193-94.

⁶⁵ *Id.* at 2173, 2180, 2188, 2190.

⁶⁶ See TWCV Ex. 67 Att. B (Charts 2 and 3).

⁶⁷ Joint Motion at 45.

for STA.⁶⁸ The Bureau believes that these examples correctly formed the basis for the Presiding Judge's determination that Liberty's acts constituted more than mere inadvertence.⁶⁹

6. The *I.D.* Did Not Misconstrue The Evidence Relating To Joseph Stern

26. Liberty asserts that the Presiding Judge mistakenly found that Liberty misrepresented facts in the Joint Motion by ignoring Mr. Stern's deposition testimony, and by misinterpreting the memorandum Mr. Stern prepared on the licensing process for Mr. Nourain in 1992.⁷⁰ The Bureau disagrees with Liberty and supports the Presiding Judge's finding that Liberty should have released the Stern memorandum earlier during the proceeding, notwithstanding the fact that because of its date (June 12, 1992), it was beyond the date for discovery cutoff. Moreover, contrary to Liberty's interpretation that the memorandum did *not* detail the licensing process, it is readily apparent on its face that the memorandum does concern licensing assistance. The memorandum strongly recommends that Mr. Nourain continue to seek assistance from Washington-based communications counsel.⁷¹ While,

⁶⁸ TWCV Ex. 38; Lehmkuhl, Tr. 1265.

⁶⁹ *I.D.* ¶¶ 124-25. Additionally, the Bureau notes that Liberty's principals were familiar enough with regulatory affairs to know the necessity of compliance with government regulations. Howard Milstein and Peter Price were trained in the law, and Mr. Milstein, at least, was quite familiar with other state and federal regulatory requirements due to his large bank and real estate holdings. H. Milstein, Tr. 516. But, as the Presiding Judge found, they apparently did not care. *See Id.* ¶ 124.

⁷⁰ Exceptions at 21-22.

⁷¹ *See* Exceptions at 21 n.43.

admittedly, it is not a point-by-point instruction to Liberty on what to do to receive Commission licenses, it is nevertheless advice about licensing that Mr. Nourain received.

27. In the addition, the Bureau believes the Presiding Judge validly criticized Liberty for withholding the Stern memorandum from discovery for several reasons. First, the Stern memorandum is reliable evidence that Mr. Nourain was provided with guidance concerning licensing procedures. Such evidence is inconsistent with Liberty's argument that Mr. Nourain's actions were inadvertent. Second, the Stern memorandum conflicted with Mr. Stern's deposition testimony,⁷² but because it was unavailable to the parties until so late in the proceeding, Mr. Stern could not be questioned about it when he was deposed on June 5, 1996. Third, there was no basis to withhold the document on attorney-client or attorney work-product privilege. If, as Liberty claims, the basis of withholding the document was because of its age, the Presiding Judge accurately pointed out that Liberty managed to produce a self-serving "compliance" memorandum from Mr. Price written in 1992, equally as old as the Stern memorandum.⁷³ Thus, the Bureau concludes that Liberty should have disclosed the Stern memorandum earlier in this proceeding.⁷⁴

⁷² See *I.D.* ¶ 25.

⁷³ *I.D.* ¶ 51.

⁷⁴ The Bureau is fully aware that this document was a part of the Report which was not available to the proceeding due to Liberty's litigation in the Court of Appeals. However, the Stern memorandum, along with three other documents, were merely attachments to the Report and not the work product of Liberty's counsel.

7. The I.D. Properly Imposed Disqualification As A Sanction Against Liberty Rather Than A Monetary Forfeiture

28. Finally, Liberty argues the record evidence does not support a finding that Liberty should be disqualified.⁷⁵ In support, Liberty claims that the *I.D.* wrongly distinguished certain cases upon which Liberty relied in its Joint Motion.⁷⁶ In the Exceptions, Liberty offers additional Commission cases that it claims lends support to its argument.⁷⁷

29. The Bureau believes the Presiding Judge properly distinguished the cases Liberty had relied on in the Joint Motion, and the new cases cited by Liberty are inapposite because none of them involved substantial misrepresentation, lack of candor, or a demonstrated pattern and practice of reckless disregard for Commission's Rules that are present here.

B. TIME WARNER AND CABLEVISION'S JOINT BRIEF

The Bureau fully agrees with Time Warner and Cablevision's Joint Brief. Specifically, we agree that the Commission's role in reviewing the *I.D.* is to ascertain whether the substantial record evidence developed in this proceeding supports the Presiding Judge's

⁷⁵ Exceptions at 22-23.

⁷⁶ In the Joint Motion, Liberty's relied extensively upon *David A. Bayer*, 7 FCC Rcd 5054 (1992), and *MCI Telecommunications Corp.*, 3 FCC Rcd 509 (1988), *as supplemented*, 4 FCC Rcd 7299 (1988), *appeal dismissed sub nom., TeleSTAR, Inc. v. FCC*, 901 F.2d 1131 (D.C. Cir. 1990). Liberty relied to a lesser degree upon *Oil Shale Broadcasting Co. (KWSR)*, 68 FCC 2d 517 (1978), and *Abacus Broadcasting Corp.*, 7 FCC Rcd 6004 (I.D. 1992), *aff'd*, 8 FCC Rcd 5110 (Rev. Bd. 1993). Joint Motion at 46-51.

⁷⁷ Exceptions at 23, citing *Centel Cellular*, 11 FCC Rcd 10800 (1996), and two recent Notice of Apparent Liability cases, *US West Communications*, 1998 WL 113328 (FCC March 16, 1998), and *Mercury PCS II, LLC*, 12 FCC Rcd 17970 (1997).