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

JUL 22 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

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

To: Hon. Richard L. Sippel  
Administrative Law Judge

**OPPOSITION BY BARTHOLDI CABLE CO., INC.,  
TO THE JOINT MOTION TO ENLARGE ISSUES SUBMITTED BY  
TIME WARNER CABLE NEW YORK CITY, PARAGON CABLE MANHATTAN AND  
CABLEVISION OF NEW YORK CITY - PHASE I**

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## SUMMARY

On July 12, 1996, Time Warner Cable of New York City, Paragon Cable Manhattan (together "Time Warner") and Cablevision of New York City - Phase I ("Cablevision") filed a Joint Motion to Enlarge Issues ("Joint Motion to Enlarge"). This motion, which is the second of its kind submitted by Time Warner, seeks to add issues of misrepresentation and lack of candor based on a February 24, 1995 document (the "Lehmkuhl Inventory") produced by Liberty which purportedly conflicts with sworn deposition testimony of Peter Price and Behrooz Nourain to the effect that they learned of premature activations in late April or May 1995. The Joint Motion to Enlarge argues that, because the Lehmkuhl Inventory provided an update to Price and Nourain regarding the status of Liberty's license applications, Price and Nourain "should have known" that the buildings were activated prematurely, and they thus testified untruthfully about when they actually learned about the premature activations.

The Joint Motion to Enlarge is baseless and should be denied in its entirety. First, it is untimely, because the facts show that Time Warner and Cablevision had the Lehmkuhl Inventory as early as June 18, and under Section 1.229(b)(3) of the Rules of the Federal Communications Commission (the "Commission"), 47 C.F.R. § 1.229(b)(3), the Joint Motion to Enlarge was due to be filed no later than July 3. Thus, the July 12 filing is more than a week out of time.

In addition, the Joint Motion to Enlarge should be denied because it unnecessarily duplicates and multiplies litigation in this proceeding. Issues of misrepresentation, lack of candor and attempt to mislead the Commission with respect to Liberty's premature activation of nineteen buildings are already designated for hearing in the *Hearing Designation Order and Notice of Opportunity for Hearing*, FCC No. 96-85, WT Docket No. 96-41 (released Mar. 5,

1996), at paragraph 30(2), (3) and (4). Indeed, those issues have been central to the entire course of discovery in this case and are a focal point of the Joint Motion for Summary Decision filed by Bartholdi Cable Co., Inc., formerly known as Liberty Cable Co., Inc. (“Liberty”), and the Commission’s Wireless Telecommunications Bureau (the “Bureau”). No purpose is served by adding an issue which is already part of the proceeding and which should be properly resolved together with the other issues as set forth in the Joint Motion for Summary Decision submitted by Liberty and the Bureau.

On the merits, the Joint Motion to Enlarge should be denied because it does not meet the stringent requirements for enlargement of issues contained in Section 1.229 of the Commission’s Rules, 47 C.F.R. § 1.229. Time Warner and Cablevision offer pure speculation and surmise based on the argument that the Lehmkuhl Inventory should have put Liberty on alert as to buildings being activated prematurely. However, Liberty has already indicated in the Joint Motion for Summary Decision that it should have known about the premature activations but did not, due to deficient internal controls and inadequate supervision of appropriate personnel. Thus, the Joint Motion to Enlarge reflects Liberty’s admitted negligence with regard to its formerly disjointed license application process.

Moreover, the Joint Motion to Enlarge does not contain specific allegations of an intent to deceive, properly supported by an affidavit. The Commission’s Rules and controlling precedent are clear that, to enlarge issues based on lack of candor and misrepresentation, the movants must provide more than speculative inferences, because intent to deceive is an essential element of claims relating to lack of candor and misrepresentation. The cases cited in the Joint Motion to Enlarge are not to the contrary, and accordingly, both the uncontested facts developed in this

proceeding and applicable law mandate the denial of the Joint Motion to Enlarge.

Therefore, in accordance with the accompanying Opposition, the Joint Motion to Enlarge should be denied in its entirety.

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To: The Honorable Richard L. Sippel  
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**OPPOSITION BY BARTHOLDI CABLE CO., INC.,  
TO THE JOINT MOTION TO ENLARGE ISSUES  
SUBMITTED BY TIME WARNER CABLE NEW YORK CITY, PARAGON CABLE  
MANHATTAN AND CABLEVISION OF NEW YORK CITY - PHASE I**

Pursuant to Section 1.45(a) of the Rules of the Federal Communications Commission (the "Commission"), 47 C.F.R. § 1.45(a), Bartholdi Cable Co., Inc., formerly known as Liberty Cable Co., Inc. ("Liberty"), hereby submits this opposition to the Joint Motion to Enlarge Issues (the "Joint Motion to Enlarge") submitted by Time Warner Cable of New York City, Paragon Cable Manhattan (together, "Time Warner") and Cablevision of New York City - Phase I ("Cablevision"). For the reasons stated below, Liberty urges the Presiding Judge to reject Time

Warner's belated attempt to duplicate issues of misrepresentation and lack of candor which have already been designated for hearing in this case.

### **BACKGROUND**

Pursuant to the Presiding Judge's Order, FCC 96M-122 (released May 20, 1996), depositions in this case were to be noticed as soon as possible so that discovery could be concluded by May 31, 1996. During the last two weeks of May, numerous depositions were taken, including Peter Price, for a full day and a half, on May 28 and 31, and Behrooz Nourain, for a full day on May 29. Both Price and Nourain testified truthfully and fully to their knowledge and recollection in response to the questions posed (Declaration of Peter Price, attached hereto as Exhibit ("Ex.") A, ¶ 4 and Declaration of Behrooz Nourain, Ex. B, ¶ 4).

By the Presiding Judge's Order, FCC 96M-153 (released June 13, 1996), Liberty was directed to exchange with opposing counsel, by 2:00 p.m. on June 17, a log which identified all documents that Liberty withheld from production on grounds of privilege. Liberty fully complied with that Order.

In the course of preparing the privilege log, Liberty found additional responsive documents which were accordingly produced on June 17 for overnight delivery by June 18 (Ex. C). Included in that production was a copy of a memorandum dated February 24, 1995 from Michael J. Lehmkuhl of Pepper & Corazzini to Peter Price, Behrooz Nourain and Thomas Courtney, entitled Inventory of 18 GHz Licenses Issued to Liberty (the "Lehmkuhl Inventory"). This document was numbered FCC/CP 15980 through 15997 (Ex. D). On relevance grounds, the Lehmkuhl Inventory was redacted, to take out references to the many buildings which were not listed in Appendix A or B of the *Hearing Designation Order and Notice of Opportunity for*

*Hearing*, FCC No. 96-85, WT Docket No. 96-41 (released Mar. 5, 1996) (the “HDO”).

All the facts relied upon by Time Warner and Cablevision in their Joint Motion to Enlarge were contained in the redacted version of the Lehmkuhl Inventory which they received on June 18. The Lehmkuhl Inventory contained an explanatory cover memorandum by Michael Lehmkuhl, followed by charts listing pending applications and Special Temporary Authorities (STAs) and their status. The Lehmkuhl Inventory specifically included all the buildings listed in Appendices A and B of the HDO for which applications or STAs were submitted as of February 24, 1995.<sup>1</sup>

On June 25, 1996, in a Memorandum Opinion and Order, FCC 96M-164 (released June 27, 1996), the Presiding Judge issued his ruling on Time Warner’s Motion for In Camera Review and Production of Documents filed on June 18, 1996. The Presiding Judge granted in part and denied in part Time Warner’s motion and directed the production of unredacted copies of the inventories produced on June 17 by June 26, 1996. Accordingly, on that date, Liberty complied with the Presiding Judge’s order to produce documents. The unredacted version of the Lehmkuhl Inventory bore production numbers FCC/CP 016139 through 016164 (Ex. E) and contained additional information relating to buildings not listed in Appendix A or B of the HDO.

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<sup>1</sup> The Lehmkuhl Inventory which Time Warner and Cablevision received on June 18 included the following buildings from Appendix A of the HDO: 35 West End Avenue; 639 West End Avenue; 441 E. 92nd Street; 767 Fifth Avenue; 564 First Avenue; 545 First Avenue; 30 Waterside Plaza; 430/440 E. 56th Street; 114 E. 72nd Street; 524 E. 72nd Street; 25 W. 54th Street; 16 W. 16th Street; 6 E. 44th Street. The Lehmkuhl Inventory also included the following buildings listed in Appendix B of the HDO: 220 E. 52nd Street; 211 E. 51st Street; 55 Central Park West; 10 W. 66th Street; 170 West End Avenue; 118 W. 57th Street; 120 East End Avenue; 510 E. 86th Street; 525 E. 86th Street; 535 E. 86th Street; 44 W. 96th Street; 12 W. 96th Street; 60 Sutton Place; 420 E. 54th Street; 400 E. 59th Street; 239 E. 79th Street; 229 E. 79th Street; 207 E. 74th Street; 600 Harbor Blvd.; 170 E. 87th Street.

None of the additional information included in the unredacted version of the Lehmkuhl Inventory was used or in any way material to the pending motion by Time Warner and Cablevision.

On July 12, Time Warner and Cablevision filed the Joint Motion to Enlarge.<sup>2</sup>

## ARGUMENT

### I. The Joint Motion to Enlarge is Untimely

The Joint Motion to Enlarge should be denied because it was not filed within the time frame mandated in the Commission's Rules. Section 1.229(b)(3), under which the Joint Motion to Enlarge was filed, states expressly that "[m]otions for modifications of issues which are based on new facts or newly discovered evidence shall be filed within 15 days after such facts are discovered by the moving party." 47 C.F.R. § 1.229(b)(3). The language of this rule is mandatory, not permissive. *See In the Matter of Amendments of Parts 0 and 1 of the Commission's Rules With Respect To Adjudicatory Re-regulations of Proposals, Report and Order*, 58 FCC 2d 865, 874 (1976) ("[M]otions for modifications of issues which are based on new facts must be filed within fifteen days after such facts are known or could reasonably have been known to the moving party.").

The Joint Motion to Enlarge relies on the fact that, based on the Lehmkuhl Inventory, Price and Nourain should have known about the pending status of thirteen out of the nineteen buildings as of February 24, 1995, the date of the Lehmkuhl Inventory. Joint Motion to Enlarge at 7-8. The Joint Motion to Enlarge further concedes that each of these sites also appear in

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<sup>2</sup> This is Time Warner's second motion to enlarge issues. The first one was denied on July 12 by the Presiding Judge's Memorandum Opinion and Order, FCC 96M-178 (released July 16, 1996).

Appendix A of the HDO. *Id.* at 7 n.20. However, Time Warner and Cablevision never state that they received the Lehmkuhl Inventory produced on June 18, bearing numbers FCC/CP 15935 through 16120,<sup>3</sup> nor do they reveal that, in fact, all the information relied upon in the Joint Motion to Enlarge was already disclosed to Time Warner and Cablevision in the earlier-served, redacted Lehmkuhl Inventory.

Since Time Warner and Cablevision received the Lehmkuhl Inventory on June 18, Time Warner and Cablevision had to file a motion to enlarge by no later than July 3, 1996 under the Commission's Rules for computation of time, 47 C.F.R. § 1.4(c), (d). The Joint Motion to Enlarge was not filed until July 12, more than a week after it was due. Therefore, the Joint Motion to Enlarge is untimely and should not be considered.

**II. The Issue Sought to be Added is Already Addressed in the HDO**

The Joint Motion to Enlarge should be denied because it seeks to unnecessarily multiply litigation in this proceeding by adding an issue which is already included in the HDO. Among the issues designated for hearing in this case are the facts and circumstances surrounding Liberty's premature activation of nineteen buildings before receiving authorization from the Commission. HDO ¶ 30(2). In addition, the HDO seeks to determine whether Liberty engaged in misrepresentation, lack of candor and attempt to mislead the Commission in connection with Liberty's premature activation of the nineteen buildings. *Id.* at ¶ 30(3). In light of the evidence adduced with regard to the foregoing, the HDO seeks to determine whether Liberty is qualified to

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<sup>3</sup> All the citations to the Lehmkuhl Inventory contained in the Joint Motion to Enlarge refer to the later served, unredacted version (numbered FCC/CP 016139 through 016164) which contained no new information on the buildings listed in Appendices A and B of the HDO.

be a Commission licensee. *Id.* at ¶ 30(4).

Time Warner and Cablevision, in moving to add issues concerning whether Liberty, Price and Nourain committed misrepresentation or lacked candor in their sworn testimony in this proceeding, and whether Liberty should be disqualified on this basis, merely reiterate the issues of misrepresentation, lack of candor and attempt to mislead that have already been designated for hearing by the Commission. The Joint Motion to Enlarge is therefore duplicative. Time Warner and Cablevision do not cite any authority for the extraordinary proposition that a proceeding can be enlarged by adding an issue already designated for hearing.<sup>4</sup>

The Wireless Telecommunications Bureau (the "Bureau"), together with Liberty, have filed a Joint Motion for Summary Decision<sup>5</sup> demonstrating that, after extensive discovery in this case, no material issues of fact remain to be tried relating to the issues designated in the HDO Time Warner and Cablevision, by submitting their Joint Motion to Enlarge at the same time that the Joint Motion for Summary Decision was due, are vainly attempting to raise additional issues when the Bureau has joined with Liberty to dismiss the issues in this case. In doing so, Time

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<sup>4</sup> In the two cases cited by Time Warner and Cablevision to support the addition of misrepresentation and lack of candor issues, *Weyburn Broadcasting Ltd. Partnership v. FCC*, 984 F.2d 1220 (D.C. Cir. 1993) and *Folkways Broadcasting Co., Inc.*, 33 FCC 2d 813 (Rev. Bd. 1972), there is no indication that misrepresentation or lack of candor was already an issue in the proceeding. Indeed, in *Weyburn Broadcasting Ltd. Partnership*, the Commission was faulted for its repeated refusal to include misrepresentation and lack of candor issues. 984 F.2d at 1232. Here, by contrast, the Commission has already designated misrepresentation and lack of candor issues. Just as the Commission's authority to designate issues for hearing should not normally be disturbed by deletion, *see Anax Broadcasting, Inc.*, 87 FCC 2d 483, 486 (1981) (Administrative Law Judge exceeded authority by attempting to reconsider issue which Commission had designated for hearing), the same principle should apply with respect to addition.

<sup>5</sup> This motion was initially due to be filed on July 12 but was filed on July 15 by consent of the Presiding Judge.

Warner and Cablevision make arguments more appropriate to their opposition to the Joint Motion for Summary Decision. Therefore, the Joint Motion to Enlarge should be treated as an early-filed but inappropriate opposition to the Joint Motion for Summary Decision and should be disposed of together with that motion, because the Joint Motion to Enlarge repeats the issues already designated and does not inject any new issues. As discussed below, the Joint Motion to Enlarge should also be denied on the merits and thus, none of the facts and arguments contained in the Joint Motion to Enlarge are sufficient to defeat the Joint Motion for Summary Decision.

**III. The Joint Motion to Enlarge Should be Denied  
Because it is Grounded Solely on Speculation and Surmise**

The Joint Motion to Enlarge is premised on the following logical leap: Because Peter Price and Behrooz Nourain testified that they learned of the premature activations around late April or May 1995, and the Lehmkuhl Inventory, which was dated February 24, 1995, was addressed to Price and Nourain, they testified untruthfully about when they learned of the premature activations. This syllogism irrationally presumes that Price and Nourain received, read and fully understood the import of the Lehmkuhl Inventory and armed with that knowledge, proceeded to testify falsely that they learned of the premature activations only in April or May 1995. There is no evidence in the record to support the underlying premise of the Joint Motion to Enlarge. Indeed, Price and Nourain have submitted declarations in support of this opposition stating that they do not recall even reviewing the Lehmkuhl Inventory (Ex. A, ¶ 3; Ex. B, ¶ 3). The necessary logical link for this Joint Motion to Enlarge simply does not exist.

Furthermore, the record is replete with ways in which Price and Nourain could and should have known about premature service but did not. The essence of the Joint Motion for

Summary Decision filed in this case is that, after extensive discovery, no material issues remain to be tried, because the uncontroverted facts reveal only premature activations that were commenced unwittingly and without any intention to violate the law or to conceal the true facts from the Commission. Joint Motion for Summary Decision at ii-v, 14-15, 17-20, 41-49. Therefore, enlargement of issues is unwarranted, since the speculative allegations advanced by Time Warner and Cablevision in support of their motion are equally consistent with the view that Price and Nourain were not aware of license and STA application status, even though they should have been. *Cf. Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 396 (D.C. Cir. 1985) (Scalia, J.) (in designating issue for hearing pursuant to 47 U.S.C. § 309(d), Commission's finding that misrepresentation claim was not substantial would not be disturbed where allegations were not "inconsistent with an innocent view of the events. . .").

Under Section 1.229(d) of the Commission's Rules, motions to enlarge "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." 47 C.F.R. § 1.229(d). The Joint Motion to Enlarge nowhere cites to this provision. More notably, the Joint Motion to Enlarge fails to contain any specific factual allegations, only speculation and surmise based on a purported inconsistency in testimony with the Lehmkuhl Inventory. Furthermore, the Joint Motion to Enlarge is not supported by any affidavit. Motions to add lack of candor and misrepresentation issues have been routinely denied for failure to meet the basic specificity and affidavit requirements of Section 1.229(d). *See, e.g., Coastal Broadcasting Partners*, 6 FCC Rcd 4242, 4245 (1991); *Southland, Inc.*, 37 FCC 2d 125, 128 (Rev. Bd. 1972).

Central to an inquiry on misrepresentation and lack of candor is whether any intent to deceive is found on the part of the applicant or licensee. As stated in *Swan Creek Communications, Inc. v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994): “The Commission will not disqualify an applicant, however, for a negligent omission: ‘intent to deceive [is] an essential element of a misrepresentation of a lack of candor showing.’” (Citations omitted.) *Accord Leflore Broadcasting Co., Inc. v. FCC*, 636 F.2d 454, 461 (D.C. Cir. 1980) (“the Commission has said that a demonstration of an ‘intent to deceive’ is ‘a sine qua non of a misrepresentation issue.’”) (footnote omitted). While the Joint Motion to Enlarge cites to *Swan Creek*, no mention is made of this “essential element” of a misrepresentation or lack of candor claim.

More importantly, the Joint Motion to Enlarge does not contain any specific allegations of an intent to deceive by Liberty, Price or Nourain in sworn testimony given during this proceeding. Instead, the Joint Motion to Enlarge relies on alleged evidence which merely suggests that Liberty should have known about the premature activations earlier. For example, the Joint Motion to Enlarge (at 3) states that the documentary evidence “*suggests* that both Messrs. Price and Nourain knew that Liberty had activated microwave parths to the sites listed in the Lehmkuhl Memorandum. . . .” (Emphasis supplied.) Similarly, the Joint Motion to Enlarge (at 14) claims that “at the time he received the memorandum, Mr. Price *should have known* that Liberty was operating at least two -- and as many as nine -- paths illegally.” (Emphasis supplied.) As suggestive as these allegations may be, they do not rise to the level of specific allegations of an intent to deceive. In any event, such allegations, even assuming *arguendo* that they meet the stringent specificity requirements of Section 1.229(d), are countered by the Price and Nourain Declarations submitted in support of this opposition (Exs. A, B).

The uncontroverted facts show that the premature activations occurred due to an inadvertent communications breakdown within the company, in which no one adequately supervised Nourain in his licensing function and no one person fully monitored the license application process from beginning to end.<sup>6</sup> After extensive discovery, Liberty has shown that it did not intentionally engage in any of its premature activations. Joint Motion for Summary Decision at 47. In light of these undisputed facts, Liberty's ignorance of the premature activations, even in the face of the Lehmkuhl Inventory, is hardly surprising and is entirely consistent with the uncontroverted facts which reveal a disjointed licensing application process plagued by inadequate supervision and internal controls. Joint Motion for Summary Decision at 14-15, 41-45. Fortunately, as the factual record amply shows, Liberty took immediate action to cure this problem and instituted an effective compliance program to prevent recurrence of premature activations. *Id.* at 20-21, 44-45, 48.

Commission precedent supports denial of a motion to enlarge where the movant's allegations are not supported by any proof of an intent to deceive. For example, in *Daytona Broadcasting Co., Inc.*, the movant sought to add misrepresentation and candor issues after the hearing record was closed, based on inconsistent interrogatory response and hearing testimony regarding prior Commission forfeitures levied against the non-movant. 97 FCC 2d 212, 232 (1984). The Review Board upheld the Initial Decision, crediting the witness's affidavit which indicated that he relied on his general recollection in providing the interrogatory response. *Id.* at

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<sup>6</sup> The facts and circumstances surrounding the premature activations of the nineteen buildings listed in Appendix A of the HDO are detailed in the Joint Motion for Summary Decision at 8-21, 41-51, and are incorporated herein by reference.

233. Since the alleged misrepresentation and lack of candor were attributable to a faulty memory rather than any intent to deceive, the Review Board held that denial of the motion to enlarge was appropriate. *Id.* See also *High Sierra Broadcasting*, 96 FCC 2d 423, 436 (1983) (movant failed to establish *prima facie* case for addition of lack of candor issue where facts showed only inattentiveness, not any intent to deceive). The same result should apply here and the Joint Motion should be denied, since Time Warner and Cablevision make unsupported speculative inferences rather than specific allegations of an intent to deceive.

Finally, an untimely motion to enlarge may be considered on the merits “if (and only if) initial examination of the motion demonstrates that it raises a question of probable decisional significance and such substantial public interest importance as to warrant consideration. . . .”<sup>7</sup> As

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<sup>7</sup> In setting forth the applicable standard for enlargement of issues under Section 1.229 of the Commission’s Rules, 47 C.F.R. § 1.229, the Joint Motion to Enlarge never cites to Section 1.229(c). Instead, movants rely upon two D.C. Circuit Court of Appeals cases which arose in the context of designating issues for hearing under 47 U.S.C. § 309(d). *Astroline Com. Co. Ltd. Partnership v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988), and *Citizens for Jazz on WRVR v FCC*, 775 F.2d 392, 397 (D.C. Cir. 1985). While movants do not explain how these cases are applicable to a motion to enlarge pursuant to Section 1.229 of the Commission’s Rules, the two cases in fact support Liberty’s position that movants have failed to come forward with sufficient allegations of intent to deceive.

In *Citizens for Jazz on WRVR*, the D.C. Circuit considered whether an issue of misrepresentation was substantial for purposes of 47 U.S.C. § 309(d). In concluding that the Commission rightly found no substantial issues of misrepresentation, the D.C. Circuit stated:

[W]e . . . do not find them [the allegations] to be such strong circumstantial evidence of misrepresentation as to justify reversing the Commission’s judgment that that ultimate question was not a substantial one. None of them is necessarily inconsistent with an innocent view of the events, and the inference of guilt was refuted by sworn affidavits of no intent to change format, which the Commission was required to weigh in the balance.

775 F.2d at 396 (Scalia, J.). The existence of contested facts did not alter the court’s conclusion:

set forth above, an initial examination of the Joint Motion to Enlarge reveals that it does not contain specific and properly supported allegations of any intent to deceive, the essential element of a misrepresentation or lack of candor issue. No question of decisional significance or substantial public interest can be raised by the amorphous inferences and illogical conclusions sought to be drawn by the Joint Motion to Enlarge. Indeed, the public interest would be harmed by continuing and expanding litigation based on the flimsy innuendo raised by the Joint Motion to Enlarge. Further enlargement of the issues subject to the Joint Motion for Summary Decision is not appropriate, and the Joint Motion to Enlarge should accordingly be denied.

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“[W]e find it impossible to hold that these statements, together with the weak inference from the uncontested facts, required a finding that a substantial question concerning misrepresentation was presented.” *Id.*

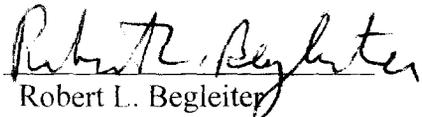
In *Astroline Com. Co. Ltd. Partnership*, the D.C. Circuit remanded the case to the Commission to reconsider its denial of a petition for evidentiary hearing in light of the two-prong public interest and substantiality test of 47 U.S.C. § 309(d). In so doing, the court observed that Astroline’s petition did not make specific allegations of intent to deceive, an essential element of misrepresentation and lack of candor. Thus, the court indicated that on remand, Astroline would not likely meet the threshold public interest finding required under 47 U.S.C. § 309(d)(1). *Astroline Com. Co. Ltd. Partnership*, 857 F.2d at 1573.

**CONCLUSION**

Based on the foregoing, the Joint Motion to Enlarge should be denied in its entirety.

Dated: New York, New York  
July 22, 1996

CONSTANTINE & PARTNERS

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**Certificate of Service**

I hereby certify that on this 22nd day of July, 1996, I caused copies of the foregoing "Opposition to Motion to Enlarge" to be served via hand delivery to the following:

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Richard L. Sippel

A

## **DECLARATION OF PETER PRICE**

PETER PRICE, hereby declares under penalty of perjury, as follows:

1. I am the President of Bartholdi Cable Co., Inc., formerly known as Liberty Cable Co., Inc. ("Liberty"). I make this declaration on personal knowledge in support of Liberty's Motion in Opposition to the Joint Motion to Enlarge Issues Submitted by Time Warner Cable of New York City, Paragon Cable Manhattan and Cablevision of New York City - Phase I.

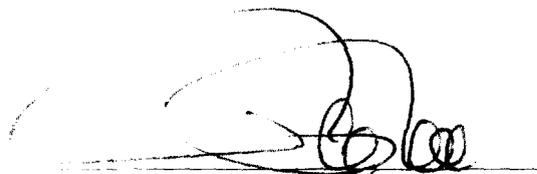
2. In connection with preparing this declaration, I reviewed both a redacted and unredacted copy of a document dated February 24, 1995 addressed to me and others from Michael Lehmkuhl at Pepper & Corazzini relating to Inventory of 18 GHz Licenses Issued to Liberty (the "Lehmkuhl Inventory").

3. I do not recall ever receiving or seeing a copy of the Lehmkuhl Inventory prior to reviewing that document in connection with the preparation of this declaration.

4. I reaffirm that all the testimony I gave at my depositions on May 28 and 31, both generally and with respect to my knowledge of Liberty's premature activation of buildings and when I became aware of it, was true, accurate and complete to the best of my knowledge and recollection. At no time in the course of this proceeding or otherwise have I engaged in any intent to deceive the Federal Communications Commission (the "Commission") or the Wireless Telecommunications Bureau (the "Bureau") in verbal and written statements submitted or

presented to the Commission or the Bureau.

Dated: New York, New York  
July 18, 1996



PETER O. PRICE



**DECLARATION OF BEHROOZ NOURAIN**

BEHROOZ NOURAIN, hereby declares under penalty of perjury, as follows:

1. I was formerly the Microwave Engineer for Bartholdi Cable Co., Inc., formerly known as Liberty Cable Co., Inc. ("Liberty"). I make this declaration on personal knowledge in support of Liberty's Motion in Opposition to the Joint Motion to Enlarge Issues Submitted by Time Warner Cable of New York City, Paragon Cable Manhattan and Cablevision of New York City Phase I.

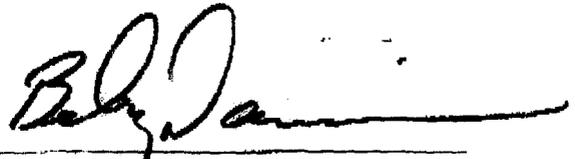
2. In connection with preparing this declaration, I reviewed a copy of a document dated February 24, 1995 addressed to me and others from Michael Lehmkuhl at Pepper & Corazzini relating to Inventory of 18 GHz Licenses Issued to Liberty (the "Lehmkuhl Inventory").

3. I do not recall receiving or reviewing a copy of the Lehmkuhl Inventory previously, other than in connection with the preparation of this declaration.

4. I reaffirm that all the testimony I gave at my deposition on May 29, both generally and with respect to my knowledge of Liberty's premature activation of buildings and when I became aware of it, was true, accurate and complete to the best of my knowledge and recollection. At no time in the course of this proceeding or otherwise have I engaged in any intent to deceive the Federal Communications Commission (the "Commission") or the Wireless Telecommunications Bureau (the "Bureau") in verbal and written statements submitted or presented to the

Commission or the Bureau.

Dated: New York, New York  
July 22, 1996

A handwritten signature in black ink, appearing to read "Behrooz Nourain", written over a horizontal line.

BEHROOZ NOURAIN

