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

In re Applications of	)	WT Docket No. 96-41	
	)		
LIBERTY CABLE CO., INC.	)		
	)	File Nos:	
For Private Operational Fixed	)	708777	WNTT370
Microwave Service Authorization	)	708778, 713296	WNTM210
and Modifications	)	708779	WNTM385
	)	708780	WNTT555
New York, New York	)	708781, 709426, 711937	WNTM212
	)	708332	(NEW)
	)	712203	WNTW782
	)	712218	WNTY584
	)	712219	WNTY605
	)	713295	WNTX889
	)	713300	(NEW)
	)	717325	(NEW)

Appearances

Robert L. Begleiter, Eliot Spitzer, Yang Chen, Robert L. Pettit, and Bryan N. Tramont on behalf of Liberty Cable Co., Inc.; Arthur H. Harding, R. Bruce Beckner, Jill Kleppe McClelland, and Debra A. McGuire on behalf of Time Warner Cable of New York City and Paragon Communications; James A. Kirkland and Christopher A. Holt on behalf of Cablevision of New York City - Phase I; and Katherine C. Power and Mark L. Keam on behalf of the Wireless Telecommunications Bureau.

DECISION

Adopted: November 24, 2000 ; Released: December 13, 2000

By the Commission:

I. INTRODUCTION

1. In this decision, the Commission affirms, with modifications, the Initial Decision (I.D.), 13 FCC Rcd 10716 (ALJ 1998), of Administrative Law Judge Richard L. Sippel (ALJ), which denied the fifteen captioned applications of Liberty Cable Co., Inc. ("Liberty") for private operational fixed microwave service ("OFS") facilities in New York City.[1] We do so because of Liberty's extensive

[1]Liberty is now known as Bartholdi Cable Company, Inc. following an asset sale in March 1996 to Freedom New York, LLC. Freedom is 80% owned by RCN Corporation and 20% by Bartholdi. Under the agreement, Freedom acquired Liberty's subscriber base. The agreement expressly excluded Liberty's current OFS authorizations and related equipment. The parties also agreed that Liberty

record of unlicensed OFS operations and its untruthfulness before the Commission in connection with its applications. In addition, we impose a monetary forfeiture of $1,425,000 for Liberty's admitted violations of Section 301 of the Communications Act.

2. Liberty uses OFS paths to provide multi-channel video programming to approximately 30,000 subscribers in apartment buildings in the New York metropolitan area. The Commission has granted Liberty forty-three OFS licenses since 1991. The fifteen applications for new licenses that are the subject of this proceeding cover nineteen facilities. Time Warner Cable of New York City and Paragon Communications ("Time Warner") and Cablevision of New York City - Phase I ("Cablevision") filed petitions to deny the instant applications, wherein they alleged that Liberty interconnected by hard wire non-commonly owned buildings in violation of the cable franchise requirement, that Liberty initiated OFS service to certain buildings prior to obtaining Commission authorization, and that Liberty lacked candor before the Commission. With specific regard to the unauthorized OFS service, Time Warner filed a pleading on May 5, 1995, in which it identified two buildings to which Liberty was providing service without prior authorization, and Liberty filed a response on May 17, 1995, in which it admitted the premature activations and disclosed an additional thirteen buildings to which it was also providing OFS service without having obtained Commission authorization.

3. In light of the disclosed violations, the Wireless Telecommunications Bureau on June 9, 1995 requested that Liberty supply additional information concerning its unlicensed operations. On June 16, 1995 Liberty submitted a response providing the information regarding the fifteen buildings that received unauthorized service. Liberty also informed the Bureau that its counsel was conducting a complete investigation of the matter. On July 24, 1995 Liberty disclosed four additional buildings that were activated without authorization, bringing to nineteen the number of buildings that it admitted were prematurely activated. In light of these revelations, on August 4, 1995 the Bureau directed Liberty to submit the results of the company's internal audit, including, inter alia, a listing of all OFS paths constructed or operated without authority, which ones were not disclosed in its June 16 response, the dates of construction and operation, and the number of subscribers being served. Liberty submitted its Internal Audit Report ("IAR" or "Report") to the Bureau on August 14, 1995 with a request for confidentiality under 47 C.F.R. §§ 0.457 and 0.459, which the Bureau denied, a decision to

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would provide Freedom with microwave transmission service. As a result of the sale, Liberty now provides OFS microwave transmissions to Freedom, which in turn provides video programming to Liberty's former subscribers. I.D., ¶ 10. (By Memorandum Opinion and Order, FCC 96M-178, released July 16, 1996, the ALJ denied a request to add an issue to determine whether Liberty transferred OFS licenses without Commission approval. No exception has been taken to this ruling.) In the interest of maintaining consistency with the designations used in the record, the I.D., and the exceptions, this decision refers to the applicant as Liberty.

In addition to the fifteen applications at issue here, Liberty has filed another twenty applications for new licenses, which the Commission has instructed to be granted conditioned upon the outcome of this proceeding. See ¶ 67, infra.

which Liberty sought further review. On September 7, 1995, at Liberty's request, the Bureau granted Special Temporary Authority ("STA") to Liberty to operate the nineteen admittedly unlicensed facilities.

4. Thereafter, the Commission designated for hearing issues to determine: (1) the facts and circumstances surrounding Liberty's operation of hardwired interconnected, non-commonly owned buildings, without first obtaining a franchise, and whether Liberty has violated Section 1.65 of the Commission's Rules by failing to notify the Commission of its provision of service in these buildings; (2) the facts and circumstances surrounding Liberty's admitted violations of Section 301 of the Communications Act and Section 94.23 of the Commission's Rules by operating certain OFS facilities without first obtaining Commission authorization, and whether Liberty has violated Section 1.65 of the Commission's Rules by failing to notify the Commission of its premature operation of service in either its underlying applications or its STA requests; (3) whether Liberty has misrepresented facts to the Commission, lacked candor in its dealings with the Commission, or attempted to mislead the Commission, and in this regard, whether Liberty has violated Section 1.17 of the Commission's Rules; and (4) whether Liberty possesses the requisite character qualifications to be granted the subject OFS applications. Hearing Designation Order and Notice of Opportunity for Hearing, 11 FCC Rcd 14133 (1996) ("HDO"). The HDO also called for a determination of whether an order of forfeiture should be issued against Liberty pursuant to Section 503(b) of the Act for violations of Section 301 of the Act and Sections 1.17, 1.65, and 94.23 of the Rules. Finally, noting that the STAs previously granted to Liberty to operate the subject microwave facilities were due to expire, the HDO stated that, to preserve continuity of service, the Commission would grant Liberty further interim operating authority pending a final resolution of this proceeding.

II. PROCEDURAL HISTORY

5. On July 15, 1996, following completion of discovery, Liberty and the Bureau filed a Joint Motion for Summary Decision which sought to resolve the designated issues without disqualification and to impose a substantial monetary forfeiture against Liberty. With regard to the cause of Liberty's premature activations, the Joint Motion argued that the unauthorized operations were the result of engineering negligence and management's failure to supervise properly, but did not involve intentional misconduct by Liberty. Thereafter, however, based in part on the discovery of a 1995 memorandum from counsel to Liberty's president, the ALJ determined that a hearing was necessary to examine Liberty's "credibility and candor" regarding when Liberty had first learned that it activated microwave paths without Commission authorization. See Memorandum Opinion and Order, FCC 96M-265, released December 10, 1996. The hearing was held in January 1997 and the parties filed proposed findings in February 1997. Following other developments, including the additional disclosure at the January 1997 hearing of an advisory letter written by counsel to Liberty management in 1993, the ALJ subsequently ordered another hearing session to explore Liberty's candor and the circumstances surrounding the premature activations. See Memorandum Opinion and Order, FCC 97M-63, released April 21, 1997. This hearing was held in May 1997 and supplemental findings were filed in June 1997.

6. On September 11, 1997, the ALJ issued a partial summary decision, in which he granted the Joint Motion to the extent of resolving the issues pertaining to Liberty's failure to obtain a franchise for

its hard wire interconnections by imposing a forfeiture of $80,000. The ALJ concluded that Liberty's infractions were not intentional, that it had not deceived the Commission, and that it had admitted violating the franchising requirement and Section 1.65. See Memorandum Opinion and Order, FCC 97M-154, released September 11, 1997. No appeal of this ruling has been received.

7. On September 16, 1997, following an adverse court ruling on Liberty's request that its IAR be kept confidential, Liberty produced its IAR, dated August 14, 1995, which contained relevant information describing Liberty's licensing operations and its knowledge with regard to the premature OFS operations. Liberty had withheld the Report from the hearing proceeding and had obtained an emergency stay from the court pending its appeal of the Commission's denial of its claim that the Report was entitled to confidential treatment. See Liberty Cable Co., Inc., 11 FCC Rcd 2475 (1996), aff'd sub nom. Bartholdi Cable Co., Inc. v. FCC, 114 F.3d 274 (D.C. Cir. 1997); see also Liberty Cable Co., Inc. v. FCC, No. 96-1030 (D.C. Cir. April 24, 1996) (granting stay request). After receiving the Report in evidence, the ALJ permitted the filing of further supplemental findings related to the Report in November 1997.

8. In his I.D., released March 6, 1998, the ALJ concluded that, with regard to the remaining issues concerning Liberty's OFS microwave facilities, after multiple hearing sessions it was clear that summary decision was no longer suitable for terminating the case. The ALJ stated:

> The issues on premature OFS microwave 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 the explanations made in related testimony. But the Joint Motion's record will be used in this Initial Decision when uncontested or basic fact findings can be made.

I.D., ¶ 17. Under the remaining designated issues, the ALJ found that Liberty operated OFS facilities in "reckless disregard" of its licensing obligations under Section 301, that Liberty lacked candor in its disclosure of illegally activated pathways, that it deliberately violated the reporting provisions of Section 1.65, 47 C.F.R. §1.65, and that it made misrepresentations in support of its STA and license applications in derogation of Section 1.17, 47 C.F.R. §1.17. Accordingly, he concluded that Liberty was not qualified to receive the OFS licenses at issue.

9. Liberty excepts to the I.D.'s adverse conclusions and argues that the ALJ erred in disqualifying Liberty rather than imposing the monetary forfeiture proposed by Liberty and the Bureau in their Joint Motion. Time Warner and Cablevision support the I.D. in all respects, as does the Bureau.[2]

[2] On March 2, 1999 Time Warner filed a Request for Prompt Disposition, in which it asks that the Commission issue a prompt decision in this case in light of the pendency of a "related" antitrust suit brought by Liberty against Time Warner in New York federal district court. According to Time Warner, there are issues in this proceeding that may be relevant to the antitrust case. On March 11, 1999 Liberty filed an Opposition to the Request, in which it disputes Time Warner's assertions. In light of our Decision herein, Time Warner's Request is moot and therefore is dismissed.

III. PROCEDURAL RULINGS

10. Liberty seeks oral argument in this proceeding. In this regard, Liberty asserts that such argument would permit "clarification of the Bureau's position," and notes that the Bureau did not withdraw its support for the Joint Motion until its reply to exceptions. This request is denied because we do not believe oral argument would materially assist our resolution of this proceeding. As for the Bureau's avowed change in position, the Bureau has adequately explained the reasons it supports the I.D. in its reply brief and opposition to request for oral argument, and we do not think argument would provide further illumination on this point.

11. On July 24, 1998, more than three months after reply briefs were filed by the parties, Liberty initiated a new round of pleadings by filing a Motion to Strike the Bureau's reply brief, based once again on the Bureau's reversal of position. We deny the Motion. Our resolution of this proceeding is not dependent upon the Bureau's particular view of the case, changed or otherwise, but upon our own review of the I.D. in light of the hearing record and the pleadings of all the parties. Consequently, we perceive no reason to strike the Bureau's pleading.

IV. UNAUTHORIZED OPERATION OF OFS FACILITIES

A. Factual Background

1. Liberty's Unauthorized Operations

12. Between July 11, 1994 and April 24, 1995, Liberty activated nineteen OFS microwave paths without receiving authority from the Commission. I.D., ¶ 44. These are the unlicensed operations identified in the HDO. Furthermore, the record establishes that from June 1992 to January 1995, there were an additional seventy-four premature activations -- these paths subsequently received Commission licenses -- for a total of ninety-three unauthorized activations. Id. at ¶ 63. Peter Price, Liberty's President and Chief Executive Officer, the individual responsible for day-to-day operations, testified that he did not learn of any unauthorized activations until April 27, 1995, the day he received an April 26, 1995 memorandum from Behrooz Nourain, Liberty's Director of Engineering, who was in charge of activations. The memorandum listed the sites for which STAs were being filed. At the time, all but two of these facilities were receiving service without authorization. Price stated that he concluded from the memorandum that "there was a gap there between the turning on of service and the obtaining of authority." Id. at ¶¶ 33, 73; Time Warner/Cablevision Exh. 35;[3] tr. 826-29, 1363-64. The ALJ found, however, that substantial record evidence, which we summarize below, undermined Price's testimony regarding Liberty's claimed lack of knowledge of the illegal operations prior to the April memorandum.

13. After he began his employment with Liberty in April 1992, Nourain received a

[3]Time Warner and Cablevision filed joint hearing exhibits.

memorandum of instruction dated June 16, 1992, entitled FCC Licensing - Transfer of Information, from Joseph Stern, a consultant who preceded Nourain as the person responsible for the engineering aspect of Liberty's licensing. The memorandum recited that Stern had reviewed with Nourain Liberty's history of licensing activities and "the process of coordination and license applications," including using a technical firm to provide interference clearance and a strong recommendation to "continue to use a Washington-based attorney for submittal and follow-up." Stern advised that "coordination . . . is required for adding frequencies" and "details should be checked with your attorney with each case." I.D., ¶¶ 42, 50, 106; Time Warner/Cablevision Exh. 67, Att. E.

14. In March 1993, Jennifer Richter, an attorney at Pepper & Corazzini, Liberty's licensing law firm, prepared an inventory of Liberty's microwave licenses that listed paths that were already licensed or for which applications were pending. She sent a final version of her inventory of current authorizations to Nourain on April 6, 1993. I.D., ¶¶ 65, 67; Time Warner/Cablevision Exhs. 3, 58. On April 3 and 13, 1993, Richter had telephone conversations with Nourain on the subject of the "construction and operation of paths that [had] not been granted." They discussed the problem presented by lengthy Commission processing times, Liberty's need "to get going with its business," and whether Nourain could construct and operate a path without an authorization. These conversations prompted her to write a letter on April 20, 1993, entitled Construction and Operation of New Microwave Paths, to Bruce McKinnon, Liberty's Executive Vice President and Chief Operating Officer from 1991 to May 1993, who was in charge of installation of buildings that contracted with Liberty for OFS service. She wrote that her discussions with Nourain as to "when it is permissible for Liberty to construct and operate new microwave paths and stations, and when it is not," and "some things . . . revealed during these conversations," gave both persons "pause." I.D., ¶ 69; Time Warner/Cablevision Exh. 51; tr. 2037-38, 2259-61. She further stated:

> 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.

I.D., ¶ 72; Time Warner/Cablevision Exh. 51. The letter stated that "there is a difference between construction and operation," and advised that equipment could be installed prior to grant but that the operation of microwave paths is "only permissible when the FCC has granted [Liberty] authorization to do so." Id. Richter also provided detailed information on the number of days usually required to prepare and process various types of applications. Richter stated that it took about thirty days for Nourain, the interference clearance firm, and counsel to prepare an application, and that it took from sixty to 120 days to process applications at the Commission. She stated that, if Liberty was "desperate" to commence operation sooner, it could request an STA. Id.; I.D., ¶¶ 48, 69.

15. Richter testified that in her conversations with Nourain, she had become concerned about his lack of understanding of OFS licensing procedures. Id. at ¶ 48. She believed Nourain's confusion could lead to activation of an unauthorized path. Tr. 2048. Richter stated that she hoped her letter "would concern somebody" at Liberty and that she wanted to receive a reaction to her letter. Richter testified that no one at Liberty expressed any concern about inadvertent activations. Id. at ¶¶ 60, 69.

Nourain sent a copy of Richter's letter to Price with the notation, "Peter: Pls. review and advise." Id. Price spoke to Richter after he received the letter, but they only talked about the portion of her letter that mentioned the possible use of STAs to deal with perceived lengthy processing times at the Commission and did not discuss activation compliance. He did not speak to Nourain. Price testified that he understood Richter's use of the word "pause" as reflecting only her concern over the time lags in getting licenses, and that her letter did not alert or warn him that there were or might be illegal activations. Id. at ¶¶ 60, 70-72; tr. 2192-95.

16. Nourain activated paths rapidly as customers were signed up by Liberty for video services. He spent most of his time on activations and very little on licensing. The application process began with Nourain contacting Comsearch, Liberty's technical consultant, with location coordinates. Comsearch then checked for interference from other microwave systems on the paths identified for licensing. When Comsearch notified Michael Lehmkuhl, a Pepper & Corazzini attorney who succeeded Richter, that it had completed its interference study and there were no objections, Lehmkuhl prepared a license application. Lehmkuhl's filings were made within two weeks of receipt of the final Comsearch report. Lehmkuhl coordinated with Nourain only to the extent of assuring the accuracy of the technical data. To expedite matters, Pepper & Corazzini arranged to receive presigned blank applications from Nourain. At least thirty-five and possibly as many as 100 applications were received and filed in this manner. Nourain assumed that applications would be filed as soon as possible after Comsearch clearance was obtained. In addition, Nourain assumed that Lehmkuhl simultaneously filed STA requests with license applications and that the Bureau acted on the STA applications "within a few days." He testified that he acted "under the assumption that all these STAs were granted," and he assumed further that STAs were in place at the time of activation. Based on these assumptions, and without factual verification, he activated the buildings. I.D. at ¶¶ 43, 49, 54-57.

17. Although Richter filed some STA requests after her letter to Price, Lehmkuhl and Howard Barr, a senior attorney at Pepper & Corazzini, both testified that there was no standing instruction to file STA requests for Liberty as a matter of course. In fact, counsel informed Liberty in October 1993 that the FCC disfavored the routine filing of STA requests and counsel ceased filing them at that time. Id. at ¶¶ 86-87; tr. 1097, 1188-90, 1514-15, 1795-96, 2064-65; Time Warner/Cablevision Exh. 67, p. 13. In addition, the record shows that activations of the nineteen buildings referenced in the HDO occurred within a range of four to 198 days after finalization of the Comsearch reports, with no pattern of similar activation times corresponding to Nourain's assumptions of authorizations. I.D., ¶ 45.

18. Lehmkuhl, Richter, and Barr all testified that they had no knowledge of Nourain's compliance methodology. Nourain did not inform the attorneys when he was activating a building. McKinnon stated that there was no procedure established for Pepper & Corazzini to monitor licenses and the timing of activations. No one knew at any given moment the progress of the licensing procedure from frequency coordination to application to commencement of service. Nourain illegally activated microwave paths both before and after receiving Richter's April 1993 letter explaining the difference between construction and operation and advising how long application preparation and processing took. And, even after it received Richter's letter expressing concern about Nourain's compliance, Liberty's management never monitored Nourain's erroneous time assumptions or his path activations. I.D., ¶¶ 53-54, 57-60; Joint Motion at 14-15.

19. In addition to the information Liberty received in the Richter letter, Lehmkuhl provided Price and Nourain with an inventory of Liberty's licenses and pending applications as of February 24, 1995. The inventory listed pending applications, granted licenses, transmit location information, and status and path information for each transmitter site. The license status of each path was identified as pending or granted. Liberty also prepared internal weekly Installation Progress Reports, containing information on the status of installations. The February 23 and March 2, 1995 reports indicated a "complete" status for six buildings later listed in the HDO as having unauthorized paths. Price forwarded the inventory's cover memorandum to Liberty owners Howard and Edward Milstein and to its other counsel. Howard Milstein testified that he would have expected a recipient of Lehmkuhl's memorandum to compare its inventory of licenses with Liberty's own list of activated facilities. Edward Milstein stated, however, that no one at Liberty reconciled FCC authorizations with activated facilities. Price also attended weekly staff meetings of senior management at which scheduling for construction related to the installation of OFS paths was regularly discussed, but he testified that he did not make the connection or attempt any comparison between Lehmkuhl's memorandum and Liberty's reports. Id. at ¶¶ 32, 40, 61; Time Warner/Cablevision Exhs. 14, 65; Liberty/Bureau Exh. 1;[4] tr. 559, 1618, 2175-76. Lehmkuhl also prepared a second inventory on April 28, 1995 that indicated premature operations at twelve of the nineteen buildings listed in the HDO. Id. at ¶¶ 34, 45, 74; see ¶ 28, infra.

20. The IAR revealed that, out of a total of 126 buildings Liberty served by OFS paths, Liberty activated ninety-three paths without authorization between June 1992 and April 1995. Liberty activated six of the nineteen unauthorized microwave facilities identified in the HDO before an application was filed. Of the seventy-four additional unauthorized activations disclosed in the IAR, there were thirty-two activations before an application was filed. Of this latter group, there was a hiatus between activation and filing ranging from eight days to thirteen months, with an average hiatus between activation and application of 2.43 months. In all, Liberty activated service on thirty-eight of the prematurely operated paths prior to filing an application for a license. Path activation was expensive -- estimated at $25,000 per path -- and highly labor intensive for Nourain, who worked up to sixty hours a week. Nourain testified that activations had to be coordinated with marketing. The record also showed that Liberty's executive offices were physically located in a different part of Manhattan from where Nourain worked, Nourain was not invited to the weekly staff meetings at which planned installations and activations were discussed, and licensing issues were not a topic of discussion at the meetings even though Price, McKinnon, and Liberty owners Howard and Edward Milstein were present. I.D., ¶¶ 44 (and Table I), 46, 49, 55, 62-63 (and Table II), 64; Time Warner/Cablevision Exh. 67; tr. 683-84.

21. McKinnon testified that during his tenure at Liberty, where he supervised construction and activation, no paths were activated without Commission licenses, and that he had no knowledge of unauthorized activations. According to information contained in the IAR, however, during

[4] "Liberty/Bureau" exhibits are ones submitted in support of the Joint Motion for Summary Decision.

McKinnon's tenure, there were twenty-three paths illegally activated, of which nineteen were activated before applications were filed. The Report concluded that "Mr. McKinnon was aware from Mr. Nourain that some buildings were being activated without a specific FCC license or STA." I.D., ¶¶ 52-53; Time Warner/Cablevision Exh. 67. Furthermore, according to the Report, Nourain "believe[d] that he told Mr. Price that [Liberty] was rushing and might not get approvals on time." I.D., ¶ 54; Time Warner/Cablevision Exh. 67. In addition to McKinnon, the Report concluded that Nourain, Richter, and Anthony Ontiveros, Liberty's General Manager and Director of Operations, also probably knew that there were illegal activations. I.D., ¶ 30.

2. Statements Made in Applications and Pleadings

22. In addition to the evidence of Liberty's unauthorized activations, the ALJ also made findings pertaining to Liberty's representations in a series of STA requests and other pleadings. First, on May 4, 1995, Liberty filed fourteen applications for STAs relating to the paths that were already operating without authority. In support of its requests, Liberty stated that its applications were "in technical order" and argued that STAs were necessary because Liberty had to deliver service within thirty days or risk losing its customers. Although Liberty stated that "[a]ny further delay in the consideration of the aforementioned applications . . . seriously undermines Liberty's ability to deliver service," Liberty did not disclose that the STAs concerned ongoing unauthorized operations. Id. at ¶¶ 74-75, 78; Time Warner/Cablevision Exh. 17. On May 26, 1995, Liberty filed a reply to Time Warner's opposition to its May 4 STA requests and again did not mention that the subject facilities for which it was seeking STAs were already in operation. I.D., ¶ 82; Time Warner/Cablevision Exh. 19.

23. On May 17, 1995, Liberty filed a surreply to Time Warner's May 5, 1995 pleading, which had identified two Liberty facilities as providing microwave service without authorization. Liberty for the first time admitted violations, the two identified by Time Warner and the unauthorized activations at thirteen other facilities. Liberty had known of at least twelve of these operations since April 27 or 28, 1995. I.D., ¶ 45. These unauthorized facilities included the fourteen buildings for which Liberty had requested STA authority on May 4, 1995 (without discussing their operational status) and a fifteenth building discussed below for which Liberty did not seek an STA until May 19, 1995. See ¶ 24, infra. Liberty also asserted that it has "traditionally sought special temporary authority" to operate pending Commission approval of license applications and that "[i]t has been Liberty's pattern and practice to await a grant of either a pending application or request for STA prior to making a microwave path operational." Liberty further explained that Nourain commenced operation prior to grant because he "assumed grant of the STA requests, which in his experience had always been granted within a matter of days of filing." I.D., ¶¶ 75, 79-80; Time Warner/Cablevision Exh. 18.

24. On May 19, 1995, Liberty filed an STA request for a fifteenth microwave facility at 2727 Palisades Avenue without disclosing in the filing that unauthorized service had already been activated at that facility on April 24, 1995. I.D., ¶¶ 75, 81; Time Warner/Cablevision Exh. 38. In a May 24, 1995 amendment to the STA request for Palisades Avenue, Liberty again did not disclose that the facility was already in operation. I.D., ¶ 82; Time Warner/Cablevision Exh. 39. On July 12 and 24, 1995, Liberty again amended its May 19 Palisades Avenue STA request, stating that authority was required to operate until grant of the underlying license. It did not disclose therein that the Palisades

Avenue facility was operating without authorization. I.D., ¶ 84; Time Warner/Cablevision Exhs. 40, 43. As noted above, however, Liberty had pointed out in its May 17 surreply that the Palisades facility was already operating.

25. In response to Liberty's May 17, 1995 disclosure that it had prematurely activated fifteen buildings, on June 9, 1995 the Bureau requested that Liberty provide additional information about its unlicensed operations. On June 16, 1995 Liberty responded by listing the addresses, dates of commencement of service, and number of subscribers for the fifteen buildings. In the meantime, as a result of its internal investigation, Liberty discovered four more instances of premature operations. On July 17, 1995, Liberty filed applications for these four locations. These facilities were already in operation on the date the applications were filed, but the applications did not disclose that information. Lehmkuhl prepared the applications, and Nourain and Barr reviewed the applications prior to filing. Liberty did not subsequently amend its June 16 response to the Bureau to reveal the four additional unauthorized activations. On July 24, 1995, however, Liberty filed STA requests for the four facilities that contained the disclosure that these paths were already activated. I.D., ¶¶ 75, 83, 85; Time Warner/Cablevision Exhs. 20, 21, 25, 27.

3. Liberty's Document Production

26. The ALJ also made findings with regard to Liberty's disclosure in this proceeding of documentary evidence concerning its premature microwave activations. With respect to Liberty's IAR, the ALJ ordered production of the Report on September 16, 1997 after the court of appeals rejected on the merits Liberty's argument that the Report was protected from disclosure by FOIA Exemptions 4 and 6, 5 U.S.C. §§ 552(b)(4) and (b)(6), and concluded that Liberty's attorney-client and work-product privilege claims were not properly raised before the Commission. See Bartholdi Cable Co., Inc. v. FCC, 114 F.3d at 279, 281-83. The audit of Liberty's licensing practices was conducted by Constantine & Partners. In an affidavit associated with the Report, Lloyd Constantine stated that the auditing attorneys were given "complete access to Liberty's books and records and . . . unlimited opportunity to interview all Liberty personnel, officers and outside-retained counsel [Pepper & Corazzini]." The Report itself stated that the investigation included a review of "documentation related to the initiation and operation of service to each of the 126 buildings served by [OFS] connection." Because Liberty represented that the Report was "comprehensive" in nature, and because it contained relevant information regarding the number of undisclosed activations and knowledge on Liberty's part of those activations, the ALJ inferred that Liberty was motivated to keep the Report out of evidence to avoid undermining its direct case. I.D., ¶¶ 23, 25, 29-30; Time Warner/Cablevision Exhs. 29, 67.

27. Liberty withheld Lehmkuhl's February 24, 1995 inventory of licenses and pending applications from initial discovery on April 15, 1996 based on an assertion of attorney-client privilege, and did not make the inventory available until June 27, 1996. See Orders, FCC 96M-53, released March 20, 1996; FCC 96M-164, released June 27, 1996. Similarly, Liberty did not produce Nourain's April 26, 1995 memorandum, which Price claimed informed him of the unauthorized operations, until January 13, 1997, the first day of hearing when Nourain was scheduled to testify. Price testified that, on April 27, 1995, the day after Nourain prepared his memorandum, Price saw it and discussed the matter of unlicensed facilities with counsel in a conference call. During that call, Price decided not to

inform the Commission of the activations until Liberty had investigated the matter. The Joint Motion for Summary Decision filed by Liberty and the Bureau did not disclose the Lehmkuhl inventory, the Nourain memorandum, or the conference call. I.D., ¶¶ 31-33, 73; tr. 1386.

28. Lehmkuhl prepared a second inventory, dated April 28, 1995. This inventory, prepared at Nourain's request, also confirmed that OFS paths had been activated before authorization at a number of the sites later identified in the HDO. In an accompanying memorandum, Lehmkuhl stated that the Commission staff had indicated future STA requests would probably not be granted because of the pendency of Time Warner's petition to deny, but Lehmkuhl advised that Liberty should still apply for STAs because of the "seriousness of the situation." Liberty did not produce the Lehmkuhl document, which had not been identified as a privileged item, until January 6, 1997, one week before the hearing. In his testimony, Lehmkuhl stated that the relevant files at Pepper & Corazzini had been searched by counsel in April 1996 and the inventory and memorandum were in the files at that time, but were not turned over because of oversight. I.D., ¶¶ 34, 45, 74; Time Warner/Cablevision Exh. 34; tr. 1292-94, 1317.

29. Liberty also did not disclose in discovery the April 20, 1993 Richter letter. The letter was produced after being uncovered in the course of cross-examination of Barr on January 28, 1997. See Order, FCC 97M-14, released February 5, 1997. The Richter letter had been attached to the August 14, 1995 IAR, as was the June 16, 1992 memorandum of instruction from Stern to Nourain, which was not produced either. I.D., ¶¶ 25, 35.

30. Finally, in depositions given in May 1996, Price and Howard and Edward Milstein all stated that they may have first learned of the premature OFS activations in May 1995 as a result of Time Warner's May 5 pleading. When confronted with the February and April 1995 Lehmkuhl inventories and the April 1995 Nourain memorandum at the January 1997 hearing session, however, these witnesses changed their testimony to say they learned of the activations in April 1995, prior to Liberty's May 1995 STA requests and Time Warner's May 5, 1995 pleading identifying unlicensed operations. Id. at ¶ 36.

B. The I.D.'s Conclusions

31. The ALJ concluded that Liberty activated OFS paths in reckless disregard of its licensing obligations, deliberately withheld full disclosure in order to obtain OFS authorizations, made false statements in its filings regarding its activation practices, and tried to mislead the tribunal by withholding relevant evidence. He found that Liberty violated 47 C.F.R. §1.65 because it did not report its unlawful activations "as promptly as possible" after April 27, 1995, the date Price said he discovered them. Liberty was motivated to delay reporting the unauthorized activations to the Commission, in the ALJ's view, because Price hoped to obtain STAs for its unauthorized operations before Time Warner learned the facts. The ALJ also concluded that Liberty's continued failure to disclose the information until May 17, 1995 and its misstatements of fact on that and subsequent dates, discussed in detail below, constituted a pattern of nondisclosure in violation of 47 C.F.R. §1.17. In reaching these conclusions, the ALJ rejected Liberty's defense that its unauthorized activations were solely the result of employee negligence and an executive failure to supervise adequately. Therefore,

the ALJ determined that it would not be appropriate to impose only a forfeiture for Liberty's misconduct in this case as proposed by the Joint Motion. In view of his findings, the ALJ concluded that Liberty's applications should be denied.

32. As to Liberty's disregard of its licensing obligations, the ALJ specifically concluded that, although Liberty continuously prematurely activated microwave paths, Price did not heed Richter's April 1993 warning that it should be concerned about unlawful activations and attentive to the steps and time required for Commission authorization. Nor did he provide guidance to Nourain, as requested, on Richter's expressed concern that there might be premature activations. Likewise, the ALJ found that Price chose to ignore Lehmkuhl's February 1995 inventory, which listed a number of applications for activated paths as pending, and which provided the same type of information about activations that Price admittedly learned in April 1995. By comparing the Lehmkuhl inventory with its weekly reports, the ALJ found, Liberty could readily have ascertained that these prematurely activated paths had pending rather than granted license applications. The ALJ also found that Liberty's unauthorized operations were too numerous and the time lags too significant for Liberty to credibly deny knowledge of them prior to April 1995. Nourain did not work "in a vacuum," and someone in Liberty's management must have known of his methodology. In the ALJ's view, Liberty's principals "recklessly disassociated themselves" from any concern about whether activations were authorized. Nourain, too, in the ALJ's view, could have learned of the unauthorized activations prior to April 1995. Stern alerted him in 1992 to the need for close supervision of licensing in order to avoid premature activations; he had conversations with Richter and received her inventories in 1993, and was sufficiently concerned to ask Price for advice; and he had access to Lehmkuhl's February 1995 inventory and Liberty's Installation Progress Reports.

33. With respect to Liberty's lack of candor, the ALJ concluded that from May 4, 1995 to July 17, 1995, Liberty engaged in a pattern of failure to disclose, misrepresentation, and lack of candor in pleadings filed with the Commission. Liberty projected business losses from prospective customer cancellations if STA relief was denied, the ALJ found, and Liberty was thus motivated to present the facts as favorably as possible when it filed its fourteen STA requests on May 4, 1995. Accordingly, it did not disclose the premature activations in order to mislead the Commission that the fourteen pathways were not in operation. After Time Warner alleged two illegal operations on May 5, 1995, Liberty disclosed fifteen unauthorized activations in its May 17, 1995 reply, but misrepresented in the same pleading by claiming that it had a pattern and practice of licensing compliance. Its subsequent STA applications also failed to disclose the unauthorized activations. Liberty also did not disclose its four additional activations in its May 17, 1995 reply to Time Warner or its June 16, 1995 response to the Bureau, and its July 17, 1995 applications for the four paths did not provide an explanation for its earlier failure to disclose the four additional activations.

34. Finally, the ALJ concluded that Liberty withheld significant documentary evidence from the proceeding to such an extent that it cannot be trusted to be reliable in the future. Most significant, in the ALJ's view, Liberty "strategically withheld" production of its IAR "under a waived assertion of the attorney-client privilege." Although Liberty relied on the IAR to argue in the Joint Motion that it was acting responsibly by fully investigating and reporting the facts to the Commission, it used its erroneous assertion of confidentiality as a tool to keep the highly relevant information in the Report out of the

proceeding as long as possible. Exacerbating the situation, the ALJ held, was the fact that the Richter letter and the Stern memorandum were attached to the Report and were not made available. In addition, the ALJ noted, the two Lehmkuhl inventories and the Nourain memorandum were not produced until the eve of trial, even though they did not qualify as privileged documents. Timely disclosure of the underlying documents, the ALJ found, would have permitted more accurate deposition testimony. Although it could not be conclusively determined that the withholdings were intentional, the ALJ stated, Liberty's pattern was to deprive the tribunal of timely evidence and its apparent purpose was to mislead by omitting relevant documents from the Joint Motion in the expectation that there would be no further inquiry.

C. Exceptions

35. As a procedural matter, Liberty contends that the ALJ violated the Commission's summary decision procedures by issuing his I.D. immediately following denial of the Joint Motion, instead of holding a hearing on the remaining issues in accordance with 47 C.F.R. § 1.251(e). On the merits, Liberty initially argues that the I.D.'s negative candor findings with regard to Liberty's confidentiality and privilege assertions relating to the IAR, and its judicial appeal of the Commission's ruling, are inconsistent with Liberty's constitutional right to due process in filing its appeal, federal rules of civil procedure, its right to judicial review under 47 U.S.C. § 402, and its right to submit confidential materials under 47 C.F.R. § 0.459. Furthermore, Liberty states that the ALJ was wrong to conclude that Liberty asserted the privilege as a tool to keep relevant information hidden. In fact, Liberty points out that it made the Report available to the Bureau on August 14, 1995, and states that Time Warner rejected its pre-hearing offer to produce a redacted version of the Report. Moreover, Liberty asserts that its confidentiality claim and court appeal preceded issuance of the HDO, so the ALJ was wrong to infer that Liberty brought the appeal in order to manipulate the hearing proceeding.

36. Liberty also disputes the ALJ's candor finding based on its late production of certain other documents. Liberty asserts that it produced some 15,000 pages of documents during discovery and quickly corrected any inadvertent omissions. Specifically, it states that the February 24, 1995 Lehmkuhl inventory was withheld because of a mistaken privilege designation, and the April 26, 1995 Nourain memorandum and April 28, 1995 Lehmkuhl inventory were discovered shortly before the January 1997 hearing. Moreover, Liberty states, the Stern memorandum was not produced because it preceded the January 1, 1993 discovery cut-off date, and both it and the Richter letter were submitted to the Bureau as attachments to the IAR before the HDO was issued.

37. Liberty then excepts to the I.D.'s conclusion that it deliberately withheld knowledge of the premature activations in a series of pleadings beginning May 4, 1995 in order to deceive the Commission. Liberty states that Price and outside counsel became aware of the activations during the April 27, 1995 conference call and decided to disclose the violations when the facts were gathered and verified. Liberty avers that it initiated an accelerated audit to determine the extent of the activations and, on May 17, 1995, disclosed fifteen unauthorized operations. Liberty then ordered a fuller investigation, which resulted in the IAR, revealing an additional seventy-four unauthorized operations, that was disclosed to the Bureau in confidence on August 14, 1995, and directed counsel to develop a compliance program, which Liberty subsequently instituted. Although Liberty concedes that it would

have been better immediately to report the violations discovered in April, it contends that it did not violate 47 C.F.R. § 1.65 because it actively investigated the matter in order to make complete disclosure and revealed the premature activations within thirty days. Liberty asserts that the ALJ erred in finding that the statements in its May 17 pleading regarding Liberty's "pattern and practice" and the extent of known violations were not candid because Liberty believed the statements to be true at the time, and it did not learn that there were additional unauthorized activations until weeks later upon completion of the IAR. Liberty argues that its failure expressly to disclose the fifteen premature activations in subsequent STA requests and amendments does not establish an intent to deceive because Liberty already had apprised the Commission of the same unlicensed paths in its May 17 pleading.

38. Liberty also excepts to the I.D.'s conclusion that its principals must have known about the premature activations before April 1995. Specifically, Liberty claims, the April 20, 1993 Richter letter did not state that premature activations had occurred and Richter testified that she had no knowledge of unauthorized operations when she wrote the April 20 letter. Also, Liberty asserts, Richter's March and April 1993 inventories were not useful for determining license status, and Nourain did not look to them for that purpose. Whereas Nourain's April 26 1995 memorandum on its face alerted it to a problem, Liberty states, Lehmkuhl's February 24, 1995 inventory was a multi-page document containing technical information which, only on hindsight, should have been considered by Price as a warning sign. Even if its witnesses modified their testimony as to when they learned of the activations (that is, that they learned in April 1995 rather than in May 1995), Liberty maintains that this change was de minimis. Also, Liberty argues, reliance on the IAR for the inference that Nourain probably informed Price of unlawful activity is rebutted by the uncontroverted record evidence that none of its principals knew about these activations before April 27, 1995.

39. Next, Liberty contends that the ALJ erroneously concluded that the premature activations could not be due to inadvertence. Liberty argues that it had reason to believe Nourain was well qualified to perform his engineering duties, and he was not excluded from Liberty's weekly meetings to shield management from knowledge of illegal activities. Furthermore, Liberty contends, the sheer number of activations does not support the ALJ's conclusion that Liberty must have known of them. Liberty also disputes the ALJ's conclusion that the Stern memorandum detailed the application process to Nourain. Liberty avers that the Stern memorandum and Stern's testimony both indicate that Nourain claimed he was already familiar with the licensing process. Finally, Liberty argues that, in the absence of intentionally deceptive conduct by its principals, disqualification is inappropriate. Moreover, Liberty states, even if the ALJ's findings are accepted, the forfeiture jointly proposed by Liberty and the Bureau is the correct remedy,[5] particularly since the Commission has imposed forfeitures in cases involving

[5]The Joint Motion for Summary Decision proposed a forfeiture amount of $710,000 for the nineteen unauthorized operations identified in the HDO. This figure consisted of $75,000 for each of the six instances in which Liberty was operating prior to applying for authority, and $20,000 each for the other thirteen unauthorized operations. Joint Motion at 51; see ¶ 20, supra. The Bureau subsequently proposed, and Liberty agreed to, an increase in the forfeiture of $300,000 (or $20,000 per each of the fifteen applications in this proceeding), for a total of $1,010,000, to reflect that Liberty knowingly filed incomplete information in its fifteen May 1995 STA requests. Bureau Proposed

more serious misconduct, and there was no harm caused to the public as a result of the activations in this case.

40. In reply, Time Warner and Cablevision submit that there are at least three instances of lack of candor that are sufficient to disqualify Liberty. First, although Liberty admits it knew in April 1995 of unlicensed operations, its fourteen May 4 STA requests did not state that these facilities were already operating but, to the contrary, argued that STAs were needed to avoid losing customers. Second, Liberty's May 17 surreply did not identify all of Liberty's unlicensed operations, but did misrepresent that Nourain activated the unauthorized paths based on the mistaken assumption that applications and STA requests had been granted within a reasonable time of filing whereas, in fact, some facilities had been activated before applications were filed and others shortly thereafter. Third, Liberty moved for summary judgment based in part on the representation that Nourain was uninformed about the licensing process, even though he had received a memorandum of instruction when he began his job in 1992. Time Warner and Cablevision also support the ALJ's conclusions that Liberty's lack of candor in this proceeding is further demonstrated by its unjustified delay in producing damaging documents, and that Price's self-serving testimony should be rejected because Liberty either knew it was operating microwave facilities illegally before April 1995 or recklessly disregarded its obligations to the FCC.

41. In its reply, the Bureau explains that its support for Liberty's position has declined in light of various developments following the filing of the Joint Motion, including disclosure of the February 1995 Lehmkuhl memorandum and the April 1993 Richter letter, testimony that raised concerns about Price's candor, and testimony by Liberty's witnesses that conflicted with their deposition testimony. The Bureau agrees with the ALJ's conclusions that Liberty's overall practice was to belatedly disclose highly relevant information such as the IAR and that, in view of Liberty's business plan to rapidly activate service, and the abundant warnings against premature activation, someone at Liberty must have been aware of the violations prior to April 1995. The Bureau also concurs with the ALJ that Liberty's disregard of the Commission's requirements could not have been the result of mere inadvertence. Finally, in agreement with Time Warner and Cablevision, the Bureau stresses that the ALJ's credibility findings should be given decisional weight.

D. Discussion

42. As a preliminary matter, we conclude that the ALJ did not commit reversible procedural error by denying the Joint Motion in the course of the I.D. Summary decision may be granted only upon a showing that there is no genuine issue of material fact for determination at the hearing. 47 C.F.R. § 1.251(a)(1), (d); Big Country Radio, Inc., 50 FCC 2d 967 (Rev. Bd. 1975). As the ALJ explained in the I.D., the issues relating to premature OFS microwave activations could not be summarily decided because of disputed questions involving Liberty's credibility and candor that were central to the proceeding. Subsequent to the January 1997 hearing, the ALJ advised the parties that he would likely deny summary decision and would rule on the Joint Motion in the I.D. See Orders, FCC

Findings, filed February 28, 1997, at 40-41; Liberty Reply, filed March 10, 1997, at 42-43.

97M-63 and 97M-64, released April 21, 1997. Not only was Liberty on notice of the ALJ's intentions, but it also had a full opportunity to present evidence at the hearing on all disputed issues. Hence, although 47 C.F.R. § 1.251(e) provides that "the hearing will proceed on the remaining issues" when summary decision is either denied or only some of the issues are decided, strict adherence by the ALJ to this procedure in this case was unnecessary because the hearing was already completed and there was no prejudice or surprise to Liberty as a consequence of the ALJ's actions.

43. In considering the merits, we turn initially to the ALJ's conclusion that Liberty must have known of or suspected unauthorized operations prior to late April 1995, the date it told the Commission it learned of the violations, and, hence, that its numerous violations cannot be excused as mere negligence but amounted to a reckless indifference to its responsibility to obtain licenses. The ALJ's conclusion is based on two principal pieces of documentary evidence: first, the April 1993 Richter letter and, second, the February 1995 Lehmkuhl inventory. We need not address whether or not Richter's inventories identified a problem because we find that Richter's April letter, written to one of Liberty's two senior managers, was a clear warning to Liberty by its legal counsel that, based on her prior discussions with Nourain, there was a serious danger of future unauthorized operations. Richter stated in her letter that her conversations with Nourain, in which he asked whether he could proceed without a license, gave both parties "pause" because of "some things [that] were revealed." She emphasized in the letter in plain language that Liberty could construct a facility but not operate it without Commission authorization. Her intention in sending the letter to McKinnon was to make sure that, as Nourain's superior, he understood the rules and her concern that Nourain was confused about licensing procedures. Tr. 2054-55. The letter also stated in cautionary language how long FCC application processing takes. Despite Richter's efforts, and although Nourain forwarded the letter to Price with a specific request for advice, Price did not discuss the letter with Nourain, or Liberty's owners, or investigate the possibility that there were or might later be unauthorized operations. In its exceptions, Liberty points out that Price testified that Richter's letter did not state that Liberty was operating OFS paths illegally, and Richter agreed in her testimony that she was only concerned about future violations. Tr. 2044, 2060-61, 2194-95. In this regard, although the IAR concludes that Richter apparently learned from her conversations with Nourain of unauthorized activations, there is no direct evidence that she informed Liberty. Nevertheless, the letter to Liberty management, from a Liberty attorney responsible for licensing compliance, describing her obvious alarm over the lack of understanding of basic licensing procedures by Liberty's engineer who was responsible for building activations, was an overt admonition and caution about future compliance that someone in Price's position could not reasonably have ignored. Yet, apart from focusing on Richter's incidental reference to the possible use of STAs to overcome processing time lags, even with the most favorable reading of the record, Price appears to have done just that.

44. Two years later, Liberty received even more explicit information in the form of the Lehmkuhl inventory. This was a list of Liberty's current microwave licenses and applications that counsel sent to Price and Nourain. A number of buildings at which Liberty had commenced service were identified on the inventory as the subject of "pending" applications. Although Liberty argues that the inventory was too "technical" to provide adequate notice of premature activation, we disagree because the inventory clearly indicates the license status of each path as either pending or granted. Moreover, Liberty was aware of the status of its installations from its internal weekly progress reports,

and Howard Milstein testified that he would have expected Liberty to compare its attorney's report with Liberty's own weekly operational records, and Price admitted that such a comparison would have revealed the existence of Liberty's unlicensed but operating facilities. Tr. 559, 1417-18; Liberty/Bureau Exh. 11, at 174-78. But Price stated that he did not make such a comparison. Hence, although Price received communications from Liberty's counsel giving him cautionary advice about microwave licensing procedures in 1993 and specific data on the current status of all its applications in 1995, and could have used this information to confirm the possibility or existence of unlicensed operations, he disregarded the information.

45. Although Price freely admitted to a lack of executive oversight (tr.1413), Liberty's claim that he reasonably relied on engineering and operations staff to coordinate with counsel on licensing is undermined by other evidence. For example, Price said he set up a compliance procedure in a memo to McKinnon in 1992, but McKinnon testified that he understood the memo as instructing him to spend less time monitoring licensing procedures and more time on installing facilities. Tr. 1396-97; Time Warner/Cablevision Exh. 41, at 19-20. The memo, which is only one paragraph long, supports McKinnon's view because it directs him to "concentrate" on "planning, installation, and operation," while leaving FCC licensing matters to Stern and counsel. Time Warner/Cablevision Exh. 67, Att. D. Moreover, the efficacy of Price's memo as a compliance mechanism is questionable because, although it indicated that Price wanted Stern to provide audits of Liberty's applications, Stern did not do so, and Price took no further steps to insure that audits were generated. Joint Motion, at 11-12. Nor does it appear that Price issued any other instructions subsequent to his brief 1992 memo to insure licensing compliance, notwithstanding the specific warning contained in Richter's letter. Liberty also relies on Price's assertion that he assumed Nourain understood what he was doing because he was recommended to Price and was supervised by Ontiveros, who oversaw building construction. Ontiveros testified, however, that he did not supervise Nourain's licensing activities, although he admitted he should have been more involved. Tr. 1439-40, 1688, 1691-92, 1702. In any event, we believe that it was incumbent upon Price to review Nourain's performance after receiving Richter's letter and Nourain's explicit request for advice about the letter, but Price simply ignored the gist of the letter and Nourain's request. And, whatever Price may have thought about Nourain's activities, Liberty's licensing attorneys and Nourain agreed that only Nourain actually knew what he was doing.

46. Price attributed his first knowledge of Liberty's unauthorized operations to Nourain's memorandum, which he saw on April 27, 1995. He testified that the memorandum alerted him to a problem because it listed paths for which STA applications were being filed and which he knew Liberty was already operating. He stated that it was a simple matter to deduce from the memorandum that there were unauthorized operations because he knew some of the buildings listed were already being provided service. Tr. 1362-64, 1373-75, 1385-86, 1417-18. We agree with the ALJ that Price as easily could have learned of the activations in February 1995 by using his knowledge of Liberty's operations to compare with the equally accessible information contained in the Lehmkuhl inventory. Neither document stated directly that there were unauthorized operations, but both provided data from which that conclusion could be drawn by those familiar with Liberty's operations. In addition, we agree with the ALJ that Liberty's professed inability to learn the truth at an earlier time is undermined by the extraordinary number of unauthorized activations revealed in the record and the extensive time lags between activations and filings that occurred over a prolonged period of time. The IAR shows

that, of 126 buildings to which Liberty provided OFS service, there were ninety-three unauthorized activations, which is approximately three-fourths of the total. In addition, Liberty prematurely activated thirty-eight of these paths, or over two-fifths of its unauthorized operations, prior to filing an application with the Commission. And, of the nineteen unauthorized microwave facilities identified in the HDO, six, approximately one-third, were activated before an application was filed. The ninety-three violations, which took place over nearly a three year period between June 1992 and April 1995, can hardly be characterized as isolated incidents or atypical occurrences, such as might be expected to result from simple employee negligence or neglectful managerial oversight, as Liberty would have us find. Rather, they establish an overwhelming pattern of unlicensed operations which, it is reasonable to conclude, would have been noticed by management officials who were even minimally attentive to their licensing responsibilities.

47. Furthermore, the IAR indicates that several agents or managerial employees of Liberty knew that there were illegal activations prior to April 1995. First, consistent with Liberty's wish to activate paths rapidly to accommodate new subscribers, the Report finds that Nourain believed he informed Price that Liberty was hurrying and might not get FCC approvals before paths were activated. Second, the Report concludes that Richter appears to have learned from Nourain of specific unauthorized activations, which, in turn, implies that Nourain knew these activations were premature. Third, consistent with the ALJ's finding that there were twenty-three paths illegally activated during the time McKinnon supervised construction and activation of Liberty's microwave installations, of which nineteen were activated before applications were filed, the Report concludes that McKinnon knew that licenses had not been obtained for at least some of these microwave paths. Although McKinnon testified to his belief that these operations were covered by an experimental authorization Liberty had received from Hughes Aircraft, Stern explained in a January 1992 memorandum to McKinnon and Price that the Hughes authorization was a "Test License" that could be used only "for test purposes" and not for "commercial service." Time Warner/Cablevision Exh. 67, Att. C (Emphasis in original). Moreover, in her April 1993 letter to McKinnon, Richter reiterated that the Hughes experimental license could only be used to test equipment, and that Hughes believed it "is in contravention of its authority under the license" for operators to use it to serve subscribers while their station applications are pending. Time Warner/Cablevision Exh. 51. Thus, McKinnon (and Price) were on notice that the Hughes license could not justify Liberty's unlicensed operations. Furthermore, although Liberty seeks to distance McKinnon from its management by claiming that he was not a principal but only an "administrator" (Exceptions at 15 n. 12), the record establishes that he had management and supervisory authority (over Nourain and Stern) because he was Executive Vice President and Chief Operating Officer in charge of day-to-day operations and installation of buildings that contracted with Liberty for service. Time Warner/Cablevision Exh. 41; Joint Motion at 9; Time Warner/Cablevision Exh. 67. Finally, the Report states that Ontiveros, Liberty's General Manager, who had overall responsibility for technical and operational matters relating to the provision of service, also learned in late 1994 or early 1995 that one or two buildings had been improperly activated and raised the issue of unrealistic time constraints on the activation of service to a particular building at a December 1994 meeting.

48. Insofar as Liberty excepts to the ALJ's reliance on the IAR to find that Nourain likely informed Price of unlawful activity because the hearing testimony of its principals shows they did not

know about these activations before April 27, 1995, we must consider the ALJ's credibility findings based on his observation of the witnesses. These findings do not support Liberty's position. Most important, with regard to Price, the ALJ found that "neither substantial nor reliable evidence supports" Price's explanations, that "Price's credibility remains suspect," that his testimony that he knew of or suspected no illegal activations before April 1995 "is not sufficiently persuasive" and "will not be accepted as reliable evidence," and that his testimony explaining his understanding of the Richter letter was "vague," "lacking credibility," and "evasive." I.D., ¶¶ 40, 61 n.33, 64, 70-71. Also, despite Lehmkuhl's testimony that he did not discuss his February 1995 inventory with anyone at Liberty, the ALJ found that it was "too incredible to accept" that Liberty management did not know the substance of it. Id. at ¶ 39. Moreover, the ALJ also concluded, based on McKinnon's deposition testimony, that his "inability or unwillingness" to recall receiving Richter's April 6, 1993 final inventory, which she directed to him and Nourain, "raises doubt about his credibility and reliability as a source of evidence." Id. at ¶ 67. An ALJ's credibility findings are "entitled to great weight," Broadcast Assoc. of Colorado, 104 FCC 2d 16, 19 (1986), and his credibility determinations are to be upheld unless the findings patently conflict with other record evidence. Milton Broadcasting Co., 34 FCC 2d 1036, 1045 (1972); KQED, Inc., 3 FCC Rcd 2821, 2823 (Rev. Bd. 1988), rev. denied, 5 FCC Rcd 1784 (1990), recon. denied, 6 FCC Rcd 625 (1991), aff'd mem. sub nom. California Public Broadcasting Forum v. FCC, 947 F.2d 505 (D.C. Cir. 1991); see also WHW Enterprises, Inc. v. FCC, 753 F.2d 1132, 1141 (D.C. Cir. 1985) (ALJ's credibility findings may not be upset unless reversal is supported by substantial evidence).

49. Nourain played a key role in all of this, of course. Acting on the basis of a series of unfounded assumptions regarding the filing and processing of Liberty's applications, and with an understanding that Liberty wished to proceed quickly, he routinely activated buildings without Commission authorization. As was true of Liberty management, he did not heed the advice and information received from counsel in 1993 and 1995 regarding premature activations, and he also failed to follow Stern's recommendations in 1992 for close coordination of licensing activities with counsel. In view of the information he received from these sources, it cannot be concluded that Nourain's actions were entirely inadvertent either. Although Liberty faults the ALJ's conclusion that Stern's memorandum to Nourain "detailed" the application process, the memorandum did provide guidance to Nourain and "strongly recommend[ed]" that Nourain work with counsel on licensing matters. Furthermore, after observing Nourain's demeanor while testifying, the ALJ concluded that there was additional reason to believe that counsel was not in full control of his activities. The ALJ stated that Nourain was "more inclined to quickly rationalize his answers than to listen and answer questions asked of him based on a careful recalling of fact," and that it was conceivable counsel had difficulty convincing him to follow their advice. I.D., ¶ 56 n.27.

50. To summarize to this point, we cannot agree with Liberty that the preponderance of record evidence would support a conclusion that the excessive unlicensed operations in this case were purely the result of inadvertence or negligence. At the very least, Price was specifically warned by counsel of a present threat of unlicensed activations and later received current status information from counsel which, taken together with Liberty's readily available installation progress reports, would have informed a reasonable man that such operations in fact had occurred. Although the IAR makes clear that the extent of unauthorized activations was extreme, that the infractions occurred over a long

period of time, and that a number of individuals associated with Liberty probably had knowledge of at least some of these unlicensed operations, Liberty falls back upon the position that no one told Price in so many words that Liberty was operating unauthorized facilities. But the record certainly establishes that, at very least, Price recklessly disregarded all indications of premature activations and made little effort to insure that Liberty was acting in compliance with basic licensing requirements. Moreover, as a matter of law, we attach great weight to the ALJ's determination that Price's explanation as to his understanding of Richter's letter and his testimony with regard to his actual knowledge of unlawful operations lacked credibility. In any event, in this case, at a minimum, the record establishes an indifference and wanton disregard for the licensee's obligations to the Commission that is "equivalent to an affirmative and deliberate intent." RKO General, Inc. v. FCC, 670 F.2d 215, 225 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 and 457 U.S. 1119 (1982), quoting Golden Broadcasting Systems, Inc., 68 FCC 2d 1099, 1106 (1978).

51. We consider next the ALJ's conclusions that Liberty was lacking in candor, made misstatements of fact in violation of 47 C.F.R. § 1.17, and violated 47 C.F.R. § 1.65 in applications and pleadings filed after it admittedly learned of the unlicensed microwave operations in April 1995. To begin with, as to Liberty's candor, it is undisputed that the fourteen applications for STAs Liberty filed on May 4, 1995 did not disclose the fact that the facilities in question were already in operation. This was a blatant omission of basic information that was pertinent to the Commission's consideration of the requests. The omission was compounded by Liberty's bland assertion that its applications were "in technical order" and by Liberty's claim that approval of the STA requests was necessary to avoid losing customers, without also revealing that customers were being served at that time. In this regard, we attribute more significance than Liberty does to the fact that several of its key witnesses changed their testimony with respect to when Liberty learned of the unauthorized operations. Liberty principals Howard Milstein, Price, and Edward Milstein all indicated in deposition testimony that they did not know of the unauthorized activations until Time Warner disclosed two violations in its May 5 pleading. At hearing, after further documentary evidence was produced, these witnesses revised their testimony and agreed that they first learned of the activations in late April. Tr. 517-18, 1362-63, 1623-24. Accepting this latter testimony as correct, it must be concluded that Liberty knowingly filed incomplete and misleading information on May 4 in its fourteen STA requests because it did not disclose its knowledge of these operations. It also appears from the record that Liberty's nondisclosure was intentional because Price decided, after receiving Nourain's April 26 memo and discussing the matter with counsel, to delay reporting until Liberty had investigated the matter. Liberty evidently never considered reporting at once to the Commission what it knew at the time concerning the fourteen STA requests, with a promise to update the information as it was uncovered.

52. When Liberty did reveal premature activations in its May 17 surreply to Time Warner's May 5 pleading, its disclosure was mixed. Although it admitted the two alleged activations and revealed thirteen previously unknown activations, its statements were again incomplete, if not affirmatively misleading. It was not correct that Liberty "traditionally" sought STAs pending approval of its applications or that Liberty's "pattern and practice" was to receive a grant or an STA prior to activation. In fact, the record establishes that Liberty's overwhelming practice was to activate OFS facilities prior to receiving authorization and its substantial practice was to activate the unlicensed paths before even filing an application. Indeed, Price conceded in his testimony that he understood at the

time Liberty filed its May 17 surreply that Liberty's actual practice with regard to the buildings listed differed from its professed policy to abide by the Commission's rules. Tr. 1577-81. It was also inaccurate for Liberty to state, based on nothing more than Nourain's unsubstantiated and incorrect assumptions, that STAs were always granted "within a matter of days." Liberty argues that its May 17 pleading was not intentionally deceptive because it reflected the truth as it was known at that time. But as summarized above, a number of Liberty's principals and agents had either actual knowledge or substantial reason to suspect additional unauthorized operations well before that time. The fact that complete information was not formally set forth by counsel until completion of the IAR does not mean that Liberty management was unaware of or could not have learned the facts earlier, or that Liberty was justified in making representations that it knew or suspected had little basis in fact. And we note in this regard that the ALJ's credibility findings pertaining to Price's testimony concerning the state of his knowledge of unauthorized activations prior to the IAR are also entitled to great weight.

53. Liberty filed more misleading documents on July 17 when it submitted applications for four additional buildings that had been prematurely activated, without also revealing the fundamental fact that these facilities were already in operation. It was not until Liberty filed STA requests for the four buildings on July 24 that it revealed the activations. Although Liberty argues that it intended to file the STA requests together with the applications, this episode is consistent with the ALJ's finding that Liberty engaged in a pattern of failing to timely disclose pertinent information in its filings. On the other hand, although Liberty also filed several STA requests or amendments between May 19 and July 24 pertaining to one of the unauthorized facilities at Palisades Avenue without stating that the building was already in operation, we agree with Liberty that such disclosure, while appropriate, would have been repetitive of information previously revealed as to this path in its May 17 pleading. The same is true of Liberty's May 26 reply to Time Warner's opposition to its May 4 STA requests, which also did not mention the ongoing operations that had been disclosed previously on May 17. These filings, though incomplete, do not independently evidence an intent to mislead because the information was already on file.

54. With respect to the ALJ's conclusion that Liberty violated the reporting requirements of 47 C.F.R. § 1.65, that rule provides in pertinent part that:

> [W[henever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of his application so as to furnish such additional or corrected information as may be appropriate.

55. In arriving at his conclusion, the ALJ found that Liberty did not reveal its discovery of the unauthorized operations "as promptly as possible" after April 26, whereas Liberty argues in its exceptions that its report of the activations on May 17 was "within thirty days" of discovery. Liberty explains that it did not report the activations as quickly as possible because it decided to wait until all the facts were known before making full disclosure. Despite this stated intention, however, Liberty subsequently revealed fifteen unauthorized operations on May 17, before its investigation was complete. This disclosure was within the thirty day provision of the rule, but was prompted by and

made in reply to Time Warner's allegations on May 5, rather than in response to its reporting obligations. In any event, Liberty's explanation does not justify its failure to disclose this critical information in its May 4, 1995 STA requests.

56. We agree with the ALJ that Liberty filed applications and pleadings on May 4, May 17, and July 17 that made incomplete and intentionally misleading statements to the Commission regarding Liberty's operations and practices in violation of the Commission's rules. Section 1.17 prohibits the making of any misrepresentation or willful material omission in any application, pleading, or any other written submission to the Commission. Moreover, the duty of candor requires applicants to be fully forthcoming as to all facts and information that may be decisionally significant to their applications. The requirement for absolute truth and candor from those appearing before the Commission is fundamental because the Commission must rely heavily on the completeness and accuracy of the submissions made to it by applicants. Swan Creek Communications v. FCC, 39 F.3d 1217, 1222 (D.C. Cir. 1994); Sea Island Broadcasting Corp. v. FCC, 627 F.2d 240, 243 (D.C. Cir.), cert. denied, 449 U.S. 834 (1980). First, Liberty's obvious desire to have its STA requests and applications approved does not justify its failure to inform the Commission that the subject unlicensed facilities were already operating. Second, although Liberty voluntarily and belatedly disclosed certain of its unauthorized activations, and we have found that its failure to repeat these disclosures in every subsequent filing did not necessarily evidence a deceptive intent, nevertheless, Liberty completely mischaracterized its practices and was far less than forthcoming with regard to the most basic licensing information. Liberty deliberately withheld decisionally significant information purportedly because it was gathering the facts and believed its statements were true when made, but other evidence previously recited indicates that Liberty either knew or should have known of the state of its activations and practices before its investigation was completed. Liberty's repeated failure to promptly and accurately report its unauthorized operations was in violation of the requirements of 47 C.F.R. §§ 1.17 and 1.65.

57. Lastly, we review the ALJ's adverse findings regarding Liberty's candor and future reliability as a Commission licensee based on its document production at the hearing. Initially, with regard to the IAR, we disavow any suggestion in the I.D. that Liberty's exercise of its procedural rights to seek confidentiality for the IAR under the Commission's rules or to appeal the Commission's denial of its claims to the court of appeals is in itself a basis for disqualification.

58. With regard to other documents highlighted by the ALJ as part of a pattern of untimely disclosure, such as the Nourain memorandum and the Lehmkuhl inventories, Liberty contends that their late production was inadvertent. Other than the evident significance of these documents on their face as containing information potentially damaging to Liberty's case, and the consequent advantage to Liberty in their nondisclosure, there appears to be little or no direct evidence to contradict Liberty's explanations that they were not deliberately withheld from discovery. For example, there is no evidence to rebut Lehmkuhl's testimony that, although the relevant files were searched at the law firm, his April 1995 inventory was simply overlooked. And even though Lehmkuhl's February 1995 inventory indicated on its face that it was provided to Comsearch, a third party, there is no other evidence to undermine Liberty's claim that the document was mistakenly designated as privileged.

59. Liberty's claims with respect to the April 1993 Richter letter and June 1992 Stern

memorandum, other documents identified by the ALJ as improperly withheld, are less persuasive. Although Liberty argues that the Stern memorandum predated the January 1, 1993 discovery cutoff date, the ALJ observed that, by contrast, Liberty willingly disclosed early in the proceeding a February 1992 compliance memorandum from Price to McKinnon that Liberty considered helpful to its position. I.D., ¶ 51. And the ALJ expressly denied Liberty's claim that the Richter letter was protected by the attorney-client privilege because Liberty waived the privilege. See Order, FCC 97M-14, released February 5, 1997.

60. In short, we can readily understand how the ALJ drew the inference that Liberty engaged in a pattern of incomplete or delayed document production intended to preclude disclosure of damaging evidence. We can also sympathize with the ALJ's view that Liberty's strategy frustrated the trier of fact's efforts to compile a complete record. Nevertheless, despite the suspicious circumstances, there is little direct evidence that Liberty (and its counsel) deliberately embarked on such a course of action. Even though we concur with the ALJ that these episodes of late production were "disheartening," id. at ¶ 120, we also agree with his observation that it is "a difficult case to make" that the withholdings were intentional, id. at ¶ 117, and we find there is not substantial evidence that they were.

V. SANCTION AND ORDERING CLAUSES

61. Implementing the licensing system established by Congress in the Communications Act is a fundamental Commission duty. Section 301 of the Act precludes any person from operating a facility to transmit communications by radio without a license granted by the Commission. 47 U.S.C. § 301. Enforcement of this mandate is a core responsibility and, as we have stated many times, unlicensed operation of a radio transmitter is a serious violation of the Act. See Madison Communications, Inc., 8 FCC Rcd 1759 (1993); Data Investments, Inc., 6 FCC Rcd 4496 (1991). Indeed the Commission has made repeated efforts to terminate all unlicensed radio operations. See Creation of a Low Power Radio Service, FCC 99-6, released February 3, 1999 at 27-28. We may also disqualify where there is misrepresentation or lack of candor. See Leflore Broadcasting Co., Inc. v. FCC, 636 F.2d 454, 461 (D.C. Cir. 1980).

62. The unlicensed operations in this case were legion. We have found that, at the very least, Liberty's violations were in such total and reckless disregard of its obligations as a Commission licensee to insure that it activated only authorized OFS paths as to be tantamount to intentional misconduct. Moreover, the preponderance of record evidence establishes that Liberty was not fully candid with the Commission. Liberty lacked candor not only with regard to whether and when it knew or could have known of the illegal operations but also in statements made in multiple filings after there could be no doubt that the violations were known. These derelictions were compounded by Liberty's repeated noncompliance with the Commission's reporting requirements.

63. The Commission has broad discretion in its choice of remedies and sanctions. See RKO General, Inc. v. FCC, 670 F.2d 215, 237 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 and 457 U.S. 1119 (1982); Leflore Broadcasting Co., Inc. v. FCC, 636 F.2d at 463; Lorain Journal Co. v. FCC, 351 F.2d 824, 831 (D.C. Cir. 1965). We have decided that, because of the significant misconduct found in

this case, involving Liberty's disregard of its basic responsibilities and its lack of candor with the Commission, denial of Liberty's applications, as the ALJ held, is fully warranted. See Contemporary Media, Inc., FCC 98-133, released June 25, 1998, petition for recon. filed, July 27, 1998 (disqualification for criminal acts and repeated misrepresentations, which were unaccompanied by adequate remedial measures). In addition, because we agree with the ALJ's observations that "[i]t is hard to discern a more egregious flaunting of the most fundamental principle of licensing the spectrum" and "this [is] one of the worst cases of a pattern of unlicensed spectrum operations since 1934," I.D., ¶ 123, we also believe that imposition of the additional sanction of a substantial monetary forfeiture will serve the public interest.[6] See PCS 2000, L.P., 12 FCC Rcd 1681, 1688-89 (1997); 12 FCC Rcd 1703, 1717-18 (1997) (maximum statutory forfeiture of $1 million for misrepresentation in connection with C Block auction, but no disqualification where applicant removed all individuals responsible for misconduct).

64. We reach this conclusion for several reasons. First, Liberty's overall record of compliance with our rules and policies was extremely poor, and involved abundant violations of Section 301 of the Act and Section 94.23 of the Rules and repeated violations of Sections 1.17 and 1.65 of the Rules. Second, Liberty's proposal in the Joint Motion for Summary Decision that it should only pay a forfeiture was premised on an argument that Liberty's violations did not involve intentional misconduct, but the record does not support such a finding. Third, Liberty's violations were serious, willful, recent, and repeated throughout most of its history as an OFS licensee, and involved the reckless, if not knowledgeable, actions of the individual who, at all relevant times, served as its President and Chief Executive Officer. Cf. Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179, 1227-1228 (1986) (subsequent history omitted) (Commission considers willfulness, frequency, and currentness of the behavior, as well as its seriousness, the participation of owners and managers, and other relevant factors in weighing licensee misconduct); see also 1990 Character Policy Statement, 5 FCC Rcd 3252, 3253 (1990) (all licensees are required to tell the truth to the Commission).

65. Although Liberty does not deny that the unauthorized operations occurred or its responsibility for them, and initiated its own internal investigation that disclosed the full extent of its unlawful operations, its remedial measures were also of limited impact. Price, Nourain, and Ontiveros were disciplined for their actions only to the extent of being reprimanded and receiving no annual bonuses. By contrast, in other cases involving remedial acts, our action was based upon the removal from ownership and control positions of those responsible for misconduct. See, e.g., PCS 2000, L.P., 12 FCC Rcd at 1688-89 (disqualification not warranted where applicant expeditiously removed CEO responsible for misrepresentation and second official who was aware of misconduct but did not disclose it); Faulkner Radio, Inc., 88 F.C.C. 2d 612, 618 (1981) (renewal conditioned on total exclusion of wrongdoer from station operations); Teleprompter Cable Systems, Inc., 40 FCC 2d 1027

[6] The ALJ declined to assess a forfeiture because "the condition for Liberty's willingness to pay a substantial forfeiture" -- i.e., a finding that the violations resulted from mere negligence or inadvertence -- "has not been met." I.D., ¶ 131. Were the Commission to determine that a forfeiture was warranted, however, the ALJ believed that a forfeiture amount significantly greater than that proposed or agreed to by Liberty would be appropriate. Id.; see n. 5, supra.

(1973) (no disqualification in case involving criminal misconduct where applicant took rehabilitative step of hiring new management and board members).

66. Liberty also temporarily suspended billing for the nineteen paths that were prematurely activated, at least until it received interim authority from the Commission. More significantly, Liberty adopted a compliance program, naming its in-house counsel as Compliance Officer and requiring him to certify to an FCC license check list and to verify that the Commission has stamped "granted" on a pending application before approving commencement of service. I.D., ¶ 75; Joint Motion, at 20; Time Warner/Cablevision Exh. 67, Att. A; tr. 2371. The effect of this program, however, is diminished by Liberty's current status. As a result of its asset sale to Freedom in March 1996 (see n. 1, supra), Liberty now only provides OFS transmission service to Freedom, which in turn provides video programming directly to customers. According to Price, Liberty currently is involved only in maintaining the microwave network, is not applying for licenses, and has no knowledge of what licensing procedures Freedom is using. Tr. 2207.

67. Liberty argues that there could be an adverse "impact on competition in New York and the possible displacement of Liberty's current subscribers" if its applications are denied. Request for Oral Argument at 2-3. We disagree. The Bureau informs us that, since Liberty's asset sale to Freedom, Freedom has filed applications for new microwave licenses to provide video programming in New York City, including service along the same paths that are the subject of this proceeding. According to the Bureau, although RCN, Freedom's parent, could conditionally activate these paths under 47 C.F.R. § 101.31(e), it has advised the Bureau that it will await the Bureau's action on its pending applications. Bureau Opposition to Request for Oral Argument at 5-6. Assuming grant of these applications, therefore, the competitive implications of denial of Liberty's OFS applications would appear to be minimal. Therefore, we direct the Bureau to expedite its processing of Freedom's applications in order to insure that there is no interruption of service to existing subscribers in New York City following the denial of Liberty's applications. We note that, with regard to twenty additional applications filed by Liberty that are not subject to this proceeding, we previously instructed the Bureau to grant those applications conditioned on the outcome of this proceeding (see n. 1, supra). We direct the Bureau to take into account our findings here in the disposition of those applications and, if appropriate to its deliberations, to take into consideration the views of the respective parties. [7]

68. Finally, in light of Liberty's willful and repeated failure to comply with Section 301 of the Act in connection with the unauthorized operations involving nineteen buildings identified in the HDO, we conclude that a forfeiture should be imposed pursuant to 47 U.S.C. § 503(b). The statutory maximum under 47 U.S.C. § 503(b)(2)(C) for a continuing violation is $75,000 for each single violation of the Act, and we believe this is the appropriate amount to be assessed here in view of the serious magnitude of the infractions. As we have stated previously, "the Commission has had no reservation about imposing the maximum authorized penalty when the circumstances of a case warrant

[7] Those applications were granted "subject to the outcome of the hearing designation order and notice of opportunity for hearing WT Docket No. 96-41." See, e.g., Order, File Number 9508718556, Call Sign WPJA950 (WTB March 11, 1996).

such a sanction." Centel Cellular Co., 11 FCC Rcd 10800, 10806 (1996) ($2,000,000 forfeiture for failure to obtain FAA tower approval and failure to light tower); see also PCS 2000, L.P., 12 FCC Rcd at 1717-18 (maximum forfeiture of $1 million for misrepresentation); A T & T Communications, 10 FCC Rcd 1664 (1995) (maximum $1,000,000 forfeiture for continuing violation of Section 201(a)). The amount in this case was determined after consideration of the factors set forth in 47 U.S.C. § 503(b)(2)(D), including the nature, circumstances, extent, and gravity of the violations.[8] We find no downward adjustment factors present. See 47 C.F.R. § 1.80. The total forfeiture is $1,425,000.[9]

69. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 U.S.C. §503(b), Liberty Cable Co., Inc. SHALL FORFEIT to the United States the sum of one million four hundred and twenty five thousand dollars ($1,425,000) for willful and repeated violations of 47 U.S.C. § 301. Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the Federal Communications Commission, within forty (40) days of the release date of this order, to Federal Communications Commission, P.O. Box 73482, Chicago, IL. 60673-7482.

70.. IT IS FURTHER ORDERED, That the Motion to Strike filed July 24, 1998 by Liberty Cable Co., Inc. IS DENIED; the Request for Prompt Disposition filed March 2, 1999 by Time Warner Cable of New York City and Paragon Communications IS DISMISSED; and the subject applications of Liberty Cable Co., Inc. for private operational fixed microwave service authorization and modifications in New York City ARE DENIED.

71. IT IS FURTHER ORDERED, That Liberty IS AUTHORIZED to continue interim operation of the subject OFS facilities until 12:01 A.M. on the ninety-first day following the release date of this Decision; PROVIDED, however, that if Liberty seeks reconsideration or judicial review of our Decision, it is authorized to continue to operate these facilities until final disposition of all administrative and/or judicial appeals.

FEDERAL COMMUNICATIONS COMMISSION

[8] In a recent notice of apparent liability for forfeiture issued for operating numerous unlicensed microwave paths, the Commission assessed a base forfeiture amount of $200,000, which it reduced to $100,000 because of mitigating factors, including the licensee's prior compliance with FCC licensing requirements and its voluntary disclosure of unlicensed operations in its applications and STA requests. See Preferred Entertainment, Inc., 14 FCC Rcd 11105 (1999). No such mitigation evidence is present here. The record in this case discloses, inter alia, a history of unlicensed operations and a lack of candor in STA requests and other filings with the Commission.

[9] This forfeiture, together with the $80,000 forfeiture previously imposed by the ALJ in connection with Liberty's failure to obtain a franchise for its hard wire interconnections (see ¶ 6, supra), brings the total monetary forfeiture imposed in this proceeding as a result of Liberty's infractions to $1,505,000.

Magalie Roman Salas
Secretary