

with Liberty often desired Liberty's service as quickly as possible. the company did not obligate itself contractually to activate service unless it believed that the time necessary to complete installation was adequate (H. Milstein 17:5 - 18:4; McKinnon 16:7 - 16:18; Foy 33:20 - 34:14; Ceccarelli 31:2 - 31:21). Moreover, the buildings did not press Liberty for speed of service because they were already receiving cable service from another source at the time (Price I 50:5 - 50:13). In several instances, Liberty declined to sign up a building that wanted to be activated in less time than Liberty typically would need to complete the installation process (Foy 127:6 - 129:8). At no time did anyone in Liberty's upper management suggest or order any buildings to be activated before Commission authorization was obtained (Ceccarelli 93:14 - 95:3; Walden 76:12 - 76:15, 77:10 - 77:16).

**G. Liberty's Discovery of Buildings Activated Before Commission Grant of Authorization**

36. At the end of April 1995, in the course of ongoing litigation over Time Warner's petitions to deny or condition grant of Liberty's license applications, Liberty discovered that the company had initiated service in some buildings without prior authorization from the Commission (JX 4 at ¶ 3). Immediately, Liberty stopped activating paths (Nourain 85:11 - 85:16) and moved to investigate the cause of these premature activations of service (JX 4 at ¶ 3; H. Milstein 35:5 - 30:10; Price letter to Hayden of June 16, 1995). On May 4, 1995, Liberty filed 14 applications for STAs for the following buildings: 35 West End Avenue; 639 West End Avenue; 1775 York Avenue; 767 Fifth Avenue; 564 First Avenue; 545 First Avenue; 200 East 32nd Street; 30 Waterside Plaza; 433 East 56th Street; 114 East 72nd Street; 524 East 72nd Street; 25 West 54th Street; 16 West 16th Street; and 6 East 44th

Street. HDO at App. A. All of these buildings were activated while licenses were pending. With respect to two of the fourteen, 1775 York Avenue and 433 East 56th Street, Liberty had applied for licenses after service was already commenced. HDO at App. A.

37. While Liberty was taking swift steps internally to investigate the extent of the problem, Time Warner in a Reply to Opposition dated May 5, 1995 reported that after performing its own survey of Liberty's licenses, Time Warner discovered two buildings at which Liberty was providing service without prior authorization from the Commission: 639 West End Avenue and 1775 York Avenue.

38. On May 17, 1995, Liberty submitted its Surreply in response to Time Warner's May 5 Reply to Opposition. Liberty admitted premature activation of service at 639 West End Avenue and 1775 York Avenue. Liberty further disclosed premature activations at the fourteen buildings for which requests for STA were filed on May 4. In addition, Liberty disclosed premature activation at 2727 Palisades Avenue. Liberty applied two days later for an STA for this building. HDO at App. A.

39. On June 16, 1995, Liberty submitted to the Commission a letter from Peter Price, as President of Liberty, to Michael Hayden, Chief of the Bureau's Microwave Branch, which stated:

The unauthorized service to these buildings regretfully occurred because of unintended errors in Liberty's administrative procedures, for which I take full responsibility and which have been disclosed and explained at some length in previous filings with the Commission. A complete investigation of this administrative foul-up is currently being conducted by outside counsel who have extensive government backgrounds. Steps have been implemented to assure that these errors will not occur again

(JX 6).

## H. Liberty's Reaction to Discovery of Premature Service

40. In June 1995, Liberty engaged the firm of Constantine & Partners to conduct an internal investigation into Liberty's premature activation of service and to issue a report of the firm's findings.<sup>7</sup> Even while the investigation took its course, Price initiated efforts to survey and monitor Liberty's licensing practices and procedures. On July 13, 1995, Price issued a memorandum requesting the current status of license applications for existing and pending Liberty buildings (Price I 111:1 - 112:19; JX 7).

41. Liberty discovered four more instances of premature activation for which there remained pending applications, at the following locations: 430/440 East 56th Street; 1295 Madison Avenue; 35 East 85th; 380 Rector Place. Liberty records indicate that frequency coordination for these buildings had been requested by Liberty from Comsearch in 1994, long before service was commenced at each location. The fact that Liberty was invoiced for Comsearch's services relating to the four buildings indicates that the work was most likely performed as requested (JX 8). Comsearch, however, does not have any record of receiving

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<sup>7</sup> Liberty voluntarily submitted a copy of the internal investigative report to the Wireless Telecommunications Bureau on August 14, 1995, under the Commission's confidentiality rules, 47 C.F.R. § 0.459. On September 13, 1995, the Bureau denied Liberty's request for confidentiality and ordered that a copy of the report be sent to Time Warner. Liberty immediately appealed the Bureau's decision to the Commission and withheld disclosure of the internal audit report pending appeal. On January 24, 1996, the Commission upheld the Bureau's denial of confidentiality and ordered disclosure of the internal audit report to Time Warner. *In the Matter of Liberty Cable Co., Inc.*, Memorandum Opinion and Order, FCC 96-9 (released Jan. 26, 1996). Liberty appealed that decision to the D.C. Circuit, which stayed the Commission's order pending appeal, stating that this case "presents serious questions regarding applicability of the attorney-client and work product privileges." *Liberty Cable Co. Inc. v. FCC*, No. 96-1030 (D.C. Cir. Apr. 24, 1996).

these requests from Liberty (Courtney 121:7 - 121:12). Given Nourain's operative assumptions in 1994, as well as the absence of any internal monitoring or follow-up procedures at Liberty to track the progress of license applications, in all likelihood, the frequency clearance was initiated for these four buildings but never completed properly in 1994.

42. Liberty immediately filed for license applications on July 17, 1995 and filed requests for STAs one week thereafter, on July 25, 1995. Liberty disclosed these premature activations in its STA applications. The Chief of the Bureau's Enforcement Division, Howard Davenport, acknowledged Liberty's disclosure of the four additional premature activations by letter dated August 4, 1995 (JX 9).

43. After the investigation was concluded, Howard and Edward Milstein took disciplinary action against responsible Liberty personnel. Price, Ontiveros and Nourain were all reprimanded, and they did not receive bonuses that year (E. Milstein 62:20 - 63:4; H. Milstein 58:5 - 58:19; Price I 223:20 - 226:10; Nourain 235:9 - 235:14). Furthermore, Liberty suspended billing to buildings that were prematurely activated until the licensing matter was resolved with the Commission (Ceccarelli 76:10 - 80:20; E. Milstein 59:22 - 60:17; Price I 173:10 - 173:20; JX 10, JX 11).

#### **I. The Compliance Program**

44. To insure that unauthorized activation of buildings would not occur again, Liberty instituted a compliance program developed by Constantine & Partners (Berkman 14:3 - 14:4). Andrew Berkman became Compliance Officer and was charged with making sure that no

future buildings would be turned on unless Liberty had the proper authorization from the Commission (Berkman 14:13 - 18). The compliance program tracked the licensing process and Berkman had to certify various steps along the process on an FCC Path License Check List for applications that Liberty filed (Berkman 14:3 - 14:8, 18:5 - 18:11). Berkman would not approve commencement of service until he verified that the Commission had stamped "granted" on a given application (Berkman 19:5 - 19:20). The FCC Path License Check List listed at least sixteen separate areas which needed to be filled out before the compliance officer could authorize initiation of service for a specific path (JX 12).

45. On March 1, 1996, the Commission amended its rules so that effective from August 1, 1996, applicants can start operation of OFS and other point-to-point microwave facilities upon filing of an application with the Commission. HDO at ¶ 14 n. 9.

#### **IV. LIBERTY'S USE OF HARDWIRE CONNECTION**

46. The uncontroverted record with respect 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 (Ceccarelli 34:4 - 34:8, 54:19 - 54:23; Price I 90:17 - 91:4). Consequently, Liberty's employees firmly believed that use of hardwire connections, a small fraction of Liberty's overall system (JX 1), was lawful. When the legality of Liberty's hardwire connections was questioned, Liberty asserted the propriety of its legal position, raising a constitutional challenge to the "cable system" definition then embodied in the statute,

and also negotiated with and ultimately pursued a franchise from the local franchising authority.<sup>8</sup>

**A. Liberty's Commencement of Hardwire Interconnection of Buildings**

47. On April 27, 1992, New York City's franchising authority issued a letter opinion stating that no license was required for the Russian American Broadcasting Company ("RABC") to operate a satellite-delivered Russian language video and audio service in New York City:

Under the New York City charter, no license is required from the New York City Department of Telecommunications and Energy ("DTE")<sup>9</sup> in order for RABC to provide such service.

*Because RABC does not intend to utilize the inalienable property of the City for either private or public purposes, neither a revocable consent nor a franchise is required. Assuming, without admitting, that RABC is a "cable system", there are no provisions of City law which empower DTE to authorize the operation of cable systems other than through a franchise as set forth in Chapter 14 of the New York City Charter*

(JX 13) (Emphasis and footnote supplied.) RABC proposed to serve by hardwire interconnection multiple dwelling units that were not commonly owned, controlled or managed (JX 14).

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<sup>8</sup> Liberty does not claim in this Joint Motion that it was in compliance with the Commission's statutory franchise requirement as set forth in Section 602(7)(B) of the Communications Act of 1934, as amended, 47 U.S.C. § 522(7)(B). 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 47 U.S.C. § 522(7), prior to enactment of the Telecommunications Act of 1996, violated the First Amendment.

<sup>9</sup> DTE became the Department of Information Technology and Telecommunication ("DOITT") (JX 15, JX 32). All references to DOITT include DTE.

48. In June 1992, the D.C. Circuit Court of Appeals held in *Beach Communications v. FCC*, 965 F.2d 1103 (D.C. Cir. 1992), that the definition of a “cable system” in the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521-559 (the “1984 Cable Act”), even as clarified by the Commission,<sup>10</sup> was unconstitutional on equal protection grounds, because no rational basis existed for a distinction based on common ownership, control or management of multiple dwelling units.<sup>11</sup> *Beach Communications*, 965 F.2d at 1105.

49. On November 23, 1992, Liberty provided service to 60 Sutton Place by hardwire interconnection from 420 East 54th Street (receiver location). These two buildings were not commonly owned, controlled or managed. It was the first of Liberty’s Non-Common Systems. HDO at App. B. Starting in 1993, Liberty’s standard practice was to examine an installation location to determine whether it could be served by hardwire interconnection as well as microwave (Price I 55:10-16). If service could be provided by hardwire, Price, Howard and Edward Milstein, Ontiveros, and others would decide the relative merits of providing service by microwave versus hardwire (H Milstein 25:1 - 26:10; Price I 81:16 - 81:18; Ontiveros 19:22 - 21:6, 114:12 - 115:3).

#### **B. Legal Challenges to Liberty’s Hardwire Interconnections**

50. In June 1993, the United States Supreme Court reversed the D.C. Circuit’s decision in *FCC v. Beach Communications, Inc.* 508 U.S. 307 (1993). The Court decided

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<sup>10</sup> *In re Definition of a Cable Television System*, 5 FCC Rcd 7638 (1990) (the “Definitional Order”).

<sup>11</sup> Liberty had lobbied Congress in 1992 to amend the 1984 Cable Act to delete this distinction, which Liberty believed to be irrational (Price I 89:18 - 90:15).

only the equal protection question. The case was remanded to consider the Respondents' arguments concerning heightened scrutiny for the First Amendment claims. *Id.* at 314 n. 6.<sup>12</sup>

51. On October 13, 1993, while *Beach Communications* was on remand to the D.C. Circuit, the New York City Council passed Resolution 1639 (JX 15). Resolution 1639 was at that time the only procedure by which any entity could obtain a franchise in New York City to be a cable operator (JX 32). Resolution 1639 addressed franchise application procedures for cable operators who used the "inalienable property of the City of New York." It contained no provisions relating to MVPDs, like Liberty, which did not use any city property or public rights-of-way.

52. On or about May 31, 1994, Time Warner filed a complaint with the New York State Commission on Cable Television ("NYSCCT") alleging that Liberty was operating a cable system without a franchise in violation of the law, based on Liberty's hardware interconnection of its Non-Common Systems.

53. On June 28, 1994, Liberty wrote to NYSCCT, denying Time Warner's allegations that Liberty engaged in any unlawful method of operation (JX 16). Liberty openly and forthrightly admitted hardware interconnections between residential buildings. Liberty's response specifically noted, however, that two of the buildings served by hardwire, 525 East 86th Street and 535 East 86th Street, were commonly managed. The answer directly stated

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<sup>12</sup> On October 22, 1993, the D.C. Circuit issued its Order on remand in *Beach Communications, Inc. v. FCC*, 10 F.3d 811 (D.C. Cir. 1993), dismissing a petition for review on the basis that application of a heightened scrutiny standard was unwarranted and no other meritorious issues remained to be considered. This Order was not approved for publication until two months later, on December 21, 1993.

Liberty's reliance on New York City's policy that a franchise would not be required if Liberty did not use city property or public rights-of-way in providing Liberty's services.

54. In July 1994, Liberty wrote to the Deputy Commissioner of DOITT requesting written confirmation that Liberty, like RABC, did not need a franchise to provide MVPD services, because Liberty does not use city property or public rights-of-way to provide such services (JX 17). DOITT's Deputy Commissioner sent back to Liberty's attorney an opinion letter which concluded that Liberty did not require a franchise from the City unless Liberty used cable to connect buildings not commonly controlled, owned or managed "to provide a microwave transmission service." (JX 18.) DOITT's letter closed with the statement that "[w]e are available to meet and discuss all aspects of cable television franchise requirements at your convenience." *Id.* DOITT did not request that Liberty discontinue the hardwire service.

55. On August 23, 1994, NYSCCT released an Order to Show Cause in Time Warner's petition against Liberty's alleged unauthorized operation of a cable system without a franchise (JX 19). NYSCCT ordered Liberty to show cause in writing by September 18, 1994 (i) why it should not be deemed a cable system subject to state and local franchising requirements; or (ii) why it should not be compelled to remove all its hardwire interconnections until it obtained the proper authorization from the appropriate franchising authority.

56. On September 8, 1994, Liberty and DOITT met to discuss how Liberty could obtain a franchise to provide its MVPD services (JX 14).

57. On September 13, 1996, DOITT submitted to NYSCCT a Communication from the City of New York which stated that, in the best interest of the City's cable television subscribers, NYSCCT's September 18 deadline in the Order to Show Cause should be extended to December 18, 1994, on certain conditions.<sup>13</sup>

58. By fall 1994, Liberty had interconnected eleven pairs of buildings by hardwire. HDO at App. B. Three of these building pairs were commonly owned or managed.

59. On September 28, 1994, the Commission released its *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, 9 FCC Rcd 7442 (1994) ("1994 Report on Competition"). At paragraph 252 of the *1994 Report on Competition*, the Commission recommended that

Congress consider modifying 47 U.S.C. § 522(7)(B) so as to exclude from the definition of a "cable system" not only commonly-owned, but also separately-owned, dwellings interconnected by wires which do not cross public rights-of-way. Such a revision would promote the growth of wireless cable and SMATV systems as competitors to cable systems by substantially reducing costs of expanding their systems.

9 FCC Rcd at 7558.

60. On October 28, 1994, Liberty wrote to DOITT to express its interest "in applying for a cable television franchise pursuant to Resolution 1639 and applicable federal law."

(JX 14, JX 20.)

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<sup>13</sup> These conditions included the requirement that Liberty submit either (i) a written request to DOITT for a franchise, or (ii) a written agreement with NYSCCT and DOITT that Liberty would remove by December 18, 1994 all cable or other closed transmission paths interconnecting buildings that were not commonly owned, controlled or managed. DOITT further requested that NYSCCT either issue an immediate standstill order prohibiting Liberty from establishing additional Non-Common Systems or condition the extension on the execution of a standstill agreement with Liberty.

61. On October 31, 1994, Liberty filed its Answer and Appearance (“Answer”) in the NYSCCT proceeding (JX 14). Liberty’s Answer further reiterated the company’s reliance on the RABC decision and the City’s policy not to require a franchise to provide MVPD services without using any city streets or public rights-of-way. Liberty’s Answer also pointed out that the only available franchise procedure, Resolution 1639, applied solely to cable television franchises that use city streets and public rights-of-way

62. During the fall of 1994, Liberty prepared for the contingency that it would be ordered by the NYSCCT to cease service by hardwire interconnection. Liberty directed Nourain to perform the necessary work to prepare the hardwire locations to receive transmissions by microwave (JX 5 at ¶ 4). On November 7, 1994, Liberty filed for modifications of previously granted Commission 18 GHz licenses to open paths for the following buildings being served by hardwire: 239 East 79th Street, 525 East 86th Street, 44 West 96th Street and 60 Sutton Place (JX 21 at ¶ 3)

63. On December 8, 1994, Liberty filed an action in the United States District Court in the Southern District of New York against DOITT (“*Liberty v. City of New York*”), seeking declaratory and injunctive relief against DOITT for requiring Liberty to obtain a franchise and for failing and refusing to provide Liberty with the means to obtain a franchise.<sup>14</sup> The action sought, in part, to have the cable system definition of 47 U.S.C. § 522(7) declared

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<sup>14</sup> Liberty later amended the complaint to add NYSCCT and its members as parties. Later, the United States of America and Time Warner were joined as defendants-intervenors. Since the United States was a party, the Commission participated in the action through the office of its General Counsel. *Liberty v. City of New York*, 60 F.3d 961, 962 (2d Cir. 1995).

unconstitutional on First Amendment grounds, as applied to the establishment of Non-Common Systems without using public property or rights-of-way.

64. On December 9, 1994, NYSCCT opened its hearing, pursuant to a Notice of Hearing released on November 18, 1994 (JX 22). DOITT did not attend the hearing; instead, DOITT sent a letter stating that it was unable to appear because DOITT was “considering various issues affecting cable system franchising in the City,” and DOITT could not testify as to those deliberations at that time (JX 23). DOITT did not ask NYSCCT to order Liberty to stop servicing Non-Common Systems by hardwire interconnection. NYSCCT on December 9 issued an immediate standstill order prohibiting Liberty from establishing any new Non-Common Systems. NYSCCT did not order that Liberty stop serving existing Non-Common Systems by hardwire interconnection (JX 24).

65. On March 13, 1995, United States District Judge Preska issued her opinion in Liberty’s New York Federal court litigation, granting Defendants’ motion to dismiss most of the claims, including those based on the First Amendment, on grounds of ripeness. *Liberty v. City of New York*, 893 F. Supp. 191, 198, 207, 209, 214 (S.D.N.Y. 1995). Judge Preska also denied Liberty’s motion for preliminary injunction *Id.* at 214. Liberty immediately appealed this decision to the Court of Appeals for the Second Circuit.<sup>15</sup>

66. As the appeals process progressed, Liberty commenced service on April 13, 1995 in New Jersey at Lincoln Harbor Yacht Club by hardwire interconnection from a microwave

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<sup>15</sup> On July 12, the Second Circuit issued its decision on Liberty’s appeal in *Liberty v. City of New York*, 60 F.3d 961 (2d Cir. 1995). Liberty petitioned to the United States Supreme Court for Writ of Certiorari which was denied on March 18, 1996. *Liberty v. City of New York*, 116 S. Ct. 1262 (1996).

receiver location at 600 Harbor Boulevard. Liberty entered into a contract directly with Lincoln Harbor Yacht Club and had no individual subscribers there (JX 33).<sup>16</sup> This hardware interconnection, Liberty believed, did not create a “cable system,” because there were no subscribers at the Lincoln Harbor Yacht Club (Foy 104:11 - 104:18; Price I 280:22 - 281:4). *See also Definitional Order*, 5 FCC Rcd 7638, 7642 (1990).

67. On February 1, 1996, Congress passed the Telecommunications Act of 1996, Pub. L. 104-114, 110 Stat. 56 (1996), which the President signed into law on February 8, 1996. Among the changes enacted in this legislation was the deletion of the common ownership requirement of the 1984 Cable Act. This significant revision follows the Commission’s recommendation in the *1994 Report on Competition* to make just such a change to promote competition in the delivery of video programming. Thus, 47 U.S.C. § 522(7)(B) now reads:

[T]he term “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 (B) a facility that serves subscribers without using any public rights-of-way.

This change in the “cable system” definition obviates the need for Liberty to obtain a franchise in order to provide MVPD services via the Non-Common Systems configuration.

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<sup>16</sup> JX 33 is a Private Cable Agreement between Liberty and the Lincoln Harbor Yacht Club and has been filed under seal pursuant to the Stipulated Protective Order.

## V. THE ALLEGEDLY INCONSISTENT BEHROOZ NOURAIN STATEMENTS

68. On January 9, 1995, Time Warner filed with the Commission the first of many petitions seeking to deny or condition the Commission's grant of licenses to Liberty, claiming that Liberty was unqualified to hold Commission 18 GHz licenses because (i) Liberty admitted that it was a "cable system" by virtue of the hardwire interconnections; (ii) Liberty was engaging in the unauthorized operation of a "cable system" since it did not have a franchise from the City of New York; and (iii) Liberty lacked candor in its license applications based on Liberty's claim that it was a private cable/ SMATV operator when, according to Time Warner, Liberty was in fact a "cable system" as defined by 47 U.S.C. § 522(7). The bases for Time Warner's allegations were issues then being litigated before the United States District Court in New York, but which were not yet decided. The petition referred specifically only to the following hardwire locations: 44 West 96th Street; 239 East 79th Street; and 60 Sutton Place (JX 25 at 6).

69. In the course of motion practice in *Liberty v. City of New York*, Liberty submitted on February 21, 1995 an affidavit of Behrooz Nourain in response to the January 30, 1995 affidavit of Roosevelt Mikhail, a Time Warner engineer (JX 26). Nourain's affidavit countered Mikhail's statements that Liberty could technologically and economically serve its hardwired locations by microwave. Mikhail's affidavit referred specifically to Liberty's filing of Commission applications in November 1994 for paths to certain hardwire locations (JX 21). Nourain, in his affidavit, stated plainly: "I am advised that Time Warner has opposed Liberty's pending applications to the Federal Communications Commission for various 18 [GHz] microwave licenses." At this point, the only Time Warner petitions before the

Commission related to the January 9, 1995 filing, which addressed only the 18 GHz applications for the hardwire locations at 44 West 96th Street, 239 East 79th Street and 60 Sutton Place.

70. After Time Warner pointed out two instances of Liberty's premature activation of service on May 5, 1995, Liberty submitted its May 17, 1995 Surreply which disclosed an additional thirteen instances of premature service. In that same Surreply, Liberty stated that its administration department had failed to notify Nourain of Time Warner's petitions delaying grant of Liberty's applications (Nourain 174:11 - 175:4; Price I 191:7 - 191:20). The Surreply then went on to state, "Mr. Nourain was unaware of the petitions against Liberty's applications until late April of 1995." Nourain signed a declaration which was attached to the Surreply, attesting that everything in the Surreply was accurate (JX 27).

71. Based on the foregoing statements from Nourain, Time Warner filed its June 1, 1995 Response to the Surreply which alleged that Nourain's May 17, 1995 declaration conflicted with his February 21, 1995 affidavit submitted in *Liberty v. City of New York*. Time Warner charged that because the February 21, 1995 Nourain affidavit revealed his knowledge of Time Warner's petitions before April 1995, Liberty misrepresented facts to the Commission in the May 17 Surreply. On June 9, when Michael Hayden, Chief of the Bureau's Microwave Branch, requested additional information from Liberty, one of the answers he sought was an explanation of this apparent contradiction by Nourain (JX 28).

72. Liberty, in its June 16 Reply to Hayden, explained the purported inconsistency between Nourain's February 21, 1995 affidavit and his declaration in support of Liberty's May 17, 1995 Surreply. As stated in Nourain's June 12, 1995 declaration, attached as Exhibit

1 to Liberty's Reply, the affidavit and the declaration were submitted in two different contexts and when considered in their proper setting, the statements were not inconsistent (JX 5). The February 21 affidavit addressed only Liberty's rebuttal of Time Warner's statements regarding the feasibility of serving certain hardwire locations by microwave. The May 17 declaration addressed only the fifteen prematurely activated buildings, none of which were served by hardwire and none of which was subject to the January 9, 1995 petition to deny referenced in the February 21 affidavit (JX 5).

73. The evidence adduced through discovery did not controvert the prior written record. Price stated that the administrative department failed to notify Nourain about Time Warner's petitions delaying Liberty's application grants (Price 190:14 - 192:6; Nourain 174:11 - 175:4). Nourain also stated that his February affidavit in Federal court dealt only with hardwired buildings while his May 17 declaration to the Commission addressed microwave and hardwire sites (Nourain 169:14 - 171:8).

## **ANALYSIS**

### **I. SCOPE OF THE HDO AND APPLICABLE STANDARDS**

74. The HDO seeks to determine Liberty's qualifications to be granted the OFS licenses subject to this proceeding in light of the facts and circumstances surrounding (1) Liberty's hardwire interconnection of Non-Common Systems without first obtaining a franchise and (2) premature activation of nineteen buildings without appropriate Commission authorization. Included in each of these issues, the HDO also seeks to determine whether

Liberty complied with the disclosure requirements of 47 C.F.R. § 1.65.<sup>17</sup> In addition, the HDO seeks to determine whether Liberty, in violation of 47 C.F.R. § 1.17,<sup>18</sup> misrepresented facts to the Commission, lacked candor before the Commission or attempted to mislead the Commission in connection with the hardwire interconnections and premature activation of buildings. This issue includes the allegedly inconsistent Behrooz Nourain statements. Finally,

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<sup>17</sup> **§ 1.65 Substantial and significant changes in information furnished by applicants to the Commission.**

(a) Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application. Except where paragraph (b) of this section applies, whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of this application so as to furnish such additional or corrected information as may be appropriate. Except where paragraph (b) of this section applies, whenever there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, submit a statement furnishing such additional or corrected information as may be appropriate, which shall be served upon parties of record in accordance with § 1.47.

<sup>18</sup> **§ 1.17 Truthful written statements and responses to Commission inquiries and correspondence.**

The Commission or its representatives may, in writing, require from any applicant, permittee or licensee written statements of fact relevant to a determination whether an application should be granted or denied, or to a determination whether a license should be revoked, or to some other matter within the jurisdiction of the Commission. No applicant, permittee or licensee shall in any response to Commission correspondence or inquiry or in any application, pleading, report or any other written statement submitted to the Commission, make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission.

in light of all the evidence adduced pursuant to the above issues, the HDO seeks to determine whether Liberty has the requisite character qualifications to be granted the OFS licenses here at issue and whether such grant would serve the public interest, convenience and necessity. HDO at ¶ 30. The HDO additionally ordered an inquiry into the possibility that an Order of Forfeiture be issued against Liberty. HDO at ¶¶ 35-36.

75. This case does not involve any qualification issues other than character qualifications. The standards for character eligibility have been defined in the Report, Order and Policy Statement issued *In the Matter of Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986) (the “*Character Policy Statement*”). The *Character Policy Statement* expressly declared that “future inquiries into an applicant’s basic character eligibility will be narrowed to focus on the likelihood that an applicant will deal truthfully with the Commission and comply with the Communications Act and our rules and policies.” 102 FCC 2d at 1183. Thus, scrutiny into a license applicant’s character qualifications centers specifically on truthfulness before the Commission and prospective compliance with the law.

76. Pursuant to Section 1.251(a) of the Commission’s Rules, parties moving for summary decision must “show, by affidavit or other materials subject to consideration by the presiding officer, that there is no genuine issue of material fact for determination at the hearing.” 47 C.F.R. § 1.251(a). In a joint motion, the burden rests on the moving parties, here Liberty and the Bureau, to establish that summary decision is appropriate on the papers submitted. See *Raveesh K. Kumra*, 6 FCC Rcd 3352, 3356 (I.D. 1991); *JHP Partnership*, 4 FCC Rcd 5438, 5441 (I.D. 1989). Where the record after extensive discovery demonstrates

that no material issues of fact remain for hearing, disposition by summary decision would be proper. *Ellis Thompson Corp.*, 10 FCC Rcd 12554, 12562 (I.D. 1995); *Charles B. Shafer*, 5 FCC Rcd 3029, 3030 (I.D. 1990). As shown below, the extensive discovery in this proceeding has demonstrated that there remains no material issues of fact to be tried regarding Liberty's ability to be truthful and reliable in its dealings with the Commission, rendering a hearing superfluous. Accordingly, summary decision should be granted.

## **II. LIBERTY SHOULD NOT BE DISQUALIFIED FOR USING HARDWIRE CONNECTIONS**

77. The first issue in the HDO concerns the facts and circumstances surrounding Liberty's hardwire interconnection of Non-Common Systems without first obtaining a cable franchise in accordance with the Communications Act of 1934, as amended. This issue also seeks to determine whether Liberty violated 47 C.F.R. § 1.65 by failing to notify the Commission of Liberty's service to buildings via the Non-Common Systems configuration.

78. The facts are uncontroverted that:

- Liberty has served by hardwire interconnection thirteen pairs of buildings;<sup>19</sup>
- under Liberty's contract with Lincoln Harbor Yacht Club, Liberty has no subscribers at that location; Liberty, instead, wholesales its services to the Lincoln Harbor Yacht Club which, in turn, sells MVPD services to the residents; Lincoln Harbor Yacht Club is thus not a "cable system" under 47 U.S.C. § 522(7)(B)
- none of Liberty's hardwire interconnections crossed any public property or rights-of-way;

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<sup>19</sup> Although there was no evidence adduced to this effect in discovery, three of the pairs of hardwired buildings are commonly owned or managed.

- as long as no public rights-of-way were used, Liberty believed and acted on its assumption that it could lawfully interconnect buildings by hardwire; and
- Liberty's prior submissions to the Commission in separate proceedings reflect Liberty's consistent belief and position that local regulation of cable operators not using public rights-of-way is subject to First Amendment challenge (JX 2, JX 29).

79. Under Section 602(7)(B) of the Communications Act of 1934, as amended, which incorporated the 1984 Cable Act, a "cable system" is created when a closed transmission path is used to send video programming between non-commonly owned, controlled or managed multiple dwelling units without using any public property or rights-of-way. 47 U.S.C. § 522(7)(B). Under Section 621(b)(1) of the Communications Act, 47 U.S.C. § 541(b)(1), a franchise is required in order to operate a "cable system." Liberty's hardwire interconnection of buildings therefore constituted a "cable system" under the Communications Act and the 1984 Cable Act.

80. Liberty did not immediately disclose its hardwiring to the Commission, but at the same time, it did not conceal this fact from the Commission. Indeed, the Commission participated in Liberty's litigation in which the legality of Liberty's hardwire interconnections were directly at issue. Under these circumstances, the facts show only that Liberty acted in

accordance with its good faith belief as to the lawfulness of its conduct,<sup>20</sup> and Liberty did not intentionally violate the law.

81. Liberty established its first Non-Common System at 60 Sutton Place at the end of 1992 following DOITT's April 27, 1992 RABC opinion which stated that a franchise from the City of New York was neither required nor available for satellite-delivery of video and audio signals unless the operator used the inalienable property of the City. Liberty consistently believed that, as long as it was not using public rights of way, it did not need a franchise to operate. Neither the D.C. Circuit's decision in *Beach Communications* -- which favored Liberty's position -- nor the Supreme Court's decision to the contrary, affected Liberty's view that it could legally provide service without a franchise as long as Liberty did not use the "inalienable property" of the City of New York. The record reveals that Liberty, in establishing its other Non-Common Systems, acted consistently with this good faith view of the law (Ceccarelli 34:4 - 34:8, 54:19 - 54:23; Price 90:17 - 91:4). There are no facts to

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<sup>20</sup> Indeed, the Commission shared Liberty's view until 1990. The Commission initially construed the 1984 Cable Act's definition of "cable system" to exclude all facilities that do not use public rights of way. *In the Matter of the Amendment of Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984*, 104 FCC 2d at 386, 396 (1986), *aff'd. in part sub nom. ACLU v. FCC*, 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988). The Commission stated that "[w]hen multiple dwellings are involved, the distinction between a cable system and other forms of video distribution systems is now the crossing of the public rights-of-way, not the ownership, control or management." 104 FCC 2d at 396. *See also Ira C. Stein*, 1986 FCC LEXIS 3892 at n.2 ("It should be noted that the Cable Act only requires SMATV systems using public rights of way to obtain franchises").

show that Liberty knowingly and intentionally interconnected buildings by hardwire in order to violate the law or to avoid legal requirements.<sup>21</sup>

82. Liberty's First Amendment litigation was dismissed on ripeness grounds,<sup>22</sup> so the merits of Liberty's challenge -- that federal and local law could not constitutionally regulate activity taking place solely on private property -- was never decided. Nevertheless, Liberty's longstanding view that use of public property rather than common ownership is the proper definitional criterion for a "cable system" was codified by the 1996 Telecommunications Act's amendment to the 1984 Cable Act's definition of "cable system." The Commission supported this amendment and had previously recommended the change in its *1994 Report on Competition* in order to promote competition in the market for delivery of video programming. *1994 Report on Competition*. 9 FCC Red at 7558.

83. As set forth in the *Character Policy Statement*, one of the cardinal concerns in assessing character eligibility is whether the license applicant can be expected to be in future compliance with the law. *Character Policy Statement*. 102 FCC 2d at 1183, 1209. Given (1) the uncertain regulatory environment in which Liberty established its Non-Common Systems; (2) the absence of any evidence that Liberty intentionally and knowingly violated the law or applicable legal requirements; and (3) the current state of the law which no longer imposes a franchise requirement on Liberty, the record established in this case demonstrates

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<sup>21</sup> When Time Warner's complaint to NYSCCT threatened to terminate hardwire services, Liberty attempted to establish contingency back-up service by microwave (JX 5 at ¶ 4).

<sup>22</sup> *Liberty v. City of New York*, 893 F. Supp. 191, 198, 207, 209, 214 (S.D.N.Y. 1995), *aff'd*, 60 F.3d 961 (2d Cir. 1995), *cert. denied*. 116 S. Ct. 1262 (1996).

that Liberty's hardwiring of non-commonly owned buildings, while violating the Communications Act of 1934, as amended, does not rise to the level to warrant disqualification of Liberty as a Commission licensee.

84. The other concern of the *Character Policy Statement* relates to the applicant's truthfulness before the Commission. *Character Policy Statement*, 102 FCC 2d at 1209. On the issue of hardwire interconnections, the facts show that Liberty did not directly disclose in its applications to the Commission the fact of hardwire interconnections until around July 1995 (JX 30). At the same time, the facts do not show that Liberty sought to conceal the existence of Non-Common Systems. To the contrary, Liberty openly and forthrightly contested in public proceedings and litigation its position that forcing Liberty to obtain a franchise for its activity on private property violated the Constitution. Furthermore, Liberty admitted the hardwire interconnections of buildings in its initial response to NYSCCT (JX 16).

85. Also, in January 1995, when Time Warner began filing its petitions to deny or condition the grant of Liberty's license applications, Liberty did not conceal the fact of the Non-Common Systems in its reply to Time Warner's petition (JX 31). By that time, Liberty had already commenced its lawsuit, *Liberty v. City of New York*, to challenge the constitutionality of Federal and local law requiring Liberty to obtain a franchise. The Commission was involved in that case through the United States, which was a defendant-intervenor. *Liberty v. City of New York*, 60 F.3d at 962. Thus, the Commission was made aware of the hardwire interconnections by participating in the action.

86. While Section 1.65 of the Commission's Rules requires an applicant to keep its application current with all relevant information, the facts indicate that Liberty did not conceal or mislead the Commission with regard to the existence of the hardwire interconnections. Therefore, while Liberty may have technically violated Section 1.65 by failing to disclose in its license applications the fact that it has interconnected buildings with hardwire, the nature of the circumstances surrounding this violation does not rise to the level of questioning Liberty's ability to be truthful in its future dealings with the Commission. Instead, the appropriate sanction for this technical violation of Section 1.65 is a substantial monetary forfeiture.

87. As a matter of Commission policy, disqualification of Liberty based on violation of cable franchising requirements is against the public interest. The Commission in the 18 GHz Order noted that "[f]ranchising requirements have proved problematic for alternative multichannel operators because they are often used to discourage or even forbid competition for reasons having little to do with appropriate governmental interests." 6 FCC Rcd 1270, 1276 n.34 (citation omitted). This conclusion was first reached in the Commission's *Report: Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd 4962, 4973 (1990) (the "1990 Report on Competition").

88. The Commission has broad discretion to fashion appropriate sanctions for violations of the Communications Act and Commission Rules and policies. *Metro-Act of Rochester, Inc. v. FCC*, 670 F.2d 202, 208 (D.C. Cir. 1981); *Character Policy Statement*, 102 FCC 2d at 1210-11. Forfeiture is one such remedy short of disqualification available to the Commission. See, e.g., *Abacus Broadcasting Corp.*, 8 FCC Rcd 5110, 5114-15 (Rev. Bd.

1993) (forfeiture rather than disqualification was appropriate sanction since licensee did not intend to deceive Commission); *Oil Shale Broadcasting Company (KWSR)*, 68 FCC 2d 517, 529 (1978) (lesser sanctions may be imposed for misconduct which occurred through negligence of principal). Therefore, Liberty agrees to pay a total of \$80,000 for the unauthorized hardwire interconnections of Non-Common Systems.

### **III. LIBERTY SHOULD NOT BE DISQUALIFIED FOR PREMATURE ACTIVATION OF SERVICES**

89. The second issue in the HDO concerns the facts and circumstances surrounding Liberty's operation of certain OFS facilities without prior authorization from the Commission, in violation of Section 301 of the Communications Act, 47 U.S.C. § 301, and Section 94.23 of the Commission's Rules, 47 C.F.R. § 94.23. This issue also seeks to determine whether Liberty violated Section 1.65 of the Commission's Rules, 47 C.F.R. § 1.65, by failing to notify the Commission of Liberty's premature commencement of service in applications and requests filed with the Commission.

90. The facts are uncontroverted that Liberty provided service to the nineteen buildings listed in Appendix A of the HDO prior to receiving appropriate Commission authorization, under circumstances discussed at ¶¶ 91 through 97 below.

91. When Liberty first began transmitting video programming by using the 18 GHz band, Liberty was careful to comply with Commission licensing rules and would not activate any buildings without first receiving a license from the Commission (*Price I* 57:5 - 57:8; *McKinnon* 30:5 - 31:5; *Stern* 71:18 - 72:3). At no time did anyone in Liberty's management