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Before the

FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In Re Applications Of	)	WT DOCKET NO. 96-41	
	)		
	)	File Nos :	
LIBERTY CABLE CO., INC.	)	708777	WNTT370
	)	708778, 713296	WNTM210
For Private Operational Fixed	)	708779	WNTM385
Microwave Service Authorization	)	708780	WNTM555
and Modifications	)	708781, 709426, 711937	WNTM212
	)	709332	NEW
New York, New York	)	712203	WNTW782
	)	712218	WNTY584
	)	712219	WNTY605
	)	713295	WNTX889
	)	713300	NEW
	)	717325	NEW

To: The Honorable Richard L. Sippel  
Administrative Law Judge

**JOINT MOTION BY BARTHOLDI CABLE CO., INC., AND WIRELESS  
TELECOMMUNICATIONS BUREAU FOR SUMMARY DECISION**

CONSTANTINE & PARTNERS  
Robert L. Begleiter  
Eliot Spitzer  
Yang Chen  
909 Third Avenue  
New York, New York 10022

WILEY, REIN & FIELDING  
Robert L. Pettit  
Michael K. Baker  
Bryan N. Tramont  
1776 K Street N.W.  
Washington, D.C. 20006

CHIEF, WIRELESS  
TELECOMMUNICATIONS BUREAU  
Joseph Paul Weber  
Katherine C. Power  
Mark L. Keam  
Wireless Telecommunications Bureau  
Federal Communications Commission  
2025 M Street, N.W., Rm. 8308  
Washington, D.C. 20554

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## SUMMARY

### **I. THE RECORD DEVELOPED AFTER FULL DISCOVERY IN THIS PROCEEDING REVEALS NO MATERIAL ISSUES OF FACT TO BE TRIED ON THE ISSUES DESIGNATED FOR HEARING IN THIS CASE**

On March 5, 1996, the Federal Communications Commission ("Commission") released an order designating issues for hearing relating to the qualifications of Liberty Cable Co., Inc. ("Liberty")<sup>1</sup> as an applicant for certain private operational-fixed microwave service ("OFS") licenses. *Hearing Designation Order and Notice of Opportunity for Hearing*, FCC No. 96-85, WT Docket No. 96-41 (released Mar. 5, 1996) (the "HDO"). The HDO seeks to determine Liberty's qualifications to be granted the OFS licenses in light of facts and circumstances

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<sup>1</sup> Liberty, now known as Bartholdi Cable Co., Inc., is a multichannel video programming distributor ("MVPD") that operates satellite master antenna television ("SMATV") systems in the New York metropolitan area. Signals carrying video programming are received at a satellite master antenna and distributed in a "hub and spoke" configuration to transmitting and receiving antennas located on rooftops of multiple dwelling units. In a small percentage of cases, Liberty further transmits the cable signal via hardwire interconnections to buildings on the same block as a building with a microwave receiver antenna. Liberty provides service by microwave to approximately 160 buildings (JX 1) and service by hardwire interconnections to the thirteen buildings listed in Appendix B of the HDO. (Numbers following "JX" refer to the exhibits submitted jointly by Liberty and the Wireless Telecommunications Bureau in support of the Joint Motion for Summary Decision.)

Liberty provides service to over 25,000 subscribers (JX 1). Time Warner Cable of New York City, Paragon Cable Manhattan and Cablevision of New York City - Phase I, the franchised cable operators in New York that are parties to this proceeding, are direct competitors of Liberty. They serve over 1,000,000 subscribers.

As the Presiding Judge is aware, prior to March 1996, Liberty serviced its own customers and subscribers. In March 1996, the customers were sold as part of an asset sale to Freedom New York, L.L.C. As a consequence of the sale, Liberty now provides microwave transmission services to Freedom New York, which in turn provides video programming services to its customers.

surrounding (1) Liberty's hardwire interconnection of Non-Common Systems<sup>2</sup> without first obtaining a cable television franchise; (2) Liberty's premature activation of microwave facilities serving nineteen buildings without appropriate Commission authorization; and (3) Liberty's alleged lack of candor before the Commission, as manifested by seemingly inconsistent statements of Behrooz Nourain, Liberty's engineer.

Pursuant to paragraph 33 of the HDO, the Wireless Telecommunications Bureau (the "Bureau"), Time Warner Cable of New York City and Paragon Cable Manhattan (together, "Time Warner") and Cablevision of New York City - Phase I and Cablevision of Hudson County, Inc. (together, "Cablevision") were made parties to this proceeding. All parties participated in the exhaustive discovery in this case including the depositions of eight current and former employees of Liberty, two of the owners of Liberty, and four agents and consultants of Liberty; further, approximately 16,000 pages of documents were produced by Liberty, and Liberty answered numerous interrogatories.

After extensive and expedited discovery, the record in this proceeding demonstrates that Liberty operated Non-Common Systems without receiving a local franchise, prematurely activated service to nineteen buildings, and submitted statements that, while ostensibly contradictory, are in fact consistent when considered in context.

However, the record also amply establishes, without contravention, that any violations of Commission rules by Liberty were unintentional and that Liberty always sought to be

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<sup>2</sup> The term "Non-Common Systems" refers to the configuration by which Liberty provided video programming to its customers by hardwire interconnection of multiple dwelling units that were not commonly owned, controlled or managed. Liberty's Non-Common Systems did not use any public property or rights-of-way.

forthright and candid with the Commission. Liberty's violation of cable franchising requirements resulted from a misunderstanding about the legal consequences of providing service to customers by hardwire interconnections. The premature activations that Liberty openly admitted to the Commission resulted from a failure to supervise properly Behrooz Nourain, who misunderstood the scope of his responsibilities.

After a review of the record, both the Bureau and Liberty agree that, upon discovery of the violations at issue, Liberty acted promptly to address the violations and established a compliance program that was carefully designed to avoid any future violations of applicable law, rules and regulations. Therefore, the Bureau and Liberty submit that there are no material issues of fact in controversy relating to the issues designated in the HDO.

While Liberty's violations are admittedly serious, the uncontroverted material facts show that Liberty's acts do not justify a finding that Liberty is not qualified to be granted the licenses that are at issue in this proceeding. The Bureau and Liberty agree that in light of the facts revealed in this proceeding, Liberty should not be denied the OFS licenses. Such a denial would be contrary to the Commission's policy statement issued *In the Matter of Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986) (the "*Character Policy Statement*") and relevant Commission precedent. Rather, the appropriate remedy is for Liberty to pay a substantial forfeiture for its violations. The Bureau and Liberty have determined that the appropriate forfeiture in this proceeding is Seven Hundred and Ninety Thousand Dollars (\$790,000.00). The Bureau and Liberty now move pursuant to 47 C.F.R. § 1.251 for a finding that (i) Liberty should not be disqualified from holding the

licenses at issue; (ii) Liberty should be granted its license applications; and (iii) Liberty should be assessed the aforesaid forfeiture.

## **II. THE UNCONTESTED FACTS ON THE ISSUES DESIGNATED FOR HEARING**

The uncontroverted record relating to Liberty's use of hardwire interconnection establishes that Liberty's principals believed, in good faith, that all hardwire connections not traversing public rights-of-way were legal and did not require a franchise from the local franchising authority. Consequently, Liberty believed that it could lawfully serve buildings by hardwire interconnections, which, in any event, represented only a small fraction of its overall system.

When the legality of Liberty's hardwire connections was questioned, Liberty believed in and asserted the propriety of its legal position, and raised a constitutional challenge to the "cable system" definition then embodied in the federal law.<sup>3</sup> Further, as noted at paragraph 12 of the HDO, the definition of a "cable system" was amended by Congress this year to delete the common ownership requirement. In view of these and other factors delineated below, Liberty and the Bureau believe that a total forfeiture of \$80,000 is the appropriate penalty for hardwiring non-commonly owned buildings.

With respect to premature service to the nineteen buildings listed in Appendix A of the HDO, the uncontroverted record establishes that:

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<sup>3</sup> In the event that this Joint Motion is denied, Liberty reserves the right to re-assert its legal position that the "cable system" definition in Section 602(7)(B) of the Communications Act of 1934, as amended, 47 U.S.C. § 522(7)(B), prior to the amendment to that definition by the enactment of the Telecommunications Act of 1996, violated the First Amendment.

- Nobody in Liberty's senior management was aware of, encouraged, or in any way condoned the provision of service before appropriate authorization had been obtained from the Commission;
- the premature activations resulted from the failure of Liberty's Director of Engineering, Behrooz Nourain, to understand his responsibility with respect to licensing and the failure of Liberty's management either to supervise Nourain properly or define for him the scope of his duties;
- while the evidence demonstrates that Time Warner initially revealed to the Commission the premature activation of service to two of the buildings at issue, Liberty in short order candidly informed the Commission of another seventeen instances of premature activation;
- Liberty thereafter established a compliance program designed to insure that there would be no further non-compliance with applicable law, rules and regulations; and
- harm to the public resulting from the premature service was minimized because (i) there was no interference with the operation of other licenses; and (ii) Liberty stopped charging customers for the period from discovery of premature activation until authorization was received from the Commission.

In view of these and other factors delineated below, the Bureau and Liberty believe that a forfeiture of \$710,000 for premature activation of service is the appropriate penalty.

With respect to the alleged inconsistent statements, the uncontroverted record establishes that:

- There was no intent on Nourain's part to mislead the Commission;
- the initial statement of Nourain to the effect that he knew of Time Warner's petitions to deny was made in the context of litigation, then pending in the United States District Court for the Southern District of New York, pertaining to the hardwired buildings. Nourain's statement referred specifically to Time Warner's objections to paths that were sought to replace the hardwire connections in the event that Liberty was compelled to cease service through the Non-Common Systems configuration;
- the second statement of Nourain, made to the Bureau three months thereafter, to the effect that he had just learned of the Time Warner petitions to deny, referred to the larger universe of petitions to deny every pending application filed by Liberty, and not just the petitions to deny relating to the paths intended to replace the hardwires; and

- both statements were submitted to the Commission. The earlier statement was served on the United States Attorney, who was representing the Commission in the pending federal court litigation. Indeed, the office of the Commission's General Counsel was an active participant in that litigation. The second statement was submitted directly to the Bureau. Since it was intended and expected that both statements be received by the Commission, there could not possibly have been any intent to hide either statement from the Commission or to benefit from any inconsistency.

### **III. LIBERTY IS QUALIFIED TO BE A COMMISSION LICENSEE**

From these uncontested facts, there can be no question that Liberty meets the character qualifications to be a licensee. The key test under the *Character Policy Statement* is whether an applicant "will deal truthfully with the Commission and comply with the Communications Act . . . ." 102 FCC 2d at 1183. The evidence establishes that Liberty will satisfy both prongs of this test.

The public interest is served by promoting competition. Liberty, as an alternative MVPD using the 18 GHz band, promotes competition consistent with the Commission's stated policies. Should Liberty be denied the licenses at issue, the state of competition would suffer and several thousand customers would lose access to the MVPD of their choice.

Finally, the substantial forfeiture being proposed by the Bureau and Liberty provides a sufficient penalty and deterrent to insure future compliance.

Accordingly, Liberty's pending applications for OFS licenses, captioned in the HDO, should be granted, Liberty should not be disqualified and Liberty should be ordered to pay a forfeiture penalty in the total sum of \$790,000.

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To: The Honorable Richard L. Sippel  
Administrative Law Judge

**JOINT MOTION BY BARTHOLDI CABLE CO., INC., AND THE WIRELESS  
TELECOMMUNICATIONS BUREAU FOR SUMMARY DECISION**

Pursuant to 47 C.F.R. § 1.251, Bartholdi Cable Co., Inc., formerly known as Liberty Cable Co., Inc. ("Liberty"), together with the Chief, Wireless Telecommunications Bureau (the "Bureau"), hereby move the Presiding Judge for summary decision on the issues designated for hearing in this case as set forth below. As discussed below, the prior written record and evidence developed through discovery in this proceeding demonstrate that no genuine issues of material fact are presented requiring a hearing. In support hereof, the following is respectfully shown:

## STATEMENT OF FACTS

### I. THE HEARING DESIGNATION ORDER

1. On March 5, 1996, the Federal Communications Commission (“Commission”) released an order designating issues for hearing relating to the qualifications of Liberty Cable Co., Inc. (“Liberty”) as an applicant for certain private operational-fixed microwave service (“OFS”) licenses. *Hearing Designation Order and Notice of Opportunity for Hearing*, FCC No. 96-85, WT Docket No. 96-41 (released Mar. 5, 1996) (the “HDO”). The HDO sought to address “substantial and material questions of fact concerning [Liberty’s] qualifications to be granted the above-referenced applications . . . [and] whether Liberty engaged in misrepresentation before the Commission in connection with these applications.” HDO at ¶ 1.

2. The HDO, at paragraph 27, instructed the presiding Administrative Law Judge to expedite these proceedings to the greatest extent possible consistent with due process. The HDO, at paragraph 38, also directed the Bureau to grant Liberty interim operating authority for the captioned applications. Further, the HDO required the Bureau to grant Liberty’s other pending applications and condition “those (and future) grants on the outcome of this proceeding.” HDO at ¶ 39.

3. On March 11, 1996, the Chief Administrative Law Judge issued an Order, FCC 96M-34 (released Mar. 13, 1996), appointing Administrative Law Judge Richard L. Sippel to serve as Presiding Judge, and a hearing date was set for June 25, 1996. On March 13, 1996, the Presiding Judge issued an Order, FCC 96M-36 (released Mar. 15, 1996) which set May 24, 1996 as the deadline for completion of all discovery.

4. Pursuant to paragraph 33 of the HDO, the Bureau, Time Warner Cable of New York City and Paragon Cable Manhattan (together, "Time Warner") and Cablevision of New York City - Phase I and Cablevision of Hudson County, Inc. (together, "Cablevision") were made parties to this proceeding. On March 19, 1996 Time Warner filed a Notice of Appearance as a party in this proceeding, and on March 22, 1996, Cablevision similarly filed a Notice of Appearance. Liberty filed its Notice of Appearance on March 20, 1996, and the Bureau did so on March 23, 1996.

5. On March 26, 1996, the Presiding Judge issued Order, FCC 96M-53 (released Mar. 28, 1996) (the "First Scheduling Order"), setting forth the schedule for discovery. In general, the First Scheduling Order contemplated discovery by interrogatories and document requests during the early to middle part of April 1996, followed by deposition notices to be served by the end of April. Depositions were to be taken during the month of May 1996, in Washington, D.C.

6. On March 27, 1996, Liberty served its Freedom of Information Act request upon the Commission. Pursuant to the First Scheduling Order, on April 3, 1996, Liberty served interrogatories to the Bureau, and document requests and interrogatories to Time Warner and Cablevision. Also on April 3, 1996, Liberty received separate document requests and interrogatories from the Bureau and Time Warner

7. On April 15, 1996, Liberty served its answers and objections to interrogatories and its responses and objections to the document requests. Liberty submitted extensive supplemental responses to the Bureau's interrogatories on three subsequent occasions.

8. On April 15, 1996, Liberty served approximately 15,000 pages of documents responsive to the Bureau's document demands, including many confidential and commercially sensitive documents. Based upon an interim confidentiality agreement, Liberty produced these documents, after reviewing and marking certain documents as "confidential," to Time Warner and Cablevision on an installment basis; this production was completed by April 29, 1996. Liberty further supplemented its document production during the course of discovery, and Liberty has produced approximately 16,000 pages of documents in total.

9. On April 26, 1996, deposition notices were due to be served, pursuant to the First Scheduling Order. Liberty decided not to take any depositions. None of the parties served any notices of deposition. On the same day, Time Warner submitted a Statement Regarding Present Inability To Notice Depositions. The Bureau submitted a similar statement on April 29, 1996.

10. On May 16, 1996, following a conference among the parties before the Presiding Judge, a second order was issued setting forth the schedule for the remainder of the discovery period. Order, FCC 96M-122 (released May 20, 1996) (the "Second Scheduling Order"). The Bureau, Time Warner and Cablevision were instructed to notice depositions as soon as possible. Additionally, the time for completion of discovery was extended to May 31, 1996.

11. Liberty insured the availability for depositions of potential witnesses under its control or from whom Liberty could obtain consent to be deposed. Liberty agreed to make these witnesses available throughout the month of May to be deposed in Washington, D.C., pursuant to the Scheduling Orders. On May 20, 1996, on the motion of Time Warner, the Presiding Judge ordered the sequestration of deponents. The Presiding Judge did so to insure

that the testimony would reflect the independent factual recollections of the deponents (Foy 171:2 - 172:20).<sup>1</sup> Liberty requested permission to appeal the sequestration order, which was denied (Price I 132:16 - 145:16).

12. The following individuals were deposed in Washington, D.C., over a two-week period in May: Edward Foy (May 20), Anthony Ontiveros (May 21), Andrew Berkman (May 22), Michael Lehmkuhl (May 22), Peter Price (May 28 and 31), Behrooz Nourain (May 29), Edward Milstein (May 30), and Howard Milstein (May 30). Jennifer Walden was deposed in New York City (May 23 and 24) as was Bertina Ceccarelli (May 23).

13. At the request of Cablevision and Time Warner, and over Liberty's objection, Peter Price was deposed a second time, during the morning of May 31, 1996. Discovery was also extended until June 5 to allow for depositions of Thomas Courtney and Duy Duong of Comsearch, Joseph Stern of Stern Telecommunications Corp. and Bruce McKinnon, Liberty's former Chief Operating Officer and Executive Vice President. These depositions were taken on June 5, 1996 in Washington, D.C., with McKinnon's deposition taken by telephone.

14. On June 5, 1996, the Bureau informed the Presiding Judge of its intent to join Liberty in a motion for summary decision (Courtney 78:19 - 79:7). On June 10, 1996, the Bureau, on behalf of all the parties, filed a Consent Motion for a Stay of Procedural and Filing Dates (the "Consent Motion"), so that Liberty and the Bureau could finalize a resolution of the issues in the HDO without holding a hearing and prepare a Joint Motion for Summary Decision. On June 11, 1996, the Presiding Judge ordered that the procedural dates

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<sup>1</sup> References to deposition testimony take the form deponent's last name followed by page and line number, separated by a colon.

and hearing date previously established be canceled and established a briefing schedule in accordance with the Consent Motion. Order, FCC 96M-153 (released June 13, 1996).

## **II. LIBERTY'S EMERGENCE AS AN ALTERNATIVE PROVIDER OF VIDEO PROGRAMMING, AS AUTHORIZED BY THE COMMISSION ORDER OPENING ACCESS TO THE 18 GHZ BAND**

15. In 1985, Howard Milstein, with his brother Edward (together, the "Milsteins") and their cousin Philip, founded Liberty (E. Milstein 6:22). Between 1985 and 1991, Liberty began providing satellite master antenna television (SMATV) service in buildings owned by the Milstein family in New York City and Jersey City. Because each building had its own headend, none of these video distribution systems crossed any public property or rights-of-way. During these early years, Liberty was run by Robert Schwartz, a consultant, and Anthony Ontiveros, who was General Manager (Price I 10:19 - 11:4). During this early period, the total number of Liberty SMATV subscribers did not exceed 5,000 (Price I 12:3 - 12:14).

16. In February 1991, the Commission amended its rules to permit private cable systems to have access to the private operational-fixed microwave service ("OFS") spectrum in the 18 GHz band.<sup>2</sup> This ruling enabled a private cable system like Liberty to send point-to-point transmissions from a single headend to multiple buildings using microwave antennas as receivers. By distributing video signals through microwave, Liberty could realize

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<sup>2</sup> *In the Matter of Amendment of Part 94 of the Commission's Rules to Permit Private Video Distribution Systems of Video Entertainment Access to the 18 GHz Band*, Report and Order, 6 FCC Rcd 1270 (1991) ("18 GHz Order"). Liberty submitted comments in response to the Notice of Rulemaking which culminated in the 18 GHz Order. *Id.* at 1274, App. B. A copy of these comments is included as JX 2.

significant economies and efficiencies, in comparison to the costs incurred when installing a separate satellite master antenna on each building. The cost-effectiveness and availability of increased channel capacity permitted Liberty to compete effectively as an alternative multichannel video programming distributor ("MVPD") in the New York City area against Time Warner and Cablevision (Price I 16:15 - 17:17; 18 GHz Order, 6 FCC Rcd at 1275 n. 11). *See also* 18 GHz Order, 6 FCC Rcd at 1271 ("As competition from alternative multichannel providers . . . emerges, we find that it would serve the public interest to encourage these rival operators to enter the market and to enhance their competitive potential.").

17. Peter Price joined Liberty in early 1991 (Price I 10:5 - 10:10). Price, a graduate of Princeton University and Yale Law School, held varied and prominent positions throughout his professional career, including Counsel to the New York City Taxi Commission during the administration of the Hon. John V. Lindsay, and Publisher of the New York Post and the National Sports Daily (Price I 6:20 - 6:22, 8:4 - 8:5, 9:17 - 9:18). Price, however, had not worked in the cable industry (Price I 14:3 - 14:4). At the time Price joined, Liberty had not yet begun transmission by microwave (Price I 12:15 - 12:18). Since Price was new to the telecommunications industry, he spent the first several months of his tenure learning the business (Price I 14:2 - 14:4). He had no formal or written job description; rather, his basic role was to manage and grow the business (Price I 11:13 - 12:2).

18. During the spring of 1991, Liberty began soliciting non-Milstein owned buildings as customers, intending to capitalize on the commercial and competitive potential of transmission on the 18 GHz band (Price I 20:6 - 20:10, 21:5 - 21:10). From that time

forward, the company's senior management consisted of Peter Price as President and Co-Chief Executive Officer and Howard Milstein as Chairman and Co-Chief Executive Officer (Price I 26:13 - 27:3, 29:1 - 29:4, 30:22 - 31:5; H. Milstein 6:5 - 6:7). Later, Edward Milstein assumed the titles of Vice Chairman and then Co-Chairman (Price I 28:7 - 28:16, 29:5 - 29:10, 30:22 - 31:5; E. Milstein 6:16 - 6:19). By virtue of its marketing efforts, Liberty now services in excess of 25,000 subscribers (JX 1).

### **III. LIBERTY'S MANAGEMENT STRUCTURE AND LICENSE APPLICATION PROCESS**

#### **A. Liberty's Senior Management**

19. Because the Milsteins were occupied with running and managing other substantial businesses, they dedicated only a small percentage of their time to Liberty matters (E. Milstein 9:12 - 9:18; H. Milstein 7:18 - 8:10; Price I 27:4 - 28:3, 29:13 - 30:6). Most of this time was spent at weekly staff meetings of Liberty department heads, usually held on Thursdays, where all significant issues concerning Liberty's business were supposed to be discussed (Price I 65:7 - 66:7; H. Milstein 8:11 - 8:15; E. Milstein 12:10 - 14:2). The Milsteins' management style encouraged independence and autonomy among Liberty employees, with an understanding that any issues that were new, significant or problematic were to be raised with either Milstein (E. Milstein 10:1 - 10:7; H. Milstein 9:18 - 10:7).

20. Schwartz, who ran Liberty's SMATV business before Price's arrival, was actively involved for about a year after Price began working for Liberty, but over time, Schwartz's involvement diminished (Price I 31:6 - 31:20). Price thus assumed day-to-day responsibility for Liberty's business (E. Milstein 10:8 - 10:11; H. Milstein 9:3 - 9:5).

21. In 1991, Liberty's management structure also included Bruce McKinnon who, as Executive Vice President and Chief Operating Officer, was in charge of day-to-day operations as well as installations of buildings that contracted with Liberty for service (McKinnon 5:6 - 5:19). McKinnon, prior to coming to Liberty, had extensive experience in the cable industry (McKinnon 17:14 - 18:12). Anthony Ontiveros continued to be General Manager, with overall responsibility for technical and operational matters relating to Liberty's provision of services to buildings (Ontiveros 7:1 - 7:4, 7:13 - 8:2). Ontiveros filled this position for Liberty and reported to Price up until March 1996 (Ontiveros 6:2 - 6:5; Price 32:18 - 32:19).

#### **B. The License Application Process**

22. Liberty's senior management and engineering staff were aware that a Commission license was required to activate a microwave path (Price I 17:18 - 18:3; McKinnon 8:17 - 9:3). Consequently, Liberty retained Joseph Stern of Stern Telecommunications Corp. ("STC") as a consultant to handle the engineering aspect of obtaining the necessary licenses (Price I 38:22 - 39:4; Stern 8:18). Stern recommended, and Liberty agreed, to retain Comsearch to perform the frequency coordination and analysis (McKinnon 7:14 - 7:18; Courtney 10:11 - 10:22; Stern 64:21 - 65:2)<sup>3</sup>. Also, Liberty engaged the law firm of Pepper & Corazzini to handle the process of filing the applications with the Commission and monitoring their progress (Price I 37:1 - 38:3; McKinnon 7:18 - 7:20; Lehmkuhl 5:15 - 6:9).

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<sup>3</sup> Applicants for licenses to transmit on the 18 GHz frequency must coordinate with existing users and other applicants in the area to insure that the applicant's facility does not interfere with other transmission. 47 C.F.R. §§ 21.100(d), 94.63(a). This coordination must be done prior to filing of a license application 47 C.F.R. § 21.100(d)(1).

23. From about 1991 forward, Liberty followed a general pattern in obtaining licenses: Once a building signed a contract with Liberty or was on the verge of doing so, Liberty's engineering staff (initially, STC) would conduct the appropriate surveys relating to installation of microwave antennas (McKinnon 25:15 - 25:22; Ceccarelli 15:12 - 15:23, 16:8 - 16:21; Foy 123:12 - 123:19; Ontiveros 15:7 - 15:10, 52:15 - 52:22, 72:6 - 72:12; Nourain 33:7 - 34:3). Liberty's engineering staff would then send Comsearch the information needed to perform frequency coordination and analysis, and Comsearch would work with Liberty's engineering staff to insure that the information was correct and accurate (Courtney 9:12 - 10:6; McKinnon 7:10 - 7:18; Nourain 25:1 - 25:9, 41:15 - 42:5, 43:9 - 45:7, 52:20 - 53:16). After the necessary prior coordination notice has been completed,<sup>4</sup> barring any clearance issues, Comsearch would submit directly to Pepper & Corazzini the information needed to prepare and file the Commission applications (Price 1 37:1 - 37:12; McKinnon 27:10 - 27:13; Nourain 48:16 - 48:18, 57:11 - 57:21; Courtney 29:19 - 30:6, 34:9 - 34:14, 36:14 - 36:20, 37:18 - 38:5; Lehmkuhl 6:4 - 6:9, 7:21 - 8:3). When STC actively consulted for Liberty from 1991 to 1992, no buildings were activated unless Stern had Commission authorization in hand (Stern 71:11 - 71:17; McKinnon 30:5-31:5). On no occasion did anyone at Liberty suggest to Stern that a path be activated without Commission authorization (Stern 76:14 - 76:20).

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<sup>4</sup> Pursuant to 47 C.F.R. § 21.100(d), an applicant must notify other users and entities with pending applications in the area of the technical details of the proposed frequency usage. This notification, known as prior coordination notice, gives the other existing and potential users with pending applications the opportunity to raise technical problems and conflicts. Under the procedure, the users have up to thirty days to respond to the notice. Once notice and response have been certified as complete, an application may be filed. 47 C.F.R. § 21.100(d).

24. Also in the 1991 to 1992 time frame, Price became aware of delays in Liberty's acquisition of licenses (Price I 254:19 - 255:4). He learned of an informal "brown bag lunch" meeting to be hosted by the then-Private Radio Bureau of the Commission and flew to Washington, D.C. to attend (Price I 255:6 - 255:14). At that lunch, Price asked Michael Hayden of the Private Radio Bureau<sup>5</sup> why Liberty was "having difficulty getting licenses that have been approved for issuance but were not forthcoming." (Price I 255:21 - 256:2.) After the lunch, Hayden spoke with Price and suggested application for Special Temporary Authority ("STA") as a solution (Price I 256:12 - 256:14, 257:2 - 257:5).

C. **The Incomplete Effort to Lend Structure to the License Application Process**

25. Price took the knowledge he derived from this informal meeting with Commission staff, consulted with Liberty's attorneys and Stern, and met with McKinnon to discuss a procedure for Liberty to follow for getting proper authorization from the Commission (Price I 102:3 - 103:17). On February 26, 1992, Price wrote a memorandum to McKinnon regarding Commission licenses and procedures (JX 3). In that memorandum, Price indicated that he had assigned to Stern the task of auditing Liberty's applications and then preparing a "maintenance procedure going forward[.]" *Id.* Once Stern had developed this procedure, Price expected that the auditing and monitoring process would become part of Liberty's Engineering Department's responsibility. Price, in his memo, candidly observed that Liberty

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<sup>5</sup> Mr. Hayden is now Chief, Microwave Branch, Licensing Division, Wireless Telecommunications Bureau, in Gettysburg, Pennsylvania.

did not yet have the capability to handle this in-house; consequently, Price asked Stern to coordinate this function with Todd Parriott, an attorney at Pepper & Corazzini.

26. Although the memorandum was copied to Parriott, Price did not speak directly with anyone at Pepper & Corazzini regarding the subject of this memorandum (Price II 7:10 - 7:14).<sup>6</sup> Price does not recall whether McKinnon, in accordance with the memorandum, discussed licensing procedures with Pepper & Corazzini (Price II 7:15 - 7:22). Stern did not provide the weekly audits as directed by Price (Stern 83:3 - 83:19). Price took no further action to insure that the audits were generated pursuant to his February 26, 1992 memorandum (Price II 6:22 - 9:10, 14:15 - 15:12).

**D. The Hiring of Nourain and the Development of Liberty's Engineering Department**

27. In 1992, faced with the high expense of retaining STC as a regular consultant, Liberty decided to bring STC's functions in-house. Stern advised Liberty to set up its own Engineering Department (Stern 9:1 - 9:5). Stern was charged with interviewing candidates for the position of Director of Engineering. After speaking with a number of individuals, Stern recommended that Liberty hire Behrooz Nourain. Liberty believed that Nourain had excellent credentials and strong references and that he would be the "hands-on" kind of engineer that Liberty wanted (Stern 41:22 - 43:7; Price I 265:6 - 265:19). Consequently, Liberty hired Nourain around April 1992 (Nourain 16:5 - 16:9).

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<sup>6</sup> "Price II" refers to the second day of Peter Price's deposition, taken on May 31, 1996. The transcript is incorrectly labeled "Volume 1."

28. After Liberty hired Nourain, Stern met with Nourain to explain the application process to him. Nourain at that time stated that he was fully familiar with Commission licensing procedures and that Stern did not need to go into detail (Stern 70:14 - 71:4). Stern did not give Nourain a written memorandum detailing the application process (Stern 73:18 - 73:19). Nourain did not feel that he needed to be instructed on the process by his superiors because he was hired to serve as chief engineer (Nourain 32:3 - 32:9; McKinnon 10:1 - 11:1) and to operate a microwave network (Nourain 20:9 - 21:5), and he knew what steps to follow in designing a system for a building (Nourain 40:19 - 41:7).

29. Nourain stated that his responsibilities with respect to licensing extended no further than frequency coordination (Nourain 52:20 - 53:4) and that all further responsibilities with respect to licensing resided elsewhere (Nourain 53:5 - 53:9). Specifically, he stated that it was Pepper & Corazzini's responsibility to obtain all Commission authorizations prior to activation (Nourain 67:12 - 68:9). Nourain even signed license applications in blank and sent them to Pepper & Corazzini (Nourain 44:12 - 45:1; Lehmkuhl 72:4 - 72:8). As a result, Nourain had no participation in the license application process after the frequency was coordinated. Nourain, as a matter of practice, did not insure that there was an authorization in hand before activating service (Nourain 209:9 - 211:6). Although Stern remained as a consultant with Liberty for about two years thereafter, he had no involvement during that period with the application process (Stern 9:11 - 17; 77:10 - 77:21; Price 39:14 - 39:20).

**E. Liberty's License Application and Installation Practices Commencing Around 1993**

30. By May 1993, McKinnon left the company (McKinnon 24:18). McKinnon's position as Chief Operating Officer and Executive Vice President was not filled, and Ontiveros took over McKinnon's day-to-day responsibilities (Nourain 27:17 - 28:6). Nourain, as Director of Engineering, began to sign Liberty's license applications in McKinnon's place (Nourain at 31:16 - 31:20). Although Nourain had been reporting to McKinnon, after McKinnon's departure, Ontiveros did not supervise Nourain, nor did Price (Ontiveros 26:13 - 26:18). In practice, nobody assumed responsibility for day-to-day supervision of Nourain (Nourain 40:19 - 41:7). Consequently, Nourain was essentially unsupervised as Director of Engineering. Notably, Nourain did not attend the weekly Thursday staff meetings where significant issues were discussed by senior management (Nourain 38:5).

31. Nourain viewed his role as limited to engineering and design work (Nourain 41:2 - 41:3). Thus, his method of working was to focus on the engineering and technical aspects of his position (Nourain 25:3 - 25:9). From his prior experience, he passed the paperwork relating to license application and issuance to the lawyers after the engineering was completed (Nourain 52:5 - 54:21). He assumed, without independent verification or any such instruction from upper management, that the legal and administrative aspect of obtaining licenses was being handled entirely by Pepper & Corazzini (Nourain 51:9 - 52:4). Most significantly and unfortunately, Nourain merely assumed that within a particular period of time after he had sent his data to Comsearch, the Commission license would be applied for (Nourain 67:8 - 68:9, 205:16 - 205:20). Nourain knew that after an application was filed, because of

Commission delay in issuing licenses, Liberty could provide service pursuant to STAs (Nourain 73:19-75:22). Nourain assumed that after Pepper & Corazzini submitted license applications, the firm arranged for obtaining STAs as part of the regular process and that these STAs would serve as authorization for activation of a building (Nourain 90:18 - 90:22). Based on these faulty assumptions, Nourain individually, or those reporting to him, activated service to buildings that signed up with Liberty without first obtaining proper authorization (Nourain 207:5 - 211:6).

32. In addition, Nourain did not inform anyone else within the company whether or when the Comsearch clearance process had been completed (Nourain 40:15 - 42:5). Moreover, although Pepper & Corazzini filed the applications, it did not receive copies of granted applications directly from the Commission (Lehmkuhl 14:6 - 14:13). Nourain did not inform Pepper & Corazzini when he was activating a building, nor did Pepper & Corazzini confirm that no one at Liberty commenced service before receiving proper authorization from the Commission (Nourain 208:5 - 211:6). The license application process was disjointed, and no one knew at any given time the progress of the licensing procedure from frequency coordination through application to Liberty's commencement of service (Courtney 29:19 - 30:19; Lehmkuhl 5:20 - 6:9; Nourain 53:20 - 57:10; Berkman 24:18 - 24:21). Furthermore, because Nourain was essentially unsupervised, no one at Liberty was aware of his activation of buildings based on incorrect assumptions about the license application process (Price I 104:7 - 104:19).

**F. Liberty's Contracts with Buildings Seeking Liberty Service**

33. Also in 1993, Andrew Berkman, among other responsibilities he had for the Milstein family, began acting as Liberty's general counsel (Berkman 8:17 - 9:2; Price I 35:12 - 21). Berkman, formerly a partner at the firms of Brown & Wood and Tufo & Zuccotti, had started doing legal work as counsel for the Milsteins' other companies in 1992 (Berkman 5:22 - 6:5, 7:2 - 7:8). Berkman's primary responsibility as Liberty's general counsel was the drafting and negotiating of the Private Cable Agreements between Liberty and buildings that wanted Liberty's service (Berkman 9:10 - 9:12). Berkman did not advise Liberty with respect to communications law, franchising or licensing issues (Berkman 10:5 - 10:13).

34. In the Private Cable Agreements, Liberty generally used a 90 to 120 day period as the time frame for buildings to be activated for service once the parties had executed an agreement (Berkman 39:9 - 39:13). This timetable was developed from Berkman's understanding that about 90 to 120 days were needed for Liberty to take all necessary steps to be fully operational. He believed that this included sufficient time to obtain the appropriate Commission authorization (Berkman 53:19 - 54:2). Others in the company shared the belief that 90 to 120 days were needed to complete the installations and obtain Commission licenses (Ceccarelli 31:17 - 31:25; Foy 34:9 - 34:14; Berkman 53:18 - 54:2; Price I 51:1 - 51:5). At no time since Berkman started preparing contracts for Liberty, had anyone suggested that 90 to 120 days were not sufficient (Price I 51:1 - 52:5; Walden 24:23 - 25:4).

35. In general, Liberty's contractual installation time frame was not an issue with the buildings to which Liberty was marketing (Walden 24:23 - 25:4; Ceccarelli 28:7 - 28:16; Price I 50:5 - 50:13, 51:12 - 52:5; McKinnon 16:7 - 17:2). Although customers contracting