

## II. BACKGROUND

1. On December 9, 1994, the Commission adopted an order in this proceeding (herein referred to as the "Standstill Order") against the respondent, Liberty Cable Company, Inc. ("Liberty"), "requiring no additional cable or closed transmission interconnections of buildings not commonly owned, controlled or managed; that where service is not currently being provided, that no new subscribers be serviced through such hard-wired interconnection absent common ownership, control or management; . . ." (Official Transcript of Proceedings, at p. 84.) In the Matter of Time Warner Cable of New York City and Paragon Cable - Manhattan regarding the operations of Liberty Cable Company, Inc. (Docket No. 90460) (December 9, 1994).

2. On October 26, 1995, we issued a Further Order to Show Cause in this docket against Liberty for the apparent violation of the Standstill Order. In the Further Order to Show Cause, we described a complaint filed October 3, 1995 by Time Warner Cable of New York City and Paragon Cable Manhattan ("Time Warner"), parties to this proceeding, and the results of an independent investigation on October 12, 1995 by the Commission's technical staff of premises situate at 22 West 66th Street, a condominium known as the Europa, in the Borough of Manhattan in the City of New York. Time Warner had alleged in its complaint that an interconnection by coaxial cable had been made by Liberty at the Europa in August or September of this year in violation of the Standstill Order.

3. Based on staff's investigation, which confirmed the allegations of the complaint, we concluded that "[i]t fully appears that Liberty is engaged in the operation of a cable television system by the interconnection by wire of two buildings -- 10 West 66th Street and 22 West 66th Street -- which are not commonly owned, controlled or managed." We directed Liberty "to show cause, in writing, by not later than Monday, November 6, 1995 at 5:00 p.m., why the connection by hard wire of the building at 22 West 66th Street in the Borough of Manhattan, City of New York, and the provision of cable service thereto, should not be determined to constitute a violation of the Commission's Standstill Order of December 9, 1994 in this docket."

4. Liberty, by its attorney in this proceeding, W. James MacNaughton, filed a timely Response of Liberty Cable Company, Inc. to the Further Order To Show Cause dated November 6, 1995 ("Response"). Liberty's Response includes an Affidavit of Andrew Berkman, General Counsel of Liberty, sworn to November 6, 1995 ("Berkman Affidavit"). Attached to the Berkman Affidavit, as an exhibit, is a copy of a Supplemental Filing to Emergency Petition for a Stay by Time Warner dated September 28, 1995, and filed by Time Warner in proceedings pending at the Federal Communications Commission ("FCC") concerning requests by Liberty for special temporary operating authority for private

operational fixed microwave radio service under Part 94 of the FCC's rules and regulations.<sup>1</sup>

5. In its Response, Liberty contends, first, that its ". . . provision of video programming service to the Europa via the hard wire connection to 10 West 66th Street is authorized by federal statute, regulation and administrative (FCC) precedent." Response, at p. 2. Second, Liberty claims that the "Standstill Order is only enforceable insofar as it is consistent with Federal law[.] . . ." and, therefore, "Liberty's provision of service to the Europa by a hard wire connection does not violate. . . [the]. . . Standstill Order." Id. In this regard, Liberty asserts that the Standstill Order is preempted by federal law to the extent it is inconsistent therewith.

6. With respect to the first contention, Liberty admits that 10 West 66th Street and the Europa are connected by hard wire, that video programming distributed in each building by wire is received via microwave atop 10 West 66th Street and that the buildings are not commonly owned, controlled or managed. Liberty claims, however, that its relationship with the Europa is such that there is no violation of the Standstill Order. Specifically, Liberty states that its relationship with the Europa is based on a bulk agreement whereby Liberty sells video programming services to the Europa's "owner" and the owner then "sells and distributes" or "distributes" the programming to individual residents using internal wiring owned entirely by the condominium.<sup>2</sup> In sum, Liberty's position is that it is merely a "wholesaler" of programming to the Europa, that it has no subscribers of its own in the Europa and, therefore, it is not operating a cable system at such location. Liberty goes on to state that "[n]either does this arrangement mean that Liberty is operating a 'cable system' either at 10 West 66th Street alone or at 10 West 66th Street and the Europa combined." Id., at 4. In this regard, Liberty asserts that it serves "subscribers" only at 10 West 66th Street for which it is entitled to the private cable exemption and, by implication, that the Europa or the owner of

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<sup>1</sup> Liberty employs operational fixed microwave services ("OFS") to distribute programming from its central headend to rooftop reception antennae for ultimate delivery via coaxial cable within multiple unit buildings, infra, ¶ 14.

<sup>2</sup> In its Response, Liberty asserts that the "owner" of the condominium "sells and distributes" the programming services to individual residents. . . . (Emphasis added) Response, at p. 3. In the Berkman Affidavit, it is stated that "[t]he owner of the Europa distributes the programming service it purchases from Liberty to the individual residents of the building. . . ." (Emphasis added) Berkman Affidavit, at p. 3.

the Europa is also entitled to a separate private cable exemption for the internal wiring at the condominium.

7. Having claimed that its operations at both locations do not constitute a cable system under federal law, Liberty maintains that the Commission's "authority to impose any penalty under the Standstill Order or any state law is preempted by the federal Cable Act and the FCC's interpretation of the Act." *Id.*, at 6. Liberty relies on two rulings by the FCC to support its claim that it is here a wholesaler of programming and, as such, has no subscribers. Report and Order in the Matter of Definition of a Cable Television System, MM Docket No. 89-35, FCC 90-340, adopted October 11, 1990; released December 21, 1990 ("Definitional Order"); and Memorandum Opinion and Order in the Matter of Petition of Walt Disney Company for Waiver of Program Access Rules, CSR-4197-P, DA #94-843, adopted August 1, 1994, released August 3, 1994, by the Chief, Cable Services Bureau ("Disney Order"). Liberty also states that the Commission "must also decline Time Warner's attempt to have two cable regulatory agencies deal with the same issue at the same time[.]" *Id.*, at n. 2. (In short, Liberty here is essentially contending that the Commission is without jurisdiction to make any ruling or take any action at this time under the Standstill Order which would be adverse to it.)

8. We have also received from Rubin, Baum, Levin, Constant and Friedman, Counsel to Time Warner in this proceeding, a Reply of Time Warner Cable of New York City and Paragon Cable Manhattan to the Response of Liberty Cable Company, Inc., dated November 13, 1995 ("Reply"). In its Reply, Time Warner maintains that Liberty's defenses to the Further Order to Show Cause are without merit and should be rejected. Time Warner presents three arguments. First, it contends that even if Liberty must have a subscriber in every building to which it provides video programming service, Liberty has failed to submit the necessary supporting documentation for the Commission to conclude that it does not have subscribers at the Europa. In this regard, Time Warner also questions the characterization by Liberty that a condominium has an "owner."<sup>4</sup> Time Warner also seeks to dispel notions advanced by Liberty that the ownership of the internal wiring is material to the definition of a cable system and that the residents of multiple unit buildings that receive cable service under bulk rate agreements are

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<sup>3</sup> The terms "private cable exemption" or "private cable exclusion" are used herein to refer to the exemption from cable system status found in 47 U.S.C. § 522(7)(B). This exemption is also sometimes referred to herein as the MATV or SMATV exemption.

<sup>4</sup> Time Warner notes ". . .that in condominiums the unit owners own all of the common elements (which normally comprise everything on the premises except the interiors of apartment units) as tenants in common . . .[citations omitted]. . . .Accordingly, if Liberty has a contract with the 'Owner,' that entity (or collectivity) must logically embrace unit owners who reside at the Europa and receive Liberty's service for their own consumption and not for further distribution or resale -- i.e., subscribers." Reply, pp. 4, 5.

somehow not subscribers. With respect to the FCC's Definitional Order relied on by Liberty, supra, ¶ 7, Time Warner states that the "FCC's reference to the delivery of programming to a hotel was not an interpretation of 'subscriber' calculated to remove from regulation all portions of cable systems serving ordinary residential apartment buildings pursuant to bulk rate contracts." Reply, at p. 9.

9. Second, Time Warner argues that it is irrelevant whether Liberty has "subscribers" at the Europa because it is the interconnection of SMATV facilities by hard wire that constitutes a cable system. After noting that Liberty does have subscribers at 10 W. 66th Street, Time Warner states that "[n]owhere in the Definitional Order does the FCC state that a cable operator must have current 'subscribers' in every one of the buildings that is interconnected by closed transmission paths in order for such facility to constitute a cable system." Id., at 13. Time Warner observes that if the existence of bulk rate contracts were dispositive then it and every other franchised cable operator would be free to declare portions of their cable systems exempt from regulation as a cable system. Time Warner notes, of course, that the FCC has ruled otherwise.<sup>5</sup>

10. Finally, Time Warner maintains that the Commission has primary jurisdiction to police its own Standstill Order and that such jurisdiction is both consistent with case law (decided prior to the enactment of the Cable Communications Policy Act of 1994 ("Cable Act")) cited in Liberty's Response and with judicial rulings under the Cable Act that have concluded that Congress clearly intended franchising authorities to have a primary role in the regulation of cable television.<sup>6</sup>

### III. DISCUSSION

11. For purposes of this order, we accept as truthful that the Europa at 22 West 66th Street is a condominium, that Liberty provides a package of video programming by bulk agreement to the condominium, that the condominium owns all wiring within the building and that Liberty does not bill directly, or receive

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<sup>5</sup> A cable operator may offer SMATV service only if offered ". . . in accordance with terms and conditions of the cable franchise agreement." 47 C.F.R. §76.501(c)(2). See, 47 U.S.C. § 533(a)(2).

<sup>6</sup> We also note that Time Warner claims that while Liberty argues to this Commission that the FCC should determine the legal effect of its operations at the Europa, Liberty has taken the opposite position at the FCC, arguing instead that issues involving the extension of service via hard wire are local issues for this Commission or the courts to decide. Reply, at pp 2, 3.

payment directly from, individual residents of the building for any video programming or equipment used to receive such programming.<sup>7</sup>

12. Section 602(7) of the Cable Act, 47 U.S.C. § 522(7) defines the term "cable system" as follows:

"cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include

(A) a facility that serves only to retransmit the television signals of one or more television broadcast stations;

(B) a facility that serves only subscribers in one or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way;

(C) a facility of a common carrier which is subject in whole or in part, to the provisions of Title II of this Act. . . [47 U.S.C. S. 201 et seq.]. . . except that such facility shall be considered as a cable system. . . [other than for purposes of section 621(c) (47 U.S.C. S. 541(c))]. . . to the extent such facility is used in transmission of video programming directly to subscribers; or

(D) any facilities of any electric utility used solely for operating its electric utility systems; . . . ."<sup>8</sup>

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<sup>7</sup> We note that we do not agree that a condominium includes a single "owner" as the term is used by Liberty, (see, Article 9B of the New York State Real Property Law) and, therefore, we are not prepared to accept the characterization of the relationship between the "owner" of the condominium and the residents of the individual units as a "sale" of video programming services. We do not believe, however, that these matters are essential to the determination of the defenses offered by Liberty.

<sup>8</sup> The term "cable service" is defined in Section 602(6) of the Cable Act to mean "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection of such video programming or other programming service;

. . . ." Section 621(b)(1) of the Cable Act, 47 U.S.C. § 541(b)(1) provides that "[e]xcept to the extent provided in paragraph (2) in subsection (f) of this section, a cable operator may not provide cable service without a franchise." The term "cable operator" is defined in Section 602(5) to mean "any person or group of persons, (A) who provides cable service over a cable system and directly or

13. In the Standstill Order, we found that Liberty was engaged in the operation of one or more cable television systems in the Borough of Manhattan, City of New York, by reason of the interconnection by hard wire (coaxial cable) of two or more multiple unit buildings that were not commonly owned, controlled or managed. As part of the Standstill Order, we required the company to provide a then current listing ". . . of all hard wire interconnected buildings throughout the five boroughs with an indication of which of these interconnections there is intended to be asserted an exemption because of common ownership, control or management." Official Transcript, at 84-85. Under cover of letter dated December 19, 1994, from Liberty's counsel, Liberty provided a list which included 12 pairs of buildings and one group of three buildings for a total of 14 interconnections.<sup>9</sup>

14. Also, during December, 1994, Liberty brought suit in the U.S. District Court in the Southern District of New York against the City of New York and the Commission. Liberty Cable Co., Inc., et al. v. City of New York and New York State Commission on Cable Television, et al., 94 Cir. 8886 (S.D.N.Y. filed March 13, 1995) (Order Dismissing Certain Claims and Denying Motion for Preliminary Injunction), aff'd 60 F.3d 961 (2d Cir. 1995). In support of its motion for preliminary injunction and temporary restraining order in that action, Liberty submitted an affidavit of its President, Peter O. Price, in which Mr. Price described for the court the precise nature of the company's operations. See, Affidavit of Peter O. Price, sworn to December 20, 1994. ("Price Affidavit") As described to the court, Liberty "distributes" or "provides" or "delivers" "cable-[television] service as defined in 47 U.S.C. §522(6) to residents in multiple unit buildings" or "to multiple unit buildings" in the greater New York metropolitan area using satellite and microwave technology, but not public property. Price Affidavit, ¶¶ 3-5. More particularly, Liberty's business involves the receipt of satellite and broadcast

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through one or more affiliates owns a significant interest in such cable system; or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system." Finally, the term "franchise" is defined in subdivision (9) of Section 602 to mean ". . . an initial authorization, or renewal thereof. . . issued by a franchising authority. . . which authorizes the construction or operation of a cable system."

<sup>9</sup> In four instances, Liberty noted that the "[l]ocation is not a 'cable system' as defined in 47 U.S.C. §522(7) by operation of 47 U.S.C. § 522(7)(B)." In two instances, where one of the interconnected buildings was identified as a "hotel," Liberty noted that the "[l]ocation is not a 'cable system' because service is not provided to 'subscribers,' as defined by the Federal Communications Commission in I/M/O definition of a cable television system, 5 FCC Red. 7638 (1990)." (The list -- with redactions -- is set forth as Appendix A to this order.)

television signals at a single headend facility and the transmission of such signals by microwave in the 18 GHz frequency to multiple rooftop antennae.<sup>10</sup> *Id.* at ¶ 6.

15. The Price Affidavit includes specific descriptions of how "Liberty's microwave reception antennae, located on the rooftops of multiple unit dwellings in the City, deliver cable service to building residents using three configurations[.]. . . [n]one of. . . [which]. . . use public property." *Id.* at ¶ 7. The three configurations are the "Stand Alone System," the "Common System" and the "Non-Common System."<sup>11</sup>

16. In a "Non-Common System" configuration, which is unlawful without a cable television franchise, and is at issue in this docket:

"Liberty utilizes a single microwave reception antenna located on the roof of a multiple unit dwelling to deliver cable service to two or more multiple unit buildings located nearby which are not commonly owned, controlled or managed. As with the 'Common System' configuration, coaxial cable is used to link the building with the antenna to the other building(s), without using public property." *Id.* at ¶ 10.

This is precisely the situation previously found by Commission staff to exist at two locations (Order to Show Cause in this docket, released August 23, 1994) and admitted by Liberty to exist at said locations plus five additional locations. It is also the same type of "configuration" that exists with respect to the Europa.

17. Liberty contends that even though the Europa is interconnected to 22 West 66th Street by hard wire that transmits cable service and that the buildings are not commonly owned, controlled or managed, that such

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<sup>10</sup> The 18 GHz frequency is licensed by the FCC. *supra*, ¶ 4. The Price Affidavit stated that "Liberty has secured from the FCC all licenses necessary to operate the service. . . ." ¶ 6. The affidavit was later amended on July 31, 1994 and it further appears from Exhibit 1 to the Berigman Affidavit that Liberty did not possess all necessary FCC licenses.

<sup>11</sup> The "Stand Alone System" is described as follows: "Liberty utilizes a single microwave reception antenna to deliver cable service to the residents of the single building where the antenna is located." *Id.* at ¶ 8. In a "Common System" configuration, "Liberty utilizes a single microwave reception antenna located on the roof of a multiple unit dwelling to deliver cable service to two or more proximate multiple unit buildings under common ownership, control or management. Coaxial cable is used to link the building with the antenna to the other buildings without using public property." *Id.* at ¶ 9. These "configurations" fall within the private cable exclusion in § 602(7)(B) as construed by the FCC and are not at issue in this docket except to the extent that issues of fact and law may exist with respect to existence of "common management" in a particular situation.

interconnection is consistent with federal law. This argument, of course, transcends the traditional analysis of whether a particular video distribution system qualifies for the SMATV exemption, as well as Liberty's heretofore primary justification for its activities, to wit, that it only uses private property and, therefore, should not be required to obtain a franchise.<sup>12</sup> It relies on the word "subscribers" in the definition of cable system and, as noted, the actions by the FCC in its Definitional Order and by the FCC's Cable Services Bureau in the Disney Order<sup>13</sup>. We discuss the Disney Order first.

18. At issue in the Disney Order, was the application of the FCC's program access rules, 47 C.F.R. §§ 76.1000-76.1003. Petitioner, the Walt Disney Company, sought a waiver from the FCC of the program access rules with respect to the vertical integration of a "program distribution system" operated by the Madeira Land Company, Inc. ("Madeira"), a wholly-owned subsidiary of petitioner, at the Walt Disney World Resort Complex near Orlando, Florida. Madeira owned a program distribution operation that served approximately 12 hotels -- ten of which were owned by affiliates of the Walt Disney Company -- and 230 "backstage" sites

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<sup>12</sup> In its suit against the Commission and the City of New York, Liberty claims, *inter alia*, that the franchise requirement when applied to its operations on private property violates its first amendment rights. The court ruled that the first amendment issue is not ripe for determination and dismissed the claim. Liberty has appealed the decision.

<sup>13</sup> It should be noted here that the provision of some cable service by Liberty on a bulk-billing or wholesale basis is hardly novel. In the suit pending in federal district court, Liberty submitted an affidavit of then co-plaintiff, Bud Holman, sworn to December 19, 1994, in support of a motion for preliminary injunction. ("Holman Affidavit") Mr. Holman, as president of a "... non-profit New York corporation which owns a 360 unit residential co-op building at Sixty Sutton Place South," and a resident of the co-op, describes Liberty's relationship with the co-op since 1992 as follows:

"8. Liberty provides its basic cable television service to all Sutton Building residents on a 'bulk' billing basis pursuant to the . . . Contract. 'Bulk' billing means that Sixty Sutton purchases the basic cable television programming service from Liberty. Sixty Sutton, in turn, bills the tenant-stockholders for the cost of Liberty's basic cable television service as part of the tenant-stockholder's monthly maintenance fee.

9. I and other Sutton Building residents contract directly with Liberty to receive 'premium' cable television services. These premium services are delivered over the same system as the 'basic' cable television service. . . ." Aff., at ¶¶ 8, 9.

Accepting, as we have, Liberty's statement that it has no direct relationship to residents at the Europa, it may be assumed either that Liberty does not offer premium services to residents of the Europa or that they are provided as a part of the "package" for which all residents must pay.

at the Walt Disney World Resort Complex. Liberty quotes from footnote 18 in the Order as if to imply that the FCC found that Madeira's operation was not a cable system. In fact, the conclusion of the FCC's Cable Services Bureau was the opposite: ". . .the Madeira system is technically a cable system and. . . Madeira is technically a cable operator, . . ." Disney Order, ¶ 11. The Cable Services Bureau did find that because of the "unique circumstances" the "Madeira system simply is not now, in reality and as a practical matter, the kind of distribution system the program access rules were designed to reach." Id. ¶ 11.

19. The FCC's Definitional Order was prompted by two federal district court decisions<sup>14</sup> which "raised significant questions" about the FCC's then existing interpretation of the SMATV exemption in 47 U.S.C. §522(7)(B) and "other prevailing interpretations" of the Cable Act. Definitional Order, ¶ 3. See, also Notice of Rulemaking, in the Matter of Definition of a Cable Television, MM Docket No. 89-35, adopted February 1, 1989, released March 3, 1989. In the Definitional Order, the FCC modified its interpretation of the SMATV exemption to the effect that all ". . .facilities interconnected by physically closed transmission paths would meet the statute's threshold requirement for a cable system." Definitional Order, ¶ 34. It also clarified that radio services are not "closed transmission paths" and that the use of radio services does not constitute the use of a public right-of-way. It further clarified that the use of radio services only with closed transmission paths located wholly within individual buildings or between commonly owned, controlled or managed buildings did not create a cable system under the Cable Act.<sup>15</sup> In adopting these and other general principles for applying the statutory definition, the FCC expressed its belief that such principles ". . .should provide ample guidance and interpretations of the statutory term and, in our view, will significantly dispel the confusion that has arisen." Definitional Order, ¶ 34.

20. Liberty quotes from ¶ 32 of the order. Paragraph 32 provides in full as follows:

"We note, however, that for an operation to be defined as a cable system it must have 'subscribers.' Although the term 'subscriber' is not a defined term in the Cable Act, it is now and was defined at the time of passage of the Cable Act in the Commission's Rules as 'a member of the general public who receives broadcast programming distributed by a cable television system

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<sup>14</sup> City of Fargo v. Prime Time Entertainment, Inc., 1988 U.S. Dist. LEXIS 16506, at \*8 (D. N.D. 1988); Pacific & Southern Co., Inc. v. Satellite Broadcast Networks, Inc., 694 F. Supp. 1563 (N. D.Ga. 1988).

<sup>15</sup> As noted, this interpretation is not at issue in this proceeding. supra, n. 12.

and *does not further distribute it.*' [fn. omitted] Thus, for example, if video service is delivered to hotels for resale by these establishments over internal MATV wiring to lodgers, then that service provider (*i.e.*, the party delivering programming to the hotels) has no 'subscribers' as that term is defined in the Commission's Rules. Because providing service 'to multiple subscribers within a community' is a critical element in the statutory definition, such an operation -- if it operates as a wholesaler and has no 'subscribers' of its own -- may not come within the cable system definition. We note, moreover, that hotels are within the exemption for multiple unit dwellings and, as clarified herein, where more than one such multiple unit building is interconnected only by radio transmission or other non-closed transmission facilities or use closed paths but are commonly owned and have no street crossing), such an entity is not a cable system. [fn. omitted]" (Emphasis in original).

21. Liberty claims that this paragraph, including the definition of "subscriber" in FCC rules, 47 C.F.R. § 76.5(ee), protects its interconnection of the Europa, a condominium, not a hotel, from our Standstill Order because, as noted, it is a mere "wholesaler" of video programming to the condominium and doesn't have subscribers therein. We disagree. To paraphrase the FCC's characterization of the issue in the Disney Order, the "kind of distribution system" described by Liberty with respect to 10 West 66th Street and 22 West 66th Street is not "the kind of distribution system" that is exempt from the definition of a cable system, or that the FCC intended to exempt in its Definitional Order.<sup>16</sup>

22. Liberty's argument fails because it neglects the fact that the statute does not require Liberty to have subscribers of its own at every building interconnected to its wire or reception antenna. The definition of "cable system" in 47 U.S.C. § 522(7) includes three elements. A "cable system" is a (1) a facility that (2) actually provides video programming, *i.e.*, cable service, to (3) multiple subscribers. The admissions by Liberty that it owns a reception antenna atop 10 W. 66th St and that video programming received at the antenna is distributed by wire to subscribers in the building satisfy all three elements of the definition. If the "cable system" at 10 W. 66th St. was used only to provide cable service only to residents of the building then Liberty or the building owner, or both, could properly

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<sup>16</sup> Of course, the FCC is without authority to modify a definition that is clear and unambiguous. See, ACLU v. FCC, 823 F.2d 1554 (D.C. Cir. 1987), cert denied, 108 S.Ct. 1220 (1988).

claim the SMATV exemption. But once video programming received at the antenna site is distributed by wire beyond 10 W. 66th Street, neither Liberty, nor the owner of 10 W. 66th St., can satisfy the SMATV exemption. The fact, as confirmed by Liberty in its Response, that video programming received at its reception antenna atop 10 W. 66th St. is delivered by wire to the Europa for ultimate distribution to subscribers, *i.e.*, the residents of the Europa, is sufficient, by itself, to prove that the provision of cable service within the Europa is ineligible for exempt status. Whether or not the residents of the Europa are Liberty's subscribers, they are subscribers. They receive video programming selected by Liberty and distributed to them by wire from another non-commonly owned, controlled or managed multiple unit building where Liberty also provides cable service.

23. In addition, although Liberty's Response is silent on the issue, Liberty has previously admitted to this Commission in its list of interconnections filed December 19, 1994, as ordered in the Standstill Order, that 10 West 66th Street, itself, is interconnected by wire to another non-commonly owned, controlled and managed building.<sup>17</sup> Thus, the facility providing service at 10 W. 66th St. was non-exempt at the time Liberty connected to the Europa. The entire facility, then, is a cable system and Liberty cannot show, as required for the SMATV exemption, that the ". . . facility serves only subscribers in one or more multiple unit dwellings under common ownership, control or management, . . ."<sup>18</sup> Liberty is also unable to demonstrate that it or each affected building owner is eligible for any of the other exemptions in 47 U.S.C. §522(7).

24. Liberty would apply the statutory definition to various "parts" of a video distribution facility based on its particular relationship to each "part" and, it appears, the location and ownership of each "part" to determine whether a cable system exists. The statute does not provide for such analysis. Initially, we note that the statute does not require that a "cable system" be under common ownership. The term "cable operator" is defined, in part, to mean "any person or group of persons (A) who provides cable service over a cable system. . ." 47 U.S.C. §522(5). Further, the definition of "cable system" enacted by Congress in 1984 specifically omitted language in the FCC's definition at that time which required the "set of closed transmission paths and associated signal generation and control equipment. . ." to

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<sup>17</sup> Liberty's failure to address here its previous admission of a non-exempt unlawful cable system at 10 West 66th Street is most troublesome. Liberty has an ongoing responsibility to advise the Commission of changes in circumstances affecting the scope of its unauthorized cable systems, particularly, if such previously illegal interconnections involve buildings at issue in our Further Order to Show Cause and, therefore, comprise a material factor in this case.

<sup>18</sup> A literal reading of this language reveals that, in order to meet the SMATV exemption, a cable system must serve "only subscribers." By Liberty's account, the facility at W. 66th Street serves both "subscribers" (in 10 W. 66th St.) and non-subscribers (the "owner" of the Europa).

be under "common ownership and management." The FCC noted the significance of the statutory definition in this regard when it amended its rules to conform to the Cable Act:

"With regard to limiting the definition to include only a single cable operator per cable system, we feel that the definition of a cable operator [in the Cable Act] is intentionally broad and that a cable system may have more than one operator. According to the definition, any person who 'provides cable service' and 'owns a significant interest' in a cable system. . . would be a cable operator. . . Report and Order in the matter of Amendment of Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984, MM Docket No. 84-1296, Released: April 19, 1985, at ¶ 9, 58 RR 2d 1, 6." (Emphasis added).

It is apparent, therefore, that a plain reading of the pertinent definitions in the Cable Act is sufficient to determine the merits of Liberty's Response. The provision of cable service at the Europa as described by Liberty involves a cable system, neither Liberty nor the Europa is eligible for the SMATV exemption, and Liberty's connection of the Europa by hard wire is a direct violation of the Commission's Standstill Order.

25. Although not essential for our determination, we shall address, in detail, Liberty's reliance on the Definitional Order. First, it is doubtful that Congress intended to adopt the definition of "subscriber" in Section 76.5(ee) of the FCC's rules which is central to Liberty's argument. While it is true that the word "subscribers" is used numerous times throughout the Cable Act and is not itself, defined therein, it is also true that the word is not always used in the Cable Act when referring to "cable service" or "cable system." For example, in Section 602(12) of the Cable Act, 47 U.S.C. § 522(12), as amended, Congress defined the term "multichannel video programming distributor" as follows:

". . . a person such as, but not limited to, a cable operator, a multichannel multi-point distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase by subscribers or

customers, multiple channels of video programming; . . .  
.. (Emphasis added).<sup>19</sup>

The fact that Congress used the term "cable subscribers" rather than "subscribers" in various sections of the Cable Act, e.g. 47 U.S.C. §§ 542, 551, is additional evidence that it did not intend to adopt the FCC's definition.

26. Second, even if the FCC's definition of "subscriber" provides the meaning of the word as used in the definition of "cable system" in the Cable Act and that all FCC interpretive rulings are relevant to the proper application of the statute, Liberty has overstated the significance of a single paragraph in an FCC order. In its Definitional Order, the FCC included a "summary of conclusions" (¶ 5) and a "conclusion" (¶ 34). In neither paragraph did the FCC refer to the wholesale-retail distinction as it relates to the term "subscribers." In paragraph 5 the FCC stated unequivocally that "[i]f multiple unit dwellings are connected to each other by physically closed transmission paths, such SMATV or MATV systems are cable systems unless the buildings are under common ownership, control, or management and do not use public rights-of-way." In paragraph 34, it stated with equal clarity that "where a wire or cable is used to interconnect MATV or SMATV equipped buildings, the system is a cable facility unless the several buildings are commonly owned, controlled, or managed and the system's physically closed interconnection paths do not use a public right-of-way."<sup>20</sup> These conclusions are fully consistent with the extensive analysis of the "closed transmission path" requirement in paragraphs 6 through 22 of the Definitional Order and of the "private cable exclusion" in paragraphs 23 through 30 thereof. When Paragraph 32 is considered in the context of the entire Definitional Order, it is clear that the

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<sup>19</sup> This language supports our analysis of the "cable system" definition herein. It was added to the Cable Act by the Cable Television Consumer Protection and Competition Act of 1992. It represents legislative intent either that (1) anyone to whom a cable operator makes video programming available for purchase is a "subscriber" or (2) a cable system may have "customers" in addition to "subscribers." In either case, Liberty's reliance on the wholesale-retail distinction fails. Moreover, since the word "customer" was not defined in FCC rules and is not defined in the Cable Act, the juxtaposition of the two words in the same definition is strong evidence that Congress did not consider either of them to be technical words but, rather, words to be used with their ordinary and common meanings. The word "subscriber" is defined as "to enter one's name for a publication or service; also to receive a periodical or service regularly on order." Webster's New Collegiate Dictionary 1161 (8th ed. 1973).

<sup>20</sup> In its Reply, Time Warner quotes from ¶ 19 of the same order where the FCC stated: "[t]he fact that each of the apartment buildings served may own the terminating cable pathways within its confines is not determinative of [the applicant's] status as a cable television system. It is the interconnection of each separately owned apartment building which qualifies [the applicant] as a cable television system." Definitional Order, at ¶ 19, quoting from Video International Productions, Inc. (Cable Television Bureau, May 12, 1981) (italics in original).

"wholesale-retail" distinction is subordinate to, indeed is an adjunct of, a distinction the FCC was making to contrast a hotel, *i.e.*, transient occupancy, with a permanent dwelling, *i.e.*, residence. Not mentioned by Liberty, is the fact that the FCC recognized the importance of this distinction in the Disney Order where its refusal to conclude that the Madeira system was not a cable system included consideration of the fact that Madeira had reported plans to serve residents of the area in addition to hotels. Disney Order, n. 18, ¶ 13.

27. Additional evidence of the FCC's intent with respect to its own definition was contained in the First Report and Order, in Docket 20561, FCC 77-205, adopted March 9, 1977, released April 6, 1977. ("First Report and Order"). In the First Report and Order, the FCC modified its then existing definition of cable television system, in part, by substituting for "wire and cable" the term "set of closed transmission paths." In this context, it adopted for the first time, a separate definition of the term "subscriber." The FCC stated that its amended definition of cable system had the advantage of technical neutrality. The FCC was also clear as to the intent of the new definition of "subscriber." It stated its purpose as follows:

"To assure that the technological neutrality of the amended definition is not interpreted to include such non-cable television broadcast station services as Multi-point Distribution Systems, common carrier network-to-affiliate-stations program transmission links, telephone leased-back arrangements or other specialized common carrier services, . . ." Id. at ¶ 19.

There is no basis in these purposes for a finding here that Liberty should benefit from a "wholesale-retail" distinction involving residential cable service. Liberty is not a telephone company or any other type of common carrier. Its use of OFS microwave to provide video is not at issue. Liberty may install as many rooftop satellite dishes or seek as many OFS licenses from the FCC as it may need to sell its programming or serve its subscribers. What Liberty may not do is use wire or cable, or cause buildings to be interconnected by wire or cable, for the purpose of providing cable service across property boundaries unless the buildings are commonly owned, controlled or managed or it has a cable franchise. In other words, when Liberty seeks to offer service by wire to the community at large rather than individual or commonly owned multiple unit buildings, its business is indistinguishable from a cable system and the FCC intended that it be treated the same as a cable system under the law. Nothing in the Cable Act or the FCC's Definitional Order or Disney Order changes this result.

28. The same order contains additional evidence that the FCC did not intend the definition of "subscriber" to have the effect urged by Liberty. As part of the change in its definition of cable television system, the FCC eliminated as an

element of its definition the distribution of broadcast signals by wire or cable to ". . . subscribing members of the public who pay for such service. . . ." (Emphasis added). Discussing this change, the FCC noted that it had interpreted this language since 1966 to include indirect as well as direct payment and it quoted from its Notice of Rulemaking in which it stated:

"In short, we have not found the manner of payment to be of jurisdictional significance. For definitional purposes, it does not matter whether the payment is separate or combined with the general service, recreational, or rental fee, whether the payment is made directly or through some intermediary such as a home owners association, whether the payment is in the form of a capital contribution or service fee, or whether the bulk payment is made for a number of subscribers rather than an individual payment for each subscriber." Id. at ¶ 40.

29. Later, in the same order, after reiterating its preference that the term cable television system be defined as a "technical entity," the FCC enumerated a number of additional reasons that the manner and method of payment should not be an element of the definition.

"The first reason is totally pragmatic - a cable television system of transmission paths which distributes television signals, and the manner in which it is financed is irrelevant to our regulatory objectives. Equitably speaking, we decline to treat one system differently from another based on distinctions on how they meet their costs. We concur with those parties who caution against the creation of an exception for indirect payment which would be susceptible to abuse. Lastly, while we are sympathetic to certain operators of multiple housing units who seek to avoid regulation, it is better to create exceptions for such entities on grounds which are more valid than the standard of 'payment,' and this is accomplished infra., in connection with the subjects of exemption level, small cable systems and MATV systems." Id. at ¶ 42. (Emphasis added).

From this language, two conclusions are inescapable: (1) the FCC intended that residents of multiple housing units such as the Europa that receive broadcast signals (and other video programming) by wire are subscribers; and (2) the FCC did not intend its definition of "subscriber" to undermine the traditional criteria for the availability of the MATV/SMATV exemption to multiple unit residential buildings.

30. Finally, our discussion would be incomplete if we did not accent the radical nature of Liberty's position. If adopted, Liberty's "interpretation" of the cable system definition would transcend not only the common ownership, control and management criteria in FCC rules<sup>21</sup> for twenty years prior to the Cable Act and in Section 602(7)(B) of the Cable Act, but the "public street use" element of the statutory SMATV exemption as well. If, for example, a company such as Liberty could avoid cable system status by wholesaling video services to multiple unit dwellings, it would not matter whether the wires used to deliver services occupied public streets or not. In other words, it would not matter that the interconnection at the Europa was made by wire on private property from an adjacent building or by wire that actually crossed West 66th Street. Federal statute as viewed by Liberty would not require a cable television franchise in either case. This result would so clearly contradict a 30-year FCC policy, and Congressional intent as manifest in the Cable Act, that it is hardly surprising that it has never been seriously asserted before, to the best of our knowledge. We cannot accept such a novel construction of the law as a justification for violating our Standstill Order.

#### IV. CONCLUSION

31. It is the considered judgment of this Commission that under a plain reading of the statutory definition of "cable system" that Liberty's provision of cable service to the Europa in the manner described is clearly a cable system and that this result is fully consistent with the larger purposes of the Cable Act. Congress stated as one of the principal purposes of the Cable Act that cable systems must be ". . . responsive to the needs and interests of the local community; . . ." §601(2), 47 U.S.C. § 521(2). Once a person or entity such as Liberty provides, or becomes engaged in the provision of, video programming, *i.e.*, cable service, by coaxial cable beyond individual or commonly owned, controlled or managed residential multiple unit buildings, it is offering cable service to the larger community in the same manner as a cable system.

32. We conclude, as a matter of law, that the interconnection by wire of the Europa at 22 W. 66th St. with 10 W. 66th St. and the delivery of video programming by Liberty to the Europa by such wire without a franchise does not comport with federal law and constitutes a violation by Liberty of our Standstill Order. Residents of each building receive cable service by closed transmission path. The buildings are interconnected by wire and are not commonly owned, controlled and managed. These undisputed facts satisfy the definition of "cable system" and are inconsistent with the SMATV or any other exemption.

33. We further conclude that the Commission has both the jurisdiction and the duty to act to enforce statutory requirements for cable systems. Finding no

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<sup>21</sup> First Report and Order, Docket Nos. 14895, 15233, Adopted: April 22, 1965, 38 F.C.C. 683.

reason under the circumstances why Liberty should realize the fruits of its action, we shall order it to cease and desist from the provision of video programming to the Europa by means of the hardwired interconnection with 10 West 66th Street, within ten days of the release of this order.

34. Finally, the violation of a Commission order is a serious matter for which the imposition of forfeitures pursuant to Section 827-a of the Executive Law must be considered. We are directing Counsel to inquire as to other actions or circumstances relative to the subject violation before we make a determination with regard to such forfeitures.

#### **THE COMMISSION ORDERS:**

1. Pursuant to Sections 816 and 819 of the Executive Law, Liberty Cable Company, Inc. is hereby ordered to cease and desist from the delivery of video programming to 22 W. 66th St., a condominium known as the Europa, by wire interconnected to 10 W. 66th St. within ten days of the date of the release of this order, and to report promptly to the Commission its compliance with this order.

2. The issue of forfeitures is reserved. Counsel is delegated authority to take such action as necessary to properly advise the Commission as to such forfeitures.

3. A copy of this order shall be served upon Counsel for Liberty Cable Company, Inc. in this proceeding and the Europa Condominium by certified mail, return receipt requested.

**Commissioners Participating: William B. Finneran; Chairman; John A. Passidomo, Barbara T. Rochman, Commissioners.**

# Appendix A

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DEC 19 1994

December 19, 1994

BY TELECOPIER AND REGULAR MAIL

New York State Commission  
on Cable Television  
Attn.: Edward Kearse  
Tower Building, Empire State Plaza  
Albany, New York 12223

Re: Petition of Time Warner Cable of New York City  
and Paragon Cable-Manhattan Regarding the  
Operations of Liberty Cable Company, Inc.  
Docket No. 90450

Dear Mr. Kearse:

I am submitting the enclosed list in response to the order of the New York State Commission on Cable Television on December 9, 1994 requiring Liberty Cable Company, Inc. ("Liberty") to provide a "listing . . . of all hard wire interconnected buildings throughout the five boroughs with an indication of which of these interconnections there is intended to be asserted an exemption because of common ownership, control or management."

Liberty hereby requests, pursuant to Public Officers Law § 86(5) that this attachment be excepted from disclosure under paragraph (d) of subdivision 2 of Section 87 of Article 6 of the Public Officers Law. This attachment is derived from Liberty's operation as a commercial enterprise and its disclosure would cause substantial injury to the competitive position of Liberty. I await the promulgation of the confidentiality order discussed at the hearing on December 9, 1994 before disclosing the attachment to other parties to this proceeding.

Sincerely,



W. James MacNaughton

WJM:lw

Enclosure

cc: Martin Schwartz, Esq. (w/o encl.)  
Ralph A. Balsano, DOITT (w/o encl.)

Library Locations Interconnected by Wire<sup>1</sup>

- 1. [REDACTED]
- 2. [REDACTED]
- 3. [REDACTED]
- 4. [REDACTED]
- 5. [REDACTED]
- 6. [REDACTED]
- 7. [REDACTED]
- 8. [REDACTED]
- 9. [REDACTED]
- 10. [REDACTED]
- 11. 10 West 66th Street  
85 Central Park South
- 12. [REDACTED]
- 13. [REDACTED]

1 All locations in Manhattan.

2 Location is not a "cable system" as defined in 47 USC § 522(7) by operation of 47 USC § 532(7)(B).

3 Location is not a "cable system" as defined in 47 USC § 522(7) because service is not provided to "subscribers," as defined by the Federal Communications Commission in T/M/O Definition of a Cable Television System, 5 FCC Rcd. 7638 (1990).

**EXHIBIT B**





unauthorized paths were not disclosed to the [FCC] in response to its letter of June 12, 1995. Liberty is also directed to provide the date each unauthorized path was constructed and placed in operation..." *Id.*, at p.6.

With regard to the matter before us, of particular interest is a statement which Liberty apparently submitted to the FCC on or about July 12, 1995, in support of its application for a new microwave path license, reading in part:

"Although the receive sites located at 170 West End, 55 Central Park, 150 and 152 West 52nd Street are presently fed via hardwire connections from non-commonly owned, managed or controlled buildings located at 160 West End and 10 West 66th Street and Park [sic] Meridian, respectively, grant of the pending application will permit Liberty to convert the connection to microwave and discontinue the hardwire connection. *The facilities will not be extended by hardwire connection unless and until Liberty is authorized to make such a connection or unless such a connection is otherwise authorized by law.*" *Id.*, at p.4.

The building at 55 Central Park, fed from 10 West 66th Street, which together comprise an unfranchised "cable system", as indicated above, are facilities included in Liberty's promise to the FCC. If its license application is granted, Liberty is here asserting to the FCC, it will "convert the connection to microwave and discontinue the hardwire connection." Liberty then pledges to the FCC that the facilities here (55 Central Park/10 West 66th Street) will not be extended by hardware connection unless authorized to do so.

Liberty is apparently not easily deterred -- neither its being an illegal action, nor a violation of our "standstill" order, nor a clear breach of a commitment made to the FCC daunted Liberty from doing what it said it wouldn't do: extending these same facilities by hardwire connection, in this instance, to the Europa.

In ordering that Liberty's cease and desist its hard wire service to the Europa, this Commission noted:

"Liberty's overt actions in this matter, coupled with its lack of candor about important underlying facts, manifest a disrespect for this regulatory agency, the Federal Communications Commission, the judiciary, and the law itself -- a disrespect of a kind which this Commission, frankly, has never previously encountered. To allow Liberty to continue to prosper from its violation would be to invite a diminishment of esteem for this agency and the regulatory process,

and to abide an erosion of the integrity so essential to the Commission's functioning." "Order to Cease and Desist", p.3.

Liberty submitted to this Commission the Time Warner Supplemental Filing in Appendix A to support its assertion that we should foreswear action at this time because the matter is currently before the FCC. But this matter, as such, is not at issue before the FCC. The issue before the FCC is the issuance of OFC microwave transmission licenses, complicated by Liberty's apparent violations of FCC regulations.

The granting of microwave licenses, of course, is the sole province of the FCC. Time Warner, for its part, and in its own interest, has made filings with the FCC alleging that violations of law and regulation on the part of Liberty should disqualify it from being granted, or serve to at least condition the granting of, STAs by the FCC. Time Warner has posited to the FCC the matter herein before us -- that Liberty's hardwire connection to the Europa comprises an illegal "cable system" and violates this Commission's "standstill" order -- as yet another of these apparent violations.

Liberty could have, months ago, requested of the FCC an expedited Declaratory Ruling to determine if its "wholesaler/no subscriber" theory, which redefines what comprises a "cable system", complies with federal law. Needless to say, it is the considered judgment of this Commission, vested with the responsibility to regulate cable systems in New York, that Liberty's position is "without merit". But it is significant that Liberty has chosen not to request such ruling of the FCC.

#### IMPOSITION OF FORFEITURE

We find Liberty's behavior in this entire matter, frankly, to reflect the actions of an incorrigible telecommunications scoundrel. Its no-holds-barred legal antics, its lack of forthrightness, its disdain for respectful compliance with regulation and law, all serve -- if unchecked -- to effect a profound impairment of the regulatory process which, with its limited enforcement resources, is essentially reliant on voluntary compliance. ]

Notwithstanding the above, the Commission at this time will hold in abeyance any forfeitures with regard to Liberty's past illegal actions, i.e., its illegal hardwiring of various buildings in New York City, and even its violation of our "standstill order" in late August/early September in initially extending a hardwire interconnection to the Europa.