

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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In re Application of)	WT Docket No. 96-41	
)		
Liberty Cable Co., Inc.)	File Nos.:	Call Signs:
	)	708777	WNTT370
For Private Operational Fixed	)	708778, 713296	WNTM210
Microwave Service Authorization	)	708779	WNTM385
and Modifications	)	708780	WNTT555
	)	708781, 709426, 711937	WNTM212
New York, New York	)	709332	(NEW)
	)	712203	WNTW782
	)	712218	WNTY584
	)	712219	WNTY605
	)	713295	WNTX889
)	713300	(NEW)
)	717325	(NEW)

To: The Honorable Richard L. Sippel
Administrative Law Judge

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**WIRELESS TELECOMMUNICATIONS BUREAU'S CONSOLIDATED REPLIES TO
BARTHOLDI CABLE COMPANY, INC'S OPPOSITION PURSUANT TO ORDER
ISSUED MAY 16, 1996
AND
FREEDOM NEW YORK, L.L.C.'S OPPOSITION TO REQUESTS FOR
ENLARGEMENT OF ISSUES TO INCLUDE PURPORTED
REAL PARTY IN INTEREST QUESTIONS**

The Chief, Wireless Telecommunications Bureau (Bureau), pursuant to the Presiding Judge's *Order* issued on May 16, 1996, and released on May 20, 1996, FCC 96M-123,¹ hereby files the Bureau's consolidated replies to *Bartholdi Cable Company, Inc's Opposition Pursuant to Order Issued May 16, 1996*, filed by Bartholdi Cable Co., Inc., formerly known as Liberty

¹ The Presiding Judge, in an *Order* issued on May 23, 1996, and released on May 28, 1996, FCC 96M-127, extended the date to file this Reply from May 29, 1996, until June 4, 1996.

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Cable Co., Inc. (Liberty), on May 22, 1996, and an *Opposition to Requests for Enlargement of Issues to Include Purported Real Party in Interest Questions* filed by Freedom New York, L.L.C. (Freedom), which was also filed on May 22, 1996.

I. BACKGROUND

1. On April 22, 1996, Time Warner Cable of New York City and Paragon Cable Manhattan (collectively, Time Warner) filed a *Motion to Enlarge Issues*, which was followed by a *Supplement to Motion to Enlarge Issues* on April 29, 1996. In both filings, Time Warner sought to add additional issues to the *Hearing Designation Order* (HDO) concerning the possibility that Liberty may have illegally transferred control and ownership of its licensed facilities to a company called "Freedom."

2. On May 7, 1996, the Bureau filed its *Comments on Time Warner's Motion to Enlarge Issues*, which stated that it believed that Time Warner had established that a material and substantial question of fact exists as to whether Liberty has illegally transferred control of its facilities. The comments added that even if no unauthorized transfer of control has taken place, the Bureau, at a minimum, believed that a material and substantial question of fact exists as to who the real-party-in-interest is in Liberty.

3. Also on May 7, 1996, Freedom and Liberty each filed an *Opposition to Motion to Enlarge Issues*, to which Time Warner and the Bureau filed replies on May 14, 1996. The

² In an obvious attempt to minimize the significance of the Bureau's *Comments on Time Warner's Motion to Enlarge Issues*, Freedom refers to the Bureau's Comments as being the "staff's" comments. However, the Bureau trial staff has full authority to speak for the Bureau in the matters before this tribunal. And for the issues concerning the *Motion to Enlarge*, the trial staff had specific authority and approval of senior Bureau staff and the Bureau Chief. Accordingly, the *Comments* and this *Reply* are not "staff" comments, but instead, comments of the Bureau.

Bureau's *Consolidated Replies*, filed that day, stated that the Bureau was unable to state a position in support of or in disagreement with whether Liberty has transferred control and ownership to Freedom of its microwave facilities, because the Bureau lacked sufficient information concerning the transfer in order to determine whether or not Liberty complied with the Commission's Rules. However, it reiterated that, in its belief, Time Warner has raised substantial and material questions of fact as to who possesses the real control of Liberty.³

4. In Freedom's and Liberty's May 22, 1996, *Oppositions* to the enlargement of the issues in the HDO, they both set the framework for the transformation that Liberty has made from the entity that it was until February 20, 1996, to the entity that it has become since that time. First, Liberty and Freedom claim to have availed themselves of the provisions in Part 94 of the Commission's Rules which allows Liberty, as a licensee, to act as a private carrier, to offer to Freedom the service necessary to maintain the network transmission under certain conditions. In exchange for these services, Freedom pays Liberty a certain fee. Then Liberty and Freedom argue that the documents which they released to the Bureau and Time Warner on May 20, 1996,⁴ and specifically, the Asset Purchase Agreement, the Transmission Services Agreement and the Subcontractor Agreement, clearly show that Liberty has not transferred control of its Commission licensed microwave facilities, and in particular, those which are at issue in the instant proceeding. Liberty maintains that pursuant to the Transmission Services Agreement, Freedom has no ownership of, or control over, the microwave authorizations used to provide service to the subscribers it "purchased" from Liberty pursuant to the Asset Purchase Agreement. Further,

³ The Bureau's *Consolidated Replies* to Liberty's and Freedom's *Opposition* at 5.

⁴ See Letter and attachments from Michael Baker, Esq. to Judge Sippel dated May 20, 1996.

Liberty states its OFS licenses and related transmission and reception equipment were expressly excluded from the transaction. Finally, Liberty claims that it satisfies the *Intermountain Microwave*⁵ test to show that it, rather than Freedom, is the real-party-in-interest of Liberty's operation.

II. DISCUSSION

A. Transfer of Control

5. Liberty is correct in its explanation that the microwave services at issue are governed exclusively by Part 94 of the Commission's Rules which expressly allows "[l]icensees of radio stations authorized under this part [to] offer service on a for-profit private carrier basis."⁶ Liberty claims that it meets the four conditions set out at Section 94.17(a), 47 C.F.R. § 94.17(a), and thus, it is authorized to be a private carrier.

6. If Liberty is a private carrier for purposes of Section 94.17(a), and if, as stated above, Liberty continues to own and control the Commission authorizations needed to provide the transmission services, and continues to own and operate the necessary network transmission and reception equipment,⁷ the Bureau would agree that the issues in the HDO do not need to be enlarged to determine whether Liberty illegally transferred control of its licenses to Freedom. The Rules do specifically allow the type of asset transfers which Liberty and Freedom effected. However, the party offering transmission facilities must retain control of those facilities.⁸

⁵ 24 Rad. Reg. (P&F) 2d 983 (1963).

⁶ See 47 C.F.R. § 94.17.

⁷ See May 7, 1996, *Opposition*, at 5-6, and May 22, 1996, *Opposition*, at 13.

⁸ See 47 C.F.R. § 94.17(a)(2).

Accordingly, before the Bureau can ascertain with any certainty that no illegal transfer occurred, it must resolve the questions of transfer of control and real-party-in-interest which it has raised in its May 7, 1996, *Comments*, but not yet thoroughly discussed.

7. Traditionally, transfer of control inquiries center around whether ownership has been transferred from one entity to another, while real-party-in-interest inquiries are relevant to who is in actual control and operation of the systems at issue. In *Ellis Thompson Corporation*,⁹ a case that Liberty cites as one in which the "Bureau recently has had occasion to discuss and apply the *Intermountain Microwave* factors at length,"¹⁰ the issue before the Commission was not ownership, as Mr. Thompson maintained his 50.1% ownership of his application for a cellular license, but rather who really controlled the licensee's system as it became operational.

8. After reviewing the Transmission Agreement and the Asset Purchase Agreement, in light of *Ellis Thompson*, it appears to the Bureau that, at least as it appears on the face of those documents, Liberty still owns the microwave licenses at issue in this proceeding. Therefore, the Bureau is no longer supporting the enlargement of issues to include whether there has been a transfer of control from Liberty to Freedom.

9. Importantly, however, if Liberty does not actually *control* these facilities, then it is *not* in compliance with Section 94.17 of the Commission's Rules, 47 C.F.R. § 94.17, upon which it relies for viability. Of the four conditions listed at 47 C.F.R. § 94.17(a), the most significant provision for analysis purposes is subsection (c), which states that the "licensee must maintain

⁹ 10 FCC Rcd 12554 (I.D. 1995) (Summary Decision of Administrative Law Judge Joseph Chachkin).

¹⁰ May 22, 1996, *Opposition*, at 11.

access to and control over all facilities authorized under its license." This is the essence of the issue of whether or not Liberty is the real-party-in-interest, or whether Freedom actually has control of the microwave facilities at issue. Asked another way, has Liberty "retained exclusive responsibility for the operation and control of the facilities"¹¹ to avoid a violation of section 310(d) of the Communications Act?¹²

B. Real Party in Interest

10. Having found that Liberty's and Freedom's transfer comports with the Commission's Rules, the Bureau's remaining concern is in weighing the evidence to determine whether Liberty has maintained control over the facilities as required by the Rules, or whether it has relinquished control.

11. Both Liberty's and Freedom's *Oppositions* are particularly weak on the issue of who is in control of the licenses held by Liberty. Both parties are correct that the proper standard from which determine who is in control are the criterion established in *Intermountain Microwave*. The six factors of the *Intermountain* test are:

¹¹ See Stephen Sewell, *Assignments and Transfer of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934*, 43 Fed. Comm. L.J. 277, 317 (1991), citing *Intermountain Microwave, supra*, at 984.

¹² This provision of the statute reads, in pertinent part:

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

47 U.S.C. § 301(d).

- (1) Does the licensee have unfettered use of all the facilities and equipment?
- (2) Who controls the daily operations?
- (3) Who determines and carries out the policy decisions, including preparing and filing applications with the Commission?
- (4) Who is in charge of employment, supervision, and dismissal of personnel?
- (5) Who is in charge of the payment of financing obligations, including expenses arising out of operating?
- (6) Who receives moneys and profits from the operation of the facilities?

See Ellis Thompson Corporation, 9 FCC Rcd 7138, 7138-39 (1994) (*Ellis Thompson HDO*).

12. The weakness in Liberty's and Freedom's *Oppositions* comes from the fact that neither provides any support for their arguments of how Liberty has retained control under each of the *Intermountain* factors other than to refer to provisions in the various contracts, particularly the Subcontractor Agreement. This information is not determinative of the issue of control. As the U.S. Court of Appeals for the D.C. Circuit has recognized, "Commission precedent declares that *actual* control is the touchstone of the *Intermountain* test. *Telephone and Data Systems, Inc. v. FCC*, 19 F.3d 655 (D.C. Cir. 1994) (emphasis added). In other words, the contracts are helpful in so far as they demonstrate who has the legal right to take action as to the facilities; however, the contracts are useless in assisting in a resolution of who is actually taking actions as to the facilities.

13. The Commission has already learned that it cannot rely entirely on the provisions of agreements when deciding issues pertaining to control. In the *La Star Cellular Telephone Company* proceeding, the Commission was proffered a Joint Venture Agreement which indicated that control would be vested in the majority, wireline eligible party. However, after a hearing

on the issue, it was determined that the parties did not follow the formalities of the agreement and that actual control rested in the hands of the minority, noneligible party. *See La Star Cellular Telephone Company* 9 FCC Rcd 7108 (1994).

14. Moreover, the Subcontractor Agreement relied on so extensively by Liberty and Freedom was entered into on May 14, 1996, which is at least a week *after* the issue of real-party-in-interest was first raised by the Bureau. Because control of the facilities must be held by Liberty *at all times*, and not just after that control has been questioned, the lateness of the Subcontractor Agreement begs the question of what occurred prior to the execution of the Agreement.

15. Liberty's attempts to compare the instant situation with the one that existed in *Ellis Thompson* is misplaced. In that proceeding, the Bureau joined Ellis Thompson Corporation and American Cellular Network in a Motion for Summary Decision in a matter designated to determine whether Ellis Thompson, through Ellis Thompson Corporation, was the real-party-in-interest behind the cellular application for the Atlantic City market. After over 125,000 pages of documents were produced and 13 witnesses deposed, the Bureau became confident that Mr. Thompson had retained control.¹³ The Bureau did not rely only on the contracts between the parties.¹⁴ Here, not only has there been no discovery on the issue rivaling the scope covered in

¹³ *See Ellis Thompson Corporation*, 10 FCC Rcd 12554 (I.D. 1994).

¹⁴ The history of the *Ellis Thompson* proceeding further shows the inappropriateness of Liberty's reliance. The Commission initially granted the application of Ellis Thompson Corporation and denied a petition alleging that Mr. Thompson had relinquished control. *See Ellis Thompson Corporation*, 7 FCC Rcd 3932 (1992). The issues raised against Ellis Thompson Corporation, which the Commission initially dismissed, concerned agreements Mr. Thompson had entered into with American Cellular. The U.S. Court of Appeals for the D.C. Circuit reversed and remanded that decision as not consistent with Commission precedent. *Telephone and Data*

Ellis Thompson, but there has been *no* discovery whatsoever. In fact, we have nothing more than the contracts and some answers to Interrogatories to rely on in weighing the *Intermountain* factors.

16. In short, the Bureau believes that the *Oppositions* filed by Liberty and Freedom fall far short of demonstrating that Liberty is now, and has at all times been, in control of the licensed and applied-for OFS facilities. However, the burden is not on Liberty and Freedom; the burden is on the Bureau and Time Warner to establish that a substantial and material question of fact exists as to the real-party-in-interest behind the applications and licenses. Therefore, the Bureau will apply the only the limited facts known to the Bureau to the *Intermountain* factors in order to determine whether such a question has been established. It should be noted that control is determined by examining the totality of the circumstances. Therefore, failure on one point could, depending on the circumstances, be sufficient to determine that control has been abdicated.

1. Unfettered Use.

17. Both Liberty and Freedom argue that the Asset Purchase Agreement and the Subcontractor Agreement allow Liberty unfettered use and access of the facilities. However, we lack sufficient information to determine whether or not this is in fact the case. Despite the fact that Freedom now controls the programming for the video services transmitted by Liberty's facilities, based on the information which we do possess, we have no reason to believe that

Systems, Inc. v. FCC, supra. The court illustrated concern that the Commission was applying the *Intermountain* factors in the *Ellis Thompson* proceeding to determine *legal* control instead of *actual* control. *Id.* at 49. Accordingly, upon remand, the Commission determined that a substantial and material question of fact existed as to whether Mr. Thompson was in control and designated the real-party-in-interest issue for hearing. In the instant situation, we again lack the specificities necessary in order to make the required determinations with any confidence as to who holds *actual* control: the contracts only demonstrate *legal* control.

Liberty would be denied access to any of the OFS transmission or receiving facilities.

2. Day-to-Day Operations.

18. For this factor, the parties rely on the contractual provisions purporting to demonstrate that Liberty is in control of the daily operations of the facilities. Once again, however, the Bureau lacks any additional information from which to verify whether Liberty and Freedom are following the requirements of the cited contractual provisions. The Bureau believes that there remain certain questions concerning whether Liberty is in fact the party in control of the day-to-day operations. Virtually all of Liberty's employees, with the exception of some sales and customer service personnel, now work for Freedom.¹⁵ All of Liberty's former technical and maintenance staff are now Freedom employees. Accordingly, the employees responsible for designing, constructing and maintaining Liberty's OFS facilities do not work for Liberty. While it is true that Liberty has entered into an agreement whereby Freedom is "hired" by Liberty to perform these tasks and under which Liberty purportedly could "fire" Freedom if it fails to perform adequately, without any more information, it is impossible for us to ascertain the level of control over the day-to-day operations which may have been retained by Liberty.

3. Policy Decisions.

19. Again, Liberty and Freedom rely exclusively on contractual terms to demonstrate that Liberty has retained control of its facilities. While it is true that the contracts give Freedom no ownership interest in the facilities, the contracts do contemplate Freedom eventually assuming control of them. Moreover, because Freedom has "purchased" the subscribers served by Liberty's

¹⁵ In answers to the Bureau's *First Set of Interrogatories*, Liberty disclosed to the Bureau that it currently has only 13 employees, while 136 former employees of Liberty now work for Freedom. See Liberty's *Supplemental Response*, filed April 26, 1996.

facilities, the Bureau finds it difficult to believe that Liberty is free to do anything to the facilities which Freedom may perceive as diminishing the value of the operations. Moreover, because most of the former Liberty employees, save a few sales and customer service people, now work for Freedom, it would appear that the personnel to whom Liberty would turn to for advice on policy decisions are now in Freedom's employ.

20. Additionally, Freedom has applied for some OFS microwave paths on its own.¹⁶ It is difficult to imagine that these facilities are going to be managed any differently than those licensed to Liberty, especially considering the fact that they are being run by the same people and for the purpose of distributing the same programming to subscribers.

21. As to this factor, the Bureau certainly has some serious concerns regarding who is making the policy decisions affecting the facilities. However, the Bureau is unsure whether those questions rise to the level of being "substantial and material" as required by the Act in order to designate the issue.

4. Personnel Responsibilities.

22. Although Freedom maintains Liberty's facilities, the parties rely on the contractual provision giving Liberty power to remove any employee from the subcontractor should good cause exist. Once again, the Bureau is unconvinced that the contracts between Liberty and Freedom alone suffice to demonstrate that Liberty is the real-party-in-interest. First, although Liberty contractually has the right to *remove* an employee of the subcontractor, Freedom

¹⁶ See, e.g., Applications for Station Authorization in the Private Operational Fixed Microwave Radio Service Nos. 725634 (filed April 11, 1996); 725635 (filed April 11, 1996); 725639 (filed April 11, 1996); 725640 (filed April 11, 1996); 725641 (filed April 11, 1996); 725642 (filed April 11, 1996); 725643 (filed April 11, 1996).

apparently has the sole responsibility of *hiring* the employees in the first place. Second, the fact that Liberty currently only has 13 people in its employ troubles the Bureau under this factor as well. As mentioned previously, the current employees of Liberty are largely sales and customer service personnel. However, the Bureau is unsure of why Liberty would need to maintain a sales and customer service staff since it sold its subscribers to Liberty. From the information currently before the Bureau, it appears as though Freedom's staff is doing Liberty's job of running the system and Liberty's staff is doing Freedom's job of signing up new customers. This confusion does little to alleviate the questions held by the Bureau of whether Liberty has remained the real-party-in-interest.

5. Financial Obligations.

23. Liberty and Freedom again cite to specific provisions in the contracts which they allege places all financial obligations on Liberty. It is certainly true that in this instance, Liberty is not obligated to repay any financial contributions made by Freedom.¹⁷ Therefore, apparently it is Liberty that bears the financial risks, and as such, this factor would tend to indicate Liberty has retained control.

24. However, as Time Warner indicated in its *Reply to Opposition to Motion to Enlarge*, both Liberty and Freedom use checks bearing the name of "Liberty Cable." As Liberty explains it, however, the checks are drawn on separate accounts and Liberty has never had any access to the account used by Freedom.¹⁸ Although the use of checks by Liberty and Freedom bearing the

¹⁷ The repayment of financial contributions is a critical factor considered by the Commission when applying the *Intermountain* factors. See, e.g., *La Star Cellular Telephone Company, supra* (Minority, ineligible party paid all expenses for the prosecution of application).

¹⁸ *Liberty Opposition* at 22, n.47.

same company name raises questions, Liberty's explanation at first blush, appears reasonable. However, once again, the Bureau lacks sufficient facts to make an informed determination on the issue.

6. Receipt of Monies and Profits.

25. The Subcontractor Agreement requires Freedom to pay Liberty all monies and profits derived from the operation of the system. There is nothing before the Bureau to demonstrate that the relevant provisions are not being followed. Because under Liberty's and Freedom's arrangement, Liberty is apparently no longer providing the service to subscribers *per se*, but instead is providing the transmission facilities for Freedom to provide video service to subscribers, it does not matter whether the individual subscribers now make payments to Freedom as long as Freedom makes payments to Liberty. Therefore, the analysis under this factor would not indicate that Liberty has relinquished control of the facilities.

7. Totality of the Circumstances.

26. After examining the little information we possess regarding who the real-party-in-interest is behind Liberty's applications and licenses, the Bureau believes there are several questions concerning whether Liberty has maintained control. For instance, based on the fact that Liberty no longer has any technical or maintenance staff, we have definite questions regarding Liberty's ability to maintain and control the facilities on a day-to-day basis and make policy decisions affecting those facilities. But because we have very little information to draw upon, we cannot answer those concerns to our satisfaction.

27. However, although the Bureau does have certain questions concerning the control of the facilities in question here, the Bureau is not confident that those concerns rise to the level

necessary to be deemed "substantial and material" as required for the addition of an issue.¹⁹ Therefore, the Bureau cannot take a position on whether the issue should be added. However, the Bureau intends upon initiating its own investigation pursuant to Section 308(b) of the Communications Act of 1934, as amended, in order to obtain more information from Liberty and Freedom. Therefore, we request that the presiding officer delay a decision on the Motion to Enlarge while we investigate the issue further. Once the Bureau obtains the necessary additional information through a Section 308(b) investigation, it should at that time, be able to, with confidence state whether we believe a material and substantial question of fact exists as to whether Liberty is the real-party-in-interest behind its OFS applications and licenses.

For the foregoing reasons, the Chief, Wireless Telecommunications Bureau hereby states that the Bureau is no longer supporting the Motion to Enlarge as to the transfer of control issues

¹⁹ See, e.g., *Astroline Communications Limited Partnership v. FCC*, 857 F.2d 1556, 1561-62 (D.C. Cir. 1988); 47 U.S.C. §§ 309(d), 309(e).

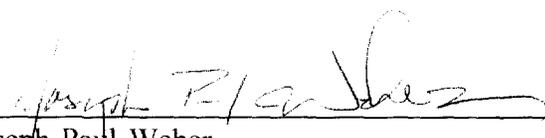
and takes no position as to the real-party-in-interest issue, but nonetheless requests that the Bureau be given time to do a further investigation

Respectfully submitted,

WIRELESS TELECOMMUNICATIONS BUREAU

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June 4, 1996

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CERTIFICATE OF SERVICE

I, Mark L. Keam, in the Enforcement Division, Wireless Telecommunications Bureau, certify that I have, on this 4th day of June, 1996, transmitted by facsimile and sent by regular First Class United States mail, copies of the foregoing "Wireless Telecommunications Bureau's Consolidated Replies to Bartholdi Cable Company, Inc.'s Opposition Pursuant to Order Issued May 16, 1996 and Freedom New York, L.L.C.'S Opposition to Requests for Enlargement of Issues to Include Purported Real Party in Interest Questions," to:

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