



COPY

NEW YORK STATE  
COMMISSION ON CABLE TELEVISION

DOCKET NO. 90460

In the Matter of

Petition of Time Warner Cable of New York City and  
Paragon Cable-Manhattan regarding the operations of  
Liberty Cable Company, Inc.

Held at:

Corning Tower  
Empire State Plaza  
Albany, New York  
December 9, 1994  
12:40 PM

TRANSCRIPT OF PROCEEDINGS held pursuant to  
Notice before Joanne M. DeStefano, Certified  
Shorthand Reporter and Notary Public in the State of  
New York.

BEFORE:

WILLIAM B. FINNERAN, Chairman  
JOHN A. PASSIDOMO, Commissioner  
BARBARA T. ROCHMAN, Commissioner  
EDWARD P. KEARSE, Executive Director

APPEARANCES:

For Commission on Cable TV:

JOHN L. GROW, Chief Counsel  
JACLYN BRILLING, Deputy Counsel  
Corning Tower, 21st Floor  
Empire State Plaza  
Albany, New York

Joanne M. DeStefano, CSR

R1089



1 MR. MacNAUGHTON: And if what you  
2 want to do is hear more on that subject, then tell  
3 me and I will make that presentation.

4 COMMISSIONER ROCHMAN: Well --

5 CHAIRMAN FINNERAN: We're going to  
6 take a five-minute break, and we urge you to return  
7 in exactly five minutes.

8 [A recess was taken from 2:33 PM to  
9 to 2:49 PM.]

10 CHAIRMAN FINNERAN: I move that the  
11 commission order an immediate standstill requiring  
12 that Liberty establish no additional cable or other  
13 closed transmission interconnections of buildings  
14 not commonly owned, controlled or managed; that  
15 Liberty shall not energize any new subscribers  
16 through such hard-wired interconnected buildings to  
17 which service is not currently being provided unless  
18 under common management, control or ownership;

19 That such standstill be in effect  
20 until vacated by this commission;

21 And finally, that within ten days  
22 Liberty provide to this commission a listing of all  
23 buildings throughout the five boroughs that have  
24 hard-wired interconnection and an indication of such  
25 where an exemption is intended to be claimed because

1 of common ownership, management or control and the  
2 nature of such claim.

3 MR. PASSIDOMO: Mr. Chairman, would  
4 you make that into three separate motions?

5 CHAIRMAN FINNERAN: Yes. Let's  
6 assume that that will be divided into three separate  
7 motions:

8 That there will be immediate  
9 standstill; again, requiring no additional cable or  
10 closed transmission interconnections of buildings  
11 not commonly owned, controlled or managed; that  
12 where service is not currently being provided, that  
13 no new subscribers be serviced through such  
14 hard-wired interconnection absent common ownership,  
15 control or management;

16 That such standstill be in effect  
17 until vacated by this commission.

18 I move that within ten days Liberty  
19 provide a listing to this commission of all  
20 hard-wired interconnected buildings throughout the  
21 five boroughs with an indication of which of these  
22 interconnections there is intended to be asserted an  
23 exemption because of common ownership, control or  
24 management.

25 I so move.

1 MR. PASSIDOMO: I second the motion.

2 CHAIRMAN FINNERAN: Chairman

3 Finneran, yes.

4 COMMISSIONER ROCHMAN: Yes.

5 COMMISSIONER PASSIDOMO: Yes.

6 MR. KEARSE: Yes.

7 CHAIRMAN FINNERAN: The evidentiary  
8 phase will be conducted, as we earlier indicated,  
9 probably in New York City by Mr. Kearse.

10 Notification as to time and place of such will be  
11 forwarded to the parties of interest.

12 There being no further business  
13 before this --

14 MR. SCHWARTZ: Could I just have a  
15 point of clarification?

16 CHAIRMAN FINNERAN: Please.

17 MR. SCHWARTZ: Was that vote on all  
18 three of the motions, or is there --

19 CHAIRMAN FINNERAN: Yes, it was.  
20 There was immediate standstill, the extent of it in  
21 terms that it is in place until such time as is  
22 vacated by the commission, and that the disclosure  
23 within ten days as I indicated.

24 MR. PASSIDOMO: Why don't we take  
25 each motion at a time so that there will be no

1 question.

2 MR. GROW: If there is no objection  
3 to it--

4 CHAIRMAN FINNERAN: There being no  
5 objection, each of those will be separately  
6 approved.

7 MR. PASSIDOMO: Fine.

8 CHAIRMAN FINNERAN: There being no  
9 objection. Okay.

10 There being no further business  
11 before the commission, we thank you, one and all.

12 MR. MacNAUGHTON: Thank you.

13 [At 2:54 PM the proceeding was  
14 adjourned.]

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

RECEIVED

JAN 29 1995

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In Re Applications Of	)		
	)		
LIBERTY CABLE CO., INC.	)	File Nos.	
	)		
For Private Operational Fixed	)		
Microwave Radio Service Authorization	)		
And Modifications	)		
	)		
New York, New York	)	709332	(New)
	)	709426	WNTT582
	)	708777	WNTT370
	)	708778	WNTT489
	)	708779	WNTT378
	)	708780	WNTT406
	)	708781	WNTT698

To: Chief, Wireless Telecommunications Bureau

PETITION TO DENY OR CONDITION GRANT

Time Warner Cable ("Time Warner"), a division of Time Warner Entertainment Company, L.P., by its attorneys and pursuant to Sections 1.962(g) and 94.33 of the FCC rules, hereby petitions to deny or condition the grant of the above captioned operational fixed microwave service ("OFS") applications filed by Liberty Cable Company, Inc. ("Liberty").<sup>1</sup> Contrary to its representations to the Commission, Liberty is not qualified to hold or obtain 18 GHz authorizations for video delivery in New York City, because it is a "cable operator" under federal law but does not hold a local franchise to provide cable television service.

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<sup>1</sup>The FCC released Public Notices of its acceptance of Liberty's above-captioned applications on December 30, 1994, Report No. 1776 (with regard to File Nos. 709332 and 709426) and December 9, 1994, Report No. 1773 (with regard to the other applications).

Time Warner, through its Time Warner New York City Cable Group, manages Paragon Cable Manhattan and Time Warner Cable of New York City, the two cable television franchisees in the borough of Manhattan. Liberty, as described below, also provides cable television service to buildings located with Time Warner's franchise areas in Manhattan, although without a franchise. The above-captioned applications seek authority to construct or modify facilities to provide video service to buildings in those areas.<sup>2</sup> It is well-established that a potential competitor for audience and revenues has standing to petition to deny an FCC application. See, e.g., Oregon Broadcasting Co., 16 RR 2d 878 (1969); Hall Broadcasting Co., Inc., 44 RR 2d 637 (1978), recon. denied, 45 RR 2d 539 (1979). See also FCC v. Sanders Brothers Radio Station, 309 U.S. 470 (1940). Accordingly, Time Warner has standing as a party in interest to file this Petition.

In 1991, the Commission amended Part 94 of its rules to permit the use of OFS authorizations in the 18 GHz band to distribute video entertainment programming. Operational-Fixed Microwave Service (Video Distribution Systems - 18 GHz), 6 FCC Rcd 1270, 68 RR 2d 1233 (1991), recon., 70 RR 2d 24 (1991). In its Report and Order, the Commission made clear that "[p]ursuant to 47 U.S.C. § 541(b)(1), firms seeking to construct and operate cable systems' as defined in Section 522(6) [now 522(7)] must first obtain a franchise from the state government or its local designate." 68 RR 2d at 1237 (footnote omitted). It explained that SMATV-served buildings would fall within the definition of "cable system" if they were interconnected by wire or cable, unless (1) the buildings were

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<sup>2</sup>Attachment 1 hereto is a list of these applications by file number, call sign, location and coordinates.

commonly-owned, controlled or managed and (2) the physically closed interconnection paths did not use public rights-of-way.<sup>3</sup> The Commission concluded that:

entities seeking to construct video distribution systems using OFS transmission are not required under 47 U.S.C. § 541(b)(1) to obtain a franchise unless they also connect properties via some type of physically closed transmission path such as wire, coaxial cable or fiber optics and do not fall within the common ownership/no public right-of-way exception. 68 RR 2d at 1237 (footnote omitted, emphasis added).<sup>4</sup>

One of Liberty's pending applications (File No. 709332) seeks authority to construct a new OFS facility in the 18 GHz band to transmit between two buildings in New York City. That application includes as Exhibit 2 a "Statement Of Eligibility And Use," in which Liberty represents that it "is the owner and operator of various private cable (SMATV) systems and proposes the point-to-point distribution of video entertainment material to private cable buildings and ultimately subscribers to the service." The six other applications captioned above seek authority to modify Liberty's existing OFS facilities by adding paths, again between various buildings in New York City. Each of these applications also contains

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<sup>3</sup>In FCC v. Beach Communications, Inc., 113 S.Ct. 2096 (1993), the Supreme Court upheld the constitutionality of the requirement that a video programming distributor obtain a franchise if its closed transmission lines interconnect separately owned and managed buildings, regardless of whether public rights-of-way are occupied.

<sup>4</sup>The interconnection of non-commonly owned buildings through "open" transmission facilities such as 18 GHz OFS frequencies would not trigger the franchise obligation:

Electromagnetic radiation, in passing above, across or through a public right-of-way does not "use" that right-of-way within the meaning of Section 522(6). The transmissions authorized in the instant proceeding fall into this latter category. 68 RR 2d at 1237 (emphasis added).

However, use of "closed" transmission facilities, such as coaxial cable, to interconnect non-commonly owned buildings invokes the statutory franchise requirement, even if no public rights-of-way are occupied.

an eligibility showing, which represents to the Commission that Liberty is the operator of "private cable (SMATV) systems" and will use the authorizations to serve "private cable buildings."<sup>5</sup> In reviewing these applications, the Commission would obviously be led to believe that Liberty is merely a SMATV operator, does not require a cable television franchise from New York City, and thus is qualified to provide 18 GHz video program service under the 1991 Report and Order. In fact, this is not true.

Liberty is a plaintiff in a suit pending in the U.S. District Court for the Southern District of New York, against the City of New York, the Commissioner of the Department of Information Technology and Telecommunications, the New York State Commission on Cable Television and others.<sup>6</sup> In its First Amended Complaint, which is included as Attachment 2 hereto, Liberty concedes that (1) it meets the statutory definition of a "cable system" under 47 U.S.C. § 522(7), (2) federal law requires it to hold a franchise from New York City and (3) it does not now hold such a franchise.

Pursuant to federal law, and in particular, 47 U.S.C. §§ 522 and 541, Liberty is required to have a franchise from the City of New York to deliver cable service to some of its subscribers, including Plaintiffs Sixty Sutton Corp. and Bud Holman, despite the fact that the delivery of cable television service to these subscribers does not use any public property or right-of-way.  
Attachment 2 at 1.

Liberty's Complaint explains that it provides cable television service in Manhattan through three configurations, "stand alone systems," in which a single microwave reception

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<sup>5</sup>Official notice may be taken of the facts underlying this Petition, which are contained in applications on file at the Commission and a Complaint on file in federal court and appended hereto.

<sup>6</sup>Liberty Cable Company v. City of New York, 94 Civ 8886 (2nd Cir.).

antenna delivers service to the residents of a single multifamily building upon which an antenna is located; "common systems," in which a single antenna delivers service to the residents of two or more multifamily buildings that are under common ownership, control or management; and "non-common systems," which Liberty describes as follows:

. . . In this configuration, Liberty utilizes a single microwave reception antenna to provide cable television service to the residents of two or more multifamily buildings that are not under common ownership, control or management. The single microwave reception antenna is located on one building and a coaxial cable, using only private property, runs to the other building(s) in the Non-Common Systems. Attachment 2 at 7.

\* \* \* \* \*

The Non-Common Systems are "cable systems" pursuant to 47 U.S.C. § 522(7) because the buildings they serve do not meet the Common Ownership Requirement in 47 U.S.C. § 522(7)(B). Thus Liberty, as a "cable operator" of these "cable systems," is required by 47 U.S.C. § 541 to have a "franchise" from a "franchising authority" for the operation of the Non-Common Systems, despite the fact that there is no use of City property or any public right-of-way.

Liberty constructed the Non-Common Systems between January 1993 and August 1994. Attachment 2 at 8.

Moreover, the relevant franchising authorities appear to have recognized that Liberty stands in violation of federal franchise requirements. On August 23, 1994, in response to a complaint from Time Warner, the New York State Commission on Cable Television ("NYSCCT") issued Liberty an Order To Show Cause why it should not be subject to franchise requirements. A copy of that Order is attached hereto as Attachment 3. On November 18, 1994, the NYSCCT released a Notice of Hearing on the matter. At a hearing held on December 9, 1994, the NYSCCT issued a limited standstill order prohibiting Liberty

from establishing any additional cable or other closed transmission path interconnections of buildings not under common ownership, control, or management.<sup>7</sup>

At least some of the above-captioned applications involve buildings which are the subject of the State's Order to Show Cause and Liberty's lawsuit as "non-common operations." For example, File No. 708779 seeks to add a path to 44 West 96th Street, as part of a cable television system being operated illegally by Liberty without a franchise, which is referenced in the Order To Show Cause. File No. 708781 seeks to add a path to 239 East 79th Street, which also is referenced in the Order to Show Cause as part of a cable system which requires a local franchise. See Attachment 3 at 2. File No. 708781 also seeks a path to a "60 Sullon" and "60 Sullon Avenue." Time Warner is not aware of any such address in New York City, and assumes that this reference is meant to be to 60 Sutton Place, a building which is also at issue in the litigation. As noted above, however, those applications represent that Liberty is a SMATV operator, not a cable operator, as Liberty concedes in its Complaint. It is not clear how many of Liberty's other past and pending OFS applications also sought to use the 18 GHz frequencies for unfranchised cable service, contrary to its representations and contrary to clear FCC policy. Liberty's Complaint, however, concedes that it has been illegally providing cable service in New York City without a franchise since at least January, 1993. Attachment 2 at 8.

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<sup>7</sup>On December 22, 1994 Judge Loretta A. Preska temporarily restrained enforcement of the limited standstill order pending hearing of Liberty's motion for preliminary injunction. Liberty Cable Co. v. City of New York, et al., 94 Civ. 8886 (SDNHY) (LAP).

In short, Liberty has clearly lacked candor with the Commission. By representing only that it is a SMATV operator, Liberty has implied that it requires no franchise. On the contrary, as Liberty admits in court, federal law does require it to hold a franchise for its non-common operations, such as the cable service it provides to 44 West 96th Street, 239 East 79th Street and 60 Sutton Place, all of which are the object of one of its OFS modification applications. As a cable operator without a franchise, Liberty should not have received the OFS licenses it did. Thus, the Commission would be fully justified in outright denial of the above-referenced applications and revocation of all other OFS licenses obtained by Liberty under false pretenses.<sup>8</sup>

Apart from questions of its candor, however, Liberty may not be qualified to use any of the new or expanded 18 GHz authorizations it now seeks to provide video programming. Pursuant to Section 94.33(b) of the FCC rules, an application may be returned as defective if (1) the applicant is statutorily disqualified or (2) the proposed use of the facility would be unlawful. 47 C.F.R. Sec. 94.33(b)(1) & (2). For example, in C&S Trenching Company, Inc., 2 FCC Rcd 116 (Mass Media Bur. 1987), a CARS microwave licensee filed a modification application to add an additional path, which would serve a cluster of non-commonly owned condominium buildings.<sup>9</sup> The Commission found that the applicant met the statutory definition of a cable operator, but did not hold a local franchise to provide cable service. Accordingly, the Commission denied the application:

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<sup>8</sup>Attachment 4 hereto is a list, based upon publicly available sources, of OFS licenses held by Liberty.

<sup>9</sup>CARS microwave, a service available to cable operators under Part 78 of the FCC rules, shares the 18 GHz band with OFS and other services.

Section 541(b)(1) of the Communications Act of 1934, as amended, requires that a cable operator must have a local franchise in order to provide cable television service.

\* \* \* \* \*

Congress mandated in the Cable Act that a cable operator may not provide cable service without a local franchise.

\* \* \* \* \*

. . . C & S does not have local authority to construct or operate a cable system. Consequently, under the Commission's Rules, it is not eligible for a CARS license.

Id. The Commission rejected the applicant's argument that the question of a franchise is a matter to be determined only at the local level, reasoning that Congress mandated in the Cable Act that an operator not provide cable services without a franchise. Clearly, if a cable operator cannot hold a CARS license for failing to meet statutory requirements applicable to all cable operators, it may not circumvent the statute by seeking an OFS license. As noted above, the Commission's OFS rules also require that an applicant be "statutorily qualified." Thus, if an OFS applicant meets the statutory definition of a cable operator, as Liberty concedes it does, it is not eligible for an OFS license absent a local cable franchise, which Liberty concedes it does not hold. Indeed, in its OFS Report and Order, supra, the Commission expressly ruled that an OFS applicant which has employed hardwire to interconnect non-commonly owned buildings must have a local cable franchise, even if no public rights of way are being occupied.<sup>10</sup>

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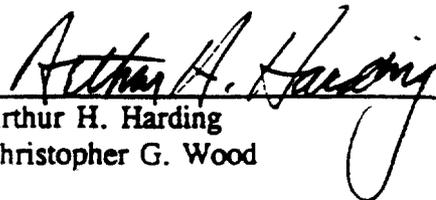
<sup>10</sup>In addition, the proposed extension of Liberty's operations raises questions concerning its compliance with the cable television/SMATV cross-ownership restrictions. See 47 U.S.C. § 533(a)(2); 47 C.F.R. Sec. 76.501(d) & (e)

By its pending modification applications, Liberty may be seeking to replace its hardwire interconnects with wireless interconnects in order to render itself a true SMATV operator and eliminate its violation of the Cable Act franchise requirement. If this is Liberty's objective, it has certainly been less than candid. Nevertheless, under these circumstances, the Commission should grant Liberty's applications only under the condition that Liberty identify all non-commonly owned buildings it presently serves by closed transmission path interconnection; promptly submit to the Commission a plan to cure, within a reasonable time frame, its violations of the Cable Act; and certify under oath that it will cease and desist from future use of hardwire interconnects without a franchise.

WHEREFORE, in light of the foregoing, it is respectfully requested that the above-captioned applications be denied or appropriately conditioned as set out herein.

Respectfully submitted,

TIME WARNER CABLE

  
Arthur H. Harding  
Christopher G. Wood

Its Attorneys

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202/939-7900

Dated: January 9, 1995

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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LIBERTY CABLE COMPANY, INC.,  
SIXTY SUTTON CORP. and  
JACK A. VEERMAN,

Plaintiffs,

v.

THE CITY OF NEW YORK and RALPH A.  
BALZANO, Commissioner of Department of  
Information Technology and Telecommunications,  
THE NEW YORK STATE COMMISSION ON  
CABLE TELEVISION, WILLIAM B.  
FINNERAN, GERARD D. DI MARCO,  
BARBARA T. ROCHMAN, DAVID F. WILBUR,  
and JOHN PASSIDOMO,

Defendants,

- and -

THE UNITED STATES OF AMERICA,  
TIME WARNER CABLE OF NEW YORK  
CITY and PARAGON CABLE MANHATTAN,

Defendants-Interventors.

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94 Civ. 8886 (LAP)

AFFIDAVIT OF  
BEHROOZ NOURAIN



clear line of sight from another rooftop or other location, access to which it can negotiate." See Mikhail Affidavit at ¶ 7. Liberty must have a clear line of sight between its 18 ghz transmission and receiving equipment for the equipment to work. Liberty also needs the permission of the building owner to put its 18 ghz transmission equipment on the building. Liberty can always "negotiate" for that permission. But there is absolutely no assurance that, notwithstanding such negotiations, Liberty can actually get the building owner's permission to install its 18 ghz transmission equipment at a building or a particular site on a building that would give a clear line of sight to 60 Sutton Place South or any other Non-Common System.

4. Mr. Mikhail claims -- incorrectly -- that "Liberty can use a transmitter at its existing transmission site on River Towers (420 East 54th Street), which building is adjacent to 60 Sutton Place South and taller than it, to send a radio signal to that building. A transmitting antenna could be installed closer to the edge of the River Tower roof looking down on 60 Sutton Place South." Mikhail Affidavit at ¶ 4. Liberty has installed and currently operates 18 ghz transmission equipment on River Towers. Liberty's 18 ghz transmission equipment is installed on River Towers pursuant to a license agreement with the building owner. That license agreement precludes Liberty from placing any 18 ghz transmission on River Towers at a site that would permit transmission to 60 Sutton Place South. Liberty needs the permission of the owner of River Towers to install such 18 ghz transmission equipment and there is no assurance Liberty could obtain that permission.

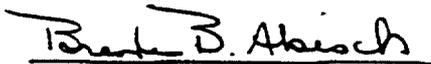
5. I am advised that Time Warner has opposed Liberty's pending application to the Federal Communications Commission for various 18 ghz microwave licenses. If the Federal Communications Commission, at the request of Time Warner, denies Liberty the

requested licenses, then Liberty will not be able to legally deliver its signal to 60 Sutton Place South by microwave. In the absence of 18 ghz licenses, the only way Liberty can deliver its signal to 60 Sutton Place South is by coaxial cable.

6. Some of the Defendants have suggested that Liberty is monopolizing all of the available 18 ghz microwave spectrum for its operations. That is not true. An 18 ghz microwave transmission is a point-to-point transmission that occupies only the space between the transmitter and receiver. Thus, it is possible for virtually unlimited other licensees to use the same frequency at the same time at other locations so long as there is no technical signal interference. For example, it would be possible for a single building to receive microwave transmissions from competing MVPDs simultaneously, so long as it had separate microwave reception antennas for each such transmission and there is no signal interference. As a consequence, Liberty's use of 18 ghz microwave technology does not preclude anyone else from also using that same technology at the same time and it does not preclude competing MVPDs from using their own 18 ghz microwave transmissions to serve subscribers in buildings also served by Liberty.

  
BEHROOZ NOURAIN

Sworn to before me this  
21<sup>st</sup> day of February, 1995.

  
Notary Public

BRENDA B. ABISCH  
Notary Public, State of New York  
No. 60-4933577  
Qualified in Westchester County  
Commission Expires May 31, 1996

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Gettysburg, PA

In Re Applications of	)	
	)	
LIBERTY CABLE CO., INC.	)	File Nos.
	)	
For Private Operational Fixed	)	712218
Microwave Service Authorizations	)	712219
	)	
New York, New York	)	

To: Chief, Wireless Telecommunications Bureau

SURREPLY

Liberty Cable Co., Inc., by counsel and pursuant to Section 1.45(c) of the Commission's Rules, respectfully submits its Surreply to the May 5, 1995 Reply to Opposition ("Reply") submitted in this matter by Time Warner Cable of New York City and Paragon Cable Manhattan (collectively "Time Warner"). The following is submitted in support thereof:

Time Warner alleges in its Reply that Liberty has installed OFS receive sites (639 West End Avenue and 1775 York Avenue (the Brittany)) and commenced to provide service to those locations. Liberty, in fact, did construct those sites and has been providing service as alleged. Exhibit 1, Affidavit of Peter O. Price.

EXHIBIT
Date <u>5/28/96</u>
Reporter <u>David A. Kasdan</u>

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Applications for authorization to establish paths of communication with these locations are presently pending under file nos. 708778 and 708779 respectively.<sup>1/</sup> Exhibit 1.

Liberty's commencement of service to these properties was, in large part, the inadvertent result of a breakdown in communications between its administrative offices and its engineering offices after the Commission requested technical changes in a host of pending applications. Exhibit 1. In addition to the above-referenced sites, service is presently being provided to: 35 West End Avenue (708778); 567 Fifth Avenue (708779); Resident Hall, NYU Campus (708780); Greenburg Hall, NYU Campus (708780); 524 East 72nd Street (708781); 30 Waterside (711937); 16 West 16th Street (712218); 433 E. 56th Street (711937); 114 E. 72nd Street (709426); 25 West 54th Street (709332); 200 East 32nd Street (708780); 6 E. 44th Street (712219); and 2727 Palisades Avenue.

Liberty has been in the private cable business via the use of 18 GHz microwave since 1991 and was a leader in the movement to open the 18 GHz band for use in the distribution of video entertainment material to customers. Exhibit 1. Liberty was awarded the first such license in 1991. Since that time, Liberty has obtained over 100 authorizations to distribute its video entertainment material to customers via microwave. Until now, Liberty has never once been alleged to be operating in violation of the Commission's rules, much less been found to be operating in such a fashion.<sup>2/</sup>

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<sup>1/</sup> 1775 York Avenue is misidentified in application file no. 708779 as 441 East 92nd Street.

<sup>2/</sup> By contrast, Time Warner has been held to be in violation of the Commission's program access and rate regulations.