

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

FCC 96M-178
61800

JUL 17 1996

In re Applications of	)	WT DOCKET NO. 96-41	
LIBERTY CABLE CO., INC.)		
For Private Operational Fixed	)	File Nos:	
Microwave Service Authorization	)	708777	WNTT370
and Modifications	)	708778, 713296	WNTM210
New York, New York	)	708779	WNTM385
	)	708780	WNTT555
	)	708781, 709426, 711937	WNTM212
	)	709332	(NEW)
	)	712203	WNTW782
	)	712218	WNTY584
	)	712219	WNTY605
	)	713295	WNTX889
	)	713300	(NEW)
	)	717325	(NEW)

MEMORANDUM OPINION AND ORDER

Issued: July 12, 1996

Released: July 16, 1996

BACKGROUND

1. This is a ruling on a Motion To Enlarge Issues filed on April 22, 1996, by Time Warner Cable of New York City and Paragon Cable Manhattan (collectively referred to as "Time Warner"), as supplemented on April 29, 1996. Bartholdi Cable Company, Inc.'s Opposition To Motion To Enlarge was filed on May 7, 1996. (Liberty Cable Co., Inc.'s name is now Bartholdi Cable Company, Inc. but is referred to herein as "Liberty" or "Liberty/Bartholdi".) Freedom New York, L.L.C. ("Freedom") was granted permission to intervene and filed an Opposition To Motion To Enlarge Issues on May 7, 1996. The Wireless Telecommunications Bureau ("Bureau") Comments On Time Warner's Motion To Enlarge Issues was filed on May 7, 1996. Time Warner's Reply To Oppositions To Motion To Enlarge Issues was filed on May 14, 1996. At the request of the parties, the Reply pleadings of the Bureau and Time Warner were filed on June 4, 1996. See Order FCC 96M-127, released May 28, 1996. In the interest of obtaining further clarification of the underlying business transaction, a transcribed Prehearing Conference was held on June 13, 1996 (referenced herein by "Tr.-").

2. Time Warner requests the addition of five issues to determine whether Liberty: (1) unlawfully transferred OFS licenses without Commission approval; (2) misrepresented or concealed facts concerning a transfer of control; (3) failed to amend OFS applications or to otherwise report a transfer of control in this proceeding; (4) has principals who possess character that qualifies to hold Commission licenses; and (5) merits sanctions including the revocation of other existing authorizations. The Bureau initially supported Time Warner in the addition of the aforementioned issues except for the request for license revocations.

3. Initially, the Bureau contended that there exists a material and substantial question of fact as to whether Liberty transferred control of its licensed facilities to Freedom. Alternatively, the Bureau contended that at a minimum there is a material and substantial question of fact as to the real-party-in-interest of the licenses held by Liberty/Bartholdi after transfer of its assets and personnel to Freedom. The Bureau requested adding an additional issue to determine the real-party-in-interest. However, the Bureau dropped its support for the requested misrepresentation issue. On May 14, 1996, the Bureau filed a Motion seeking leave to file Wireless Telecommunications Bureau's Consolidated Replies To Bartholdi Cable Company, Inc.'s Opposition To Motion To Enlarge And Freedom New York, L.L.C.'s Petition For Limited Intervention And Opposition To Motion To Enlarge Issues which was accepted. On May 22, 1996, Liberty and Freedom filed Oppositions to the Bureau's request for a real-party-in-interest issue. On June 4, 1996, with leave provided to file out of time, the Bureau and Time Warner filed Reply pleadings to Liberty's and Freedom's Oppositions to the addition of a real-party-in-interest issue. The Bureau has reassessed its earlier position and now requests a deferral of ruling on the Motion To Enlarge Issues and on the request for a real-party-in-interest issue until the Bureau conducts an investigation of the effect of the transaction on actual control of the licensed facilities. Time Warner persists in its Motion but shifts the focus to a failure to report substantial information which developed in the course of this proceeding. See 47 C.F.R. §1.65 (substantial and significant changes in information furnished by applicants to the Commission).

4. Liberty/Bartholdi and Freedom were ordered to produce the operative agreements underlying the transfer of assets which were referred to in the pleadings of Freedom and Liberty/Bartholdi. See Order FCC 96M-122, released May 20, 1996. On May 17, 1996, an unredacted set of the documents was furnished to the Presiding Judge and to Bureau counsel for a review of the redactions. Deletions of commercially sensitive information, limited almost exclusively to dollar amounts, were permitted. On May 20, 1996, Liberty provided copies of: (1) Asset Purchase Agreement; (2) List of Exhibits and Schedules to Asset Purchase Agreement; (3) Side letter to the Asset Purchase Agreement (referred to as Exhibit K to the Asset Purchase Agreement); (4) Transmission Services Agreement; (5) List of Exhibits to Transmission Services Agreement; and (6) Subcontractor Agreement (collectively referred to as the "Transaction Documents"). The redactions were found by the Presiding Judge and by Bureau counsel to be reasonable and appropriate and such redacted copies were immediately furnished to all counsel.

¹ The Transmission Services Agreement is subject to the station record-keeping rule of §94.17(3). Freedom and Liberty/Bartholdi agreed to place redacted copies of the Transmission Services Agreement and the Subcontractor Agreement on the public record. Since this ruling is dispositive and is based on all of the Transaction Documents, Freedom and Liberty/Bartholdi will also place on the public record of this proceeding redacted copies of the Asset Purchase Agreement and the Exhibit K side letter Agreement. See Memorandum Opinion And Order FCC 96M-171, released July 5, 1996.

FACTS

Transfer of Liberty Assets

5. In late 1995, Freedom and Liberty/Bartholdi were negotiating terms of an acquisition by Freedom of Liberty assets. The structure of the transaction was under negotiation when a meeting was held with Bureau officials on January 25, 1996, at the request of Freedom and Liberty/Bartholdi. (Tr. 214.) The identity of Freedom was not disclosed to the Bureau. There was then an ongoing investigation into matters that are the subject of the designation order² and the Bureau was concerned about the potential for ex parte disclosures. (Tr. 220-21.) Counsel for Freedom and Liberty/Bartholdi wanted to explain the transaction to the Bureau to avoid exacerbating the position of Liberty in the ongoing investigation. (Tr. 217-18.) There was nothing definitive resolved at the meeting. The meeting concluded with an expression of interest on the part of the Bureau for a copy of the contemplated transmission service agreement with which the Bureau had some concern. (Tr. 221.) No document was provided (Tr. 223) and the Bureau assumed that the negotiations had been discontinued. Freedom and Liberty/Bartholdi have taken the position that the meeting was sufficient to put the Bureau on notice that an asset acquisition transaction was forthcoming between Liberty and a purchaser to be later identified. However, there was nothing definitive said at the meeting by the Bureau that could be construed as advance approval of the transaction, particularly as to control of the licensed facilities. The Bureau affirmed that it gave no opinion on whether the transaction could take place without Commission approval and counsel for Liberty/Bartholdi confirmed that there was no definitive outcome of the meeting. (Tr. 223-25).

6. Unbeknownst to the Bureau, on February 20, 1996, an Asset Purchase Agreement ("Agreement") was executed by Liberty and by Freedom.³ The Agreement recites, in pertinent part, that Freedom desires to purchase Liberty's assets which are used in the business of providing subscription television services, including the name Liberty Cable Co., Inc. Assets specifically excluded are FCC licenses/authorizations that relate to transmission of 18 GHz wireless cable services, fixed transmission and reception equipment,⁴ and miscellaneous assets

² Hearing Designation Order And Notice of Opportunity For Hearing ("HDO") (FCC 96-85), released March 5, 1996.

³ Liberty as Seller collectively includes Liberty Cable Company, Inc., a New York corporation; Liberty Cable Television, Inc., a Delaware corporation; Liberty Cable Newport, Inc., a New Jersey corporation; Birdsong Communications, Inc., a Delaware corporation; Battery Place Cable Corp., a New York corporation; and Liberty Interactive Video Enterprises, Inc., a Delaware corporation. Freedom is owned by RCN Corporation (80.1%) and by Bartholdi Cable Co., Inc. (19.9%).

⁴ Included is equipment relating to the provision of 18 GHz microwave wireless cable services for each building in which existing subscribers are located.

such as pension/profit sharing plans.⁵ The purchase price was \$40 million with \$25 million due at closing on March 6, 1996, and a holdback of \$15 million to be paid to Liberty/Bartholdi after the occurrence of certain events.

Agreements Effecting Control of Transmission

7. The parties also executed a related Transmission Services Agreement dated February 20, 1996, wherein Liberty/Bartholdi agrees to provide full-time private operational fixed 18 GHz microwave communications services exclusively to Freedom as an independent contractor at identified sites. The Transmission Services Agreement applies to services that Liberty/Bartholdi will provide for the retained equipment under the Asset Purchase Agreement. It contemplates future conversion of the equipment to Freedom at which time Liberty/Bartholdi will cease providing microwave services to the sites. Once a site is converted and Freedom makes a request, Liberty/Bartholdi will cooperate with Freedom's efforts to obtain Commission licenses for the sites and will discontinue any applicable authorizations which would include FCC licenses.

8. On May 14, 1996, Liberty/Bartholdi entered into a Subcontractor Agreement with Freedom, a flip side of the Transmission Services Agreement, wherein Freedom becomes a subcontractor to provide technical and maintenance services for microwave transmission facilities owned by the "Bartholdi Network." According to that document, Freedom's services will be subject to the control and supervision of Liberty/Bartholdi, the licensee. Freedom will provide qualified employees, make necessary repairs to and provide the maintenance of equipment, arrange for bookkeeping and accounting, and provide periodic reports to Liberty/Bartholdi in connection with the operation of the Bartholdi Network. Although it was executed on May 14, 1996, by pen and ink insertion, the document is intended to be effective as of March 12, 1996. The Subcontractor Agreement expires on December 31, 2001, unless sooner terminated.

9. The Subcontractor Agreement of May 14, 1996, shows Freedom as providing both personnel and services for the operation of licensed facilities while Liberty/Bartholdi retains control of the facilities. The sequence of dates bears watching. The Motion To Enlarge Issues was filed by Time Warner on April 22, 1996, following publication of newspaper reports of the transaction. Time Warner obtained copies of pertinent excerpts of related 10-K reports, which are matters of public record at the SEC, and used that information as the basis for the Motion. Time Warner further supplemented its Motion on April 29, 1996, to show that Freedom was in the process of applying to the FCC for microwave licenses which use the transmitter equipment retained by Liberty/Bartholdi. Liberty/Bartholdi filed its Opposition on May 7, 1996. There was no reference in the opposition pleadings to a Subcontractor Agreement in gestation. On May 9, 1996, counsel were notified that the Presiding Judge would hold a Prehearing Conference on May 15 (FCC 96M-109). There was no discussion of the

⁵ Also excluded are the assets of Liberty Interactive Video Enterprises, Inc. ("LIVE"). There was also a contemplated Marketing Services Agreement under which LIVE will perform marketing and promotional services for Freedom. The LIVE arrangement is not concerned with the operation of microwave transmission/reception facilities.

universe of the Transaction Documents⁶ but copies were ordered to be produced for an in camera comparison of proposed redactions (FCC 96M-122). Counsel for Freedom and counsel for Liberty/Bartholdi represented at the Prehearing Conference of June 13, 1996, that there was delay in the preparation and execution of the Subcontractor Agreement due to other matters which took precedence over its drafting and execution.⁷

DISCUSSION

10. The Commission standards for adding post designation issues more than 15 days after designation are as follows

[T]he motion to enlarge will be considered fully on its merits if (and only if) initial examination of the motion demonstrates that it raises a question of probable decisional significance and such substantial public interest⁸ importance as to warrant consideration in spite of its untimely filing.⁹

Such motions, oppositions thereto, and replies to oppositions shall contain specific allegations of fact sufficient to support the action requested. Such allegations of fact, except for those of which official notice may be taken, shall be supported by affidavits of a person or persons having personal knowledge thereof.

⁶ The Asset Purchase Agreement has 19 Exhibits and 48 Schedules. Of these only Exhibit K to the Asset Purchase Agreement was disclosed.

⁷ Hart-Scott-Rodino filings for antitrust review were offered as an example. There was an initial filing with DOJ and FTC to report the size of the Freedom-Liberty/Bartholdi transaction. The transaction did not meet the threshold values for a full review of the transaction which would have required a far more extensive production of information. Therefore, the explanation that other more pressing matters prevented the execution of a Subcontractor Agreement in March lacks conviction.

⁸ In Astroline Com. Co. Ltd. Partnership v. F.C.C., 857 F.2d 1556 (D.C. Cir. 1988), the Court applied the two step test of (a) a prima facie inconsistency with the public interest and (2) a substantial and material question of fact is presented. Id. at 1561. See also 47 C.F.R. §1.229, supra. The public interest standard is readily met by the policy considerations underlying §310(d) of the Act prohibiting unauthorized transfers of control of Commission licenses.

⁹ Motions to enlarge issues in non-comparative cases must be filed within 15 days of the publication of the designation order in the Federal Register. 47 C.F.R. §1.229(a). The designation order here (FCC 96-85) was published on March 22, 1996. See 61 Fed. Reg. 11839. Since the Motion was filed by Time Warner on April 22, 1996, the Motion was technically untimely. However, good cause was shown for the delay in filing in view of the unawareness of the Liberty-Freedom Asset Purchase Agreement.

47 C.F.R. §1.229. There were no affidavits filed with any of the pleadings in support of the Motion. There are unchallenged declarations of the chief operating officers of Freedom and Liberty/Bartholdi. Transaction Documents selected by Freedom and Liberty Bartholdi were identified and redacted copies were utilized by counsel in addressing Time Warner's motion and in answering the Bureau's comments. The Bureau believes that the facts still raise serious doubts about whether or not Liberty/Bartholdi has control over its authorized 18 GHz microwave transmission and reception facilities. However, the Bureau contends that the Transaction Documents do not raise substantial issues of fact warranting the addition of an issue regarding control or real party-in-interest at this time.

Control Issues

11. The Commission authorizes Part 94 licensees to offer services as for-profit private carriers provided that conditions are met with respect to the licensees retaining control and the existence of a written agreement. 47 C.F.R. §94.17(a). For purposes of this ruling, Liberty is considered to qualify as a Part 94 private carrier. The Transaction Documents taken at face value show that Liberty/Bartholdi is intended to retain control over and access to the licensed facilities which are the subject of this proceeding. Liberty/Bartholdi also is represented as retaining control over related equipment. There has been no evidence offered by affidavit or documents to show that actual control of assets or equipment was assumed by Freedom or that Liberty no longer has such control. Time Warner has made arguments that raise serious questions by inference, but no factual showing was made. Based on the documents and in the absence of a factual showing, the requisite control and access to 18 GHz microwave operational facilities and equipment are presumed, for purposes of this ruling, to remain with the licensee.

12. The standard for review of the Transaction Documents, which is the only evidence available at this time, was established by the Commission in Intermountain Microwave, 24 Radio Reg. (P&F) 983, 984 (1963):

[I]t is essential that the licensee at all times retain exclusive responsibility for the operation and control of the facilities in order to avoid a violation of Section 310(b).¹⁰ The normal minimum incidents of such interest include the unfettered use of all facilities and equipment used in connection therewith; day to day operation and control; determination of and the carrying out of policy decisions,

¹⁰ Section 310(b) of the Communications Act provides:

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

including the preparation and filing of applications with this Commission; employment, supervision, and dismissal of personnel; payment of financial obligations including expenses arising out of operation; and the receipt of moneys and profits derived from the operation of the microwave facilities.

13. On the question of substantial and material question of fact that warrants a hearing, it must be determined "whether the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for." Citizens for Jazz on WRVR v. F.C.C., 775 F.2d 392, 395 (D.C. Cir. 1985). An examination of relevant documentation of the licensee may be sufficient to make a reasonable projection of control. Telephone & Data Systems, Inc., 19 F.3d 655, 657 (D.C. Cir. 1994). Since there is no testimony available, the Transaction Documents must control this interlocutory analysis under Section 1.229.

14. As described by Liberty/Bartholdi and Freedom in their respective Opposition pleadings filed on May 22, 1996, the Transaction Documents show that: (1) Liberty/Bartholdi retains the transmission and reception facilities which are subject to the licenses which were designated in this proceeding; (2) although the Asset Purchase Agreement provides for Freedom to determine when it receives the facilities for transmission and reception, it is provided that any such transfer must be made in accordance with Commission rules; (3) the Transmission Service Agreement allows Liberty/Bartholdi unlimited access to Bartholdi's equipment and the premises owned or controlled by Freedom; (4) the Subcontractor Agreement spells out with greater specificity that the transmission and reception facilities and related equipment remain the property of Liberty/Bartholdi and Freedom has access only insofar as it is necessary to fulfilling its obligations as the Subcontractor; (5) Liberty/Bartholdi is responsible for day to day operations of the facilities under the Transmission Services Agreement;¹¹ (6) Liberty/Bartholdi employs, supervises and dismisses its personnel and arranges for its own attorneys and contractors;¹² (7) Liberty/Bartholdi pays its own expenses under the Asset Purchase Agreement as made more clear by the terms of the Subcontractor Agreement; (8) the Transmission Services Agreement, as further clarified by the Subcontractor Agreement, provides that Freedom will pay Liberty/Bartholdi on a monthly basis for the transmission and reception services provided by the Bartholdi Network. Liberty/Bartholdi urges that the documents also establish that "Bartholdi determines and carries out policy decisions affecting its network." In furtherance of that assertion

¹¹ Liberty/Bartholdi argues that "the express terms of the Subcontractor Agreement resolve any question of control in Bartholdi's favor." To insure even further insulation, the Agreement uses the tautological provision that it must be carried out in conformance with Commission rules.

¹² Over 100 of the employees are former employees of Liberty who are now employed by Freedom. Thus, while the documents state that they are controlled by Liberty/Bartholdi their salaries are paid by Freedom. The Subcontractor Agreement recognizes the tensions in such an arrangement by providing for a power of removal of Freedom employees who are later found to be used in the operation of the Bartholdi system.

Liberty/Bartholdi notes its own participation as a party to this proceeding and provisions of the Transmission Services Agreement which require Liberty/Bartholdi to keep current its Commission licenses.¹³

15. Time Warner is not able to show through personal knowledge that Freedom and Liberty/Bartholdi agreed to transfer control of the licensed facilities to Freedom or that the facilities would be operated by Freedom after the transfer of assets. Time Warner can only point to circumstances which raise serious questions: First, Freedom will receive equipment at the time of a building's conversion without additional payment which shows that Freedom has already purchased the equipment; second, the effect of the Transmission Services Agreement is to give Freedom the use in perpetuity of the microwave paths assigned to Liberty/Bartholdi; and third, the Subcontract Agreement is a flip-side mirror image of the Transmission Service Agreement in that Freedom effectively replaces Liberty/Bartholdi as the provider of the services to the microwave paths. (Tr. 185-190.) Freedom even is named as the beneficiary of the damage insurance which covers the equipment. (Tr. 186.) Time Warner argues that there is a covenant not to compete that will effectively bar the present owners of Bartholdi from competing in the New York City market once Freedom takes over the facilities. (Tr. 189.) These circumstances raise questions of control.

16. To the contrary, counsel for Freedom and Liberty/Bartholdi assert that there was a parole agreement on March 12, 1996, which later became the Subcontractor Agreement of May 14, 1996, under which employees of Freedom would be subcontracting services to Liberty/Bartholdi. That Agreement requires Freedom to report on the maintenance work and even procure general business liability insurance. Monthly fees that Liberty/Bartholdi will pay to Freedom under the Subcontractor Agreement are to be offset against the payouts remaining to be paid from the holdback under the Asset Purchase Agreement. Time Warner also argues that the Subcontractor Agreement portrays Freedom as the party which is answerable to Liberty/Bartholdi. (Tr. 240.) It is concluded that there are circumstances surrounding the date and self-serving terms of the Subcontractor Agreement which raise questions. But under the circumstances here, the Transaction Documents alone, taken as a whole, do not raise "substantial" questions of actual control which the parties appear to have agreed will remain for the time being with Liberty/Bartholdi.

17. In its Reply pleading of June 4, 1996, the Bureau represents that it does not support the addition of issues related to control at this time. But the Bureau makes clear that there remain significant questions that must be answered because the only showing of control by Freedom/Bartholdi are the self-serving references to the Transaction Documents which support their position. Points made by the Bureau include: the Transaction Documents do not assist in

¹³ The Asset Purchase Agreement is structured to allow for later removal of Bartholdi's microwave facilities and to substitute new facilities of Freedom (e.g. replacing microwave with fibre optics) as illustrated in New York Times, July 10, 1996 at D.1,6: "RCN Cable Concern Offers Broad Package." It appears to be a "policy" which could terminate the Transmission Services Agreement and the Subcontractor Agreement that would be driven by Freedom.

determining who is actually taking actions at the facilities;¹⁴ the lateness of the Subcontractor Agreement begs the question of what occurred prior to its execution; there are insufficient facts presented to determine the level of control over day-to-day operations; since Freedom receives subscribers under the Asset Purchase Agreement, key employees are now in the employ of Freedom, and since it is contemplated that Freedom will ultimately obtain the facilities, it is difficult to determine that Liberty/Bartholdi now controls "policy" decisions relating to the licensed facilities; Freedom is applying for microwave paths in its own right and it would be in Freedom's interest to have a uniform "policy" for the Freedom/Bartholdi venture which is run by the same people who are distributing the same programming; and Freedom has the responsibility to hire qualified personnel and has obtained most of the Liberty technical staff which leaves Bartholdi understaffed to maintain its licensed facilities, a situation which raises a serious question of control over the technical staff.

18. The Bureau acknowledges that an adequate showing has been made under Intermountain relating to financial obligations of Bartholdi and the receipt by Bartholdi of money and profits related to operations of the licensed assets. But the totality of the circumstances is the appropriate test and the facts considered above, in their totality, continue to raise serious questions for the Bureau, particularly with respect to the operation of the licensed assets by Freedom's technical staff. At this time, only inferences can be drawn from the Transaction Documents which were drafted with the intention of showing that control of the licenses remain in Liberty/Bartholdi. Such inferences based on contractual terms yet to be flushed out do not raise "substantial questions of fact" that qualify for issues to be added for litigation. Therefore, the issues on control cannot be added at this time.¹⁵

Section 1.65 Disclosure

19. Time Warner contends that an issue should be added for a failure to report the transaction under §1.65. Negotiations began in late 1995 when the Commission was considering the charges that became the issues in this case. Agreements were executed on February 20, 1996, following a meeting with the Bureau on the subject. Yet the Bureau was not notified until Time Warner raised the issue on April 22, 1996. The effect of the transaction was to change the

¹⁴ Cf. La Star Cellular Telephone Company, 9 F.C.C. Rcd 7108 (1994) (after a hearing it was determined that the parties had not followed the formalities of the agreement and that actual control rested in the hands of the non-qualified party).

¹⁵ The Bureau does not support the position of Time Warner on the alleged transfer of control. The Bureau demurs from taking a position on whether or not a control issue relating to a real party-in-interest should be added at this time. However, if the Motion is not granted, the Bureau represents that it will undertake an investigation under Section 308(b) of the Act seeking evidence on whether Liberty/Bartholdi is the real party-in-interest. The Bureau may renew its request for a real party-in-interest issue based on newly discovered investigative facts provided that the request is made before the record is closed in this hearing and provided that the standards of Section 1.229 are met.

source of programming service for over 30,000 subscribers, including ones who are receiving service via Special Temporary Authorities ("STAs") which the Commission granted in September 1995 based on Liberty's disclosure.

20. Section 1.65(a) provides:

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

[W]henever 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

21. When the STAs were granted the Commission was relying on the ability of the technical staff of Liberty/Bartholdi to continue providing services. Since the licenses were in jeopardy after the HDO was issued and the Commission had set a substantial question of fact as to the fitness of Liberty/Bartholdi to hold the licenses in question, the execution of the two Agreements on February 20, 1996, constituted a substantial change. Yet there was sufficient concern about the transaction to cause a meeting with the Bureau in January 1996, two months before the closing. Having heard nothing further, the Bureau concluded that the parties had not achieved an agreement. Under the circumstances, the completion of a major transfer of assets in February 1996, was a material event which should have been disclosed to the Commission.

22. Liberty/Bartholdi seeks to justify its right of non-disclosure on the enabling rule for a Part 94 private carrier. See 47 C.F.R. §94.17. The rule provides for offering a service as a for profit private carrier subject to the condition, inter alia, that "all sharing, and private carrier arrangements must be conducted pursuant to a written agreement to be kept as part of the station records." 47 C.F.R. §94.17(3). The STAs that were granted at the request of Liberty/Bartholdi, and that are the subject of this proceeding, are related to applications which will not be approved while this proceeding is pending. HDO at Para. 2. It is clear from the regulatory scheme of Part 94 that when a licensee chooses to operate as a private carrier there must be disclosure of the relevant documents on file at the station.¹⁶ Until recently,

¹⁶ Freedom submits that only the Transmission Services Agreement must be in the files of the licensed stations which have become private carriers. Liberty/Bartholdi concurs. Yet there never was even that much compliance with Part 94 and the Commission was never informed. If the Transmission Services Agreement would be available to the Bureau as a station record, why was it not furnished to the Bureau when it was asked for after the January meeting?

Bartholdi/Liberty has not been in compliance with §94.17(a)(3). In pleadings related to claims of confidentiality, Liberty/Bartholdi has conceded that the Transmission Services Agreement must be made available to Commission personnel as part of station records. Memorandum Opinion And Order, FCC 96M-171, supra.

23. It is concluded that Liberty/Bartholdi is in technical violation of §1.65. However, an issue would only be added if there is a substantial question as to whether the non-disclosure was intentional. See Merrimack Valley Broadcasting, Inc., 55 Radio Reg.2d (P&F) 23, 25, recon., 57 Radio Reg. 2d (P&F) 713, 716 (1984) (Section 1.65 issues should not be added unless shown that unreporting was intended to conceal or other circumstances of significant carelessness or inattention are present). See also Swan Creek Communications v. F.C.C., 39 F.3d 1217, 1222 (D.C. Cir. 1994) (withheld information must be material and deliberately withheld with an intent to deceive the Commission). As analyzed above, the transaction materially changed the relationship between subscribers and the provider of the licensed microwave services. Therefore, the information as presented to the Commission by the STA applications was no longer substantially accurate and the change of asset alignment and the transfer of key technical employees to Freedom has decisional significance here. But Liberty/Bartholdi and Freedom knew the asset purchase would be publicized in the trade papers and in the public files at the SEC. It would not remain a secret very long, a rational assumption born out by the Motion To Enlarge Issues that was filed by Time Warner. There was a partial preliminary disclosure made to the Bureau at the January meeting. And Part 94 permits the assumption of private carrier status without Commission authorization or approval. Therefore, there will not be an issue added under §1.65.

Misrepresentation/Lack Of Candor

24. For the reasons stated for not adding a reporting issue under Section 1.65, there will be no issue added for misrepresentation or lack of candor. Intent to deceive is an essential element which does not appear from the papers. Swan Creek Communications v. F.C.C., supra; Weyburn Broadcasting L.P. v. F.C.C., 984 F.2d 1220, 1232 (D.C. Cir. 1993); Intercontinental Radio, Inc., 98 F.C.C. 2d 608, 639 (Review Bd 1984). Declarations of operating officers of Freedom and Bartholdi, although conclusory and self-serving, negate such an intent and there are no counter-affidavits which raise a substantial question of fact.

ORDER

IT IS ORDERED that the Motion To Enlarge Issues filed on April 22, 1996, by Time Warner Cable of New York City and Paragon Cable Manhattan, as Supplemented on April 29, 1996, IS DENIED

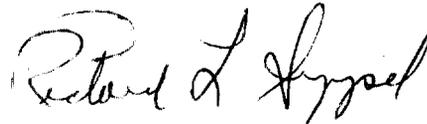
IT IS FURTHER ORDERED that the Bureau MAY INITIATE an investigation into the question of actual control of the microwave paths and related facilities operated by Bartholdi Cable Co., Inc. (formerly Liberty Cable Co., Inc.) and related questions of disclosures/nondisclosures and possible misrepresentations/lack of candor.¹⁷

IT IS FURTHER ORDERED that within five business days from the release of this document, Bartholdi Cable Co., Inc. (formerly Liberty Cable Co., Inc.) shall state for the record the status of its station records' compliance as a private carrier under 47 C.F.R. 94.17(a)(3)

IT IS FURTHER ORDERED that within five business days from the release of this document, Freedom New York, L.L.C. and Bartholdi Cable Company, Inc. (formerly Liberty Cable Co., Inc.) SHALL PLACE ON THE PUBLIC RECORD of this proceeding redacted copies of the Asset Purchase Agreement and the Exhibit K side letter Agreement.¹⁸

IT IS FURTHER ORDERED that within five business days from the release of this document, all pleadings in connection with time Warner's Motion To Enlarge Issues that were submitted to the Secretary as confidential documents SHALL BE PLACED on the public record of this proceeding.

FEDERAL COMMUNICATIONS COMMISSION¹⁹



Richard L. Sippel
Administrative Law Judge

¹⁷ See Order FCC 96M-173, released July 11, 1996 (authority to conduct a Section 308 inquiry).

¹⁸ See Also fn.1, supra. Freedom and Liberty/Bartholdi have requested an opportunity to have portions of this ruling sealed which they may hereafter assert are entitled to confidential treatment. The Presiding Judge has ruled against that request. See Memorandum Opinion And Order FCC 96M-171 issued July 5, 1996. Based on that ruling there will be no special treatment afforded to this ruling and it goes right on the public record.

¹⁹ Copies of this Memorandum Opinion And Order were made available to counsel on the date of issuance.