

WT 96-41

ORIGINAL  
RECEIVED

BEFORE THE  
**Federal Communications Commission**

WASHINGTON, D.C. 20554

SEP 13 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In Re Requests Of	) File Nos./Call Signs
	)
LIBERTY CABLE CO., INC.	) 708777 (WNTT370)
	) 708778, 713298 (WNTM210)
For Special Temporary Authority	) 708779 (WNTM385)
For Private Operational Fixed	) 708780 (WNTY375)
Microwave Radio Service	) 708781, 709426, 711937 (WNTM212)
	) 709332 (WNTY371)
New York, New York	) 712203 (WNTW782)
	) 712218 (WNTY584)
	) 712219 (WNTY605)
	) 713295 (WNTX889)
	) 713297 (WNTL307)
	) 713300 (WNTY372)
	) New/WPJB384
	) New/WPJB388
	) New/WPJB392

To: Hon. Richard L. Sippel, Administrative Law Judge

**COMBINED OPPOSITION TO JOINT MOTION FOR SUMMARY DECISION**

James A. Kirkland  
Christopher A. Holt  
Mintz, Levin, Cohn, Ferris,  
Glovsky and Popeo, P.C.  
701 Pennsylvania Ave., N.W.  
Suite 900  
Washington, D.C. 20004  
(202) 434-7300

Arthur H. Harding  
R. Bruce Beckner  
Christopher G. Wood  
Jill Kleppe McClelland  
Fleischman and Walsh, L.L.P.  
1400 Sixteenth Street, N.W.  
Washington, D.C. 20036  
(202) 939-7900

Attorneys for  
CABLEVISION OF NEW YORK CITY --  
PHASE I

Attorneys for  
TIME WARNER CABLE OF NEW YORK CITY  
and  
PARAGON CABLE MANHATTAN

Dated: September 13, 1996

No. of Copies rec'd 246  
List ABCDE

## TABLE OF CONTENTS

SUMMARY .....	i
I. PRELIMINARY STATEMENT .....	1
II. DISPUTED ISSUES OF MATERIAL FACT .....	7
A. Illegal Operation Of Microwave Paths .....	8
1. Liberty's President Knew About Liberty's Illegal Microwave Operations In February 1995 .....	8
2. Liberty's Claim That Its Chief Engineer, Mr. Nourain, Activated Unlicensed Microwave Paths Because He Assumed That STA Requests Had Been Granted Is False .....	14
3. The Joint Motion's Accounts Of How And When Liberty Learned About Its Illegal Operations Conflicts With The Testimony Of Liberty's Witnesses .....	22
4. Liberty's Failure To Disclose When It Learned About The Illegal Pathways Made Known To The Commission In July 1995 Is Itself A Lack Of Candor .....	24
5. The Joint Motion Fails To Address Additional Liberty Misrepresentations Made In Support Of The Captioned Applications .....	29
B. Liberty Deliberately Mischaracterized Itself As A SMATV Operator In Its Applications For OFS Service And In Its Applications For STA .....	32
1. Liberty Was Well Aware Of Its Franchise Obligations Under Federal And State Law .....	34
2. TWCNYC's Initial Challenge And Liberty's Response .....	38
3. Liberty's False 18 GHz Applications To The FCC .....	43
4. Liberty's Continued Flouting of the Cable Act .....	48

C.	Liberty Deliberately Misrepresented To The Commission Its Plans For Hardwire Interconnection . . . . .	53
III.	ADDITIONAL DISCOVERY IS NEEDED . . . . .	57
A.	Discovery In This Proceeding Is Not Complete . . . . .	57
B.	Additional Discovery Is Needed . . . . .	65
IV.	ARGUMENT . . . . .	67
A.	The Burden Of Persuasion Lies With The Movant . . . . .	67
B.	Liberty's Asserted Lack Of Intent To Violate The Communications Act Or The Commission's Rules, Even if True, Does Not Make Its Violations "Unintentional". . . . .	68
C.	The Joint Motion's Claim That Liberty Had No Intent To Deceive The Commission Is Based On An Incorrect Legal Standard . . . . .	74
D.	Disqualification Is An Appropriate Sanction For Liberty's Misrepresentations To The Commission And Violation Of The Commission's Rules . . . . .	77
V.	CONCLUSION . . . . .	82

## SUMMARY

This case is clearly not proper for summary decision because the record is incomplete in significant respects. Liberty has denied TWCNYC, Cablevision and the Presiding Officer access to its "Internal Audit Report," which has been described as a comprehensive investigation into Liberty's illegal activation of unlicensed microwave facilities and which was submitted to the Commission in support of the captioned applications. The D.C. Circuit has stayed pending appeal the Order of the Commission that this document be disclosed. The Presiding Officer should not grant summary decision on a record that may contradict the Report after a court upholds the Commission's decision and the Report is made available in this proceeding. In addition, there are potential witnesses who have contradicted the testimony of Liberty's most senior officials, or who have knowledge relevant to the case and therefore should be deposed before the Joint Motion is resolved.

Summary decision is also improper because the record that does exist contains disputed issues of fact at the heart of the case, as defined by the Commission in its HDO. The Joint Motion ignores the fact that this proceeding is primarily concerned not with what happened -- it is undisputed that Liberty operated 19 illegal OFS facilities and interconnected numerous buildings by cable, without any franchise, in violation of federal law -- but rather with what Liberty officials knew at the time of these events and whether they were not candid about them with the Commission. Because the Commission's HDO has raised issues as to Liberty's candor and intent, Liberty and the Bureau bear a very high burden in showing that there is no need for a hearing -- a burden that the Joint Motion does not even approach meeting.

Contrary to the Joint Motion's assertion, there is evidence that Liberty knowingly operated unlicensed microwave paths before revealing them to the Commission and deliberately activated microwave paths for which applications had not been granted. On February 24, 1995, Liberty's FCC counsel provided a detailed OFS license inventory to Peter Price, Liberty's President, and to Behrooz Nourain, the Liberty official who illegally activated these paths. Counsel clearly informed them that applications were pending -- not granted -- for paths to serve 13 of the unlicensed addresses listed in the Commission's HDO.

The record also demonstrates the falsity of Liberty's explanation to the Commission, that Mr. Nourain assumed that STA requests for the illegal paths had been granted. On the contrary:

- the license inventory from FCC counsel expressly stated that no STAs had been granted as of late February, 1995;
- there is no evidence that Liberty had a practice of filing STA requests concurrently with OFS applications;
- Mr. Nourain himself was the Liberty official responsible for filing STA requests, and signed them on behalf of Liberty, so that he could not have mistakenly assumed that so many requests had even been filed, let alone granted, without his involvement;
- the evidence shows that Mr. Nourain did not even wait the amount of time he testified was required after an application was filed before activating certain microwave paths;
- three of the *transmitters* that originated illegal paths were not previously licensed to serve *any other* path; and
- the record indicates that Mr. Nourain fully understood and monitored the licensing process at every stage, contrary to Liberty's later claims.

The Joint Motion asserts that Liberty learned about its unlawful operations on its own, in "late April" 1995, a crucial fact that remains in dispute to this day. The affidavit of

Liberty's counsel, Lloyd Constantine, filed in support of its September 20, 1995 Application for Review, also stated that Liberty's Chairman learned about the unauthorized microwave paths in late April. But Liberty's witnesses, including its Chairman, testified in discovery that they learned of Liberty's unlicensed microwave operations as a result of TWCNYC's May 5, 1995 filing at the Commission. This discrepancy is vitally important because on May 4, 1995 -- one day before TWCNYC's filing exposed these illegal operations -- Liberty filed requests for STA grants to cover 14 paths it was already illegally operating. Not only did such STA requests fail to reveal to the Commission that the paths were already activated, but they were intended to mislead the Commission into thinking that the paths had not been activated. Moreover, these STA requests were signed by Mr. Nourain, the company official who had activated the same unlicensed paths. Even if Mr. Nourain could have mistakenly assumed earlier STA grants when he activated these paths, there is no explanation as to why Liberty later failed to reveal that it was already operating paths for which it sought STAs.

In fact, the evidence indicates that, sometime in March or April of 1995, Liberty realized that it was illegally operating a number of unlicensed microwave paths. It filed STA requests for these paths on May 4, 1995, concealing that the paths were already operational, in the hope that these requests would be granted before anyone discovered its illegal activity. Unfortunately, TWCNYC had already discovered two such paths, which it revealed in a pleading filed with the Commission just one day later. It is also possible that these paths were illegally activated to increase Liberty's subscriber count and thereby inflate the purchase price in an anticipated possible sale.

With regard to Liberty's other violations, the Joint Motion claims that Liberty's principals believed, in good faith, that their cable interconnections did not require a local franchise. To the contrary, the record establishes that Liberty fully understood the legal consequences of providing service via hardwire connections to non-common buildings, that it actively concealed its use of such connections, and that it deliberately misrepresented the nature of its operations in filings with the FCC. Once again, Liberty's conduct and its intent, matters central to resolution of the designated issues, remain firmly in dispute.

Liberty was well aware of the franchise requirements imposed on it by applicable law. It participated in the FCC proceeding that authorized 18 GHz OFS service by SMATV operators, in which the Commission clearly stated that the hardwire interconnection of OFS facilities serving non-commonly owned buildings would require a local franchise. Liberty also understood that the Commission's definition of a cable system required it to obtain a franchise to interconnect non-commonly owned buildings with cable: in 1992 Liberty urged the Commission to defend that definition before the D.C. Circuit and told the Commission it did not -- and would not -- use such interconnections. Although the D.C. Circuit did, briefly, invalidate that definition, Liberty continued to interconnect non-commonly owned buildings with hardwire cable even after the Supreme Court reversed the D.C. Circuit and upheld the FCC's definition. The record also fails to support Liberty's claim of having relied on a purported policy of the local franchising authority, a claim that the franchising authority itself previously denied.

Liberty's failure to seek a cable franchise for its 13 hardwire-interconnected systems allowed Liberty to avoid having to comply not only with local franchising obligations, but

also with the numerous "public interest" obligations imposed on cable operators under federal statute and FCC regulations. Thus, the evidence shows that Liberty had ample motive to conceal its hardwire connections from both its competitors and regulatory authorities.

In 1994, after TWCNYC had revealed Liberty's cable interconnections of non-commonly owned buildings and faced with the prospect that state cable regulators would order it to cease service by hardwire interconnection -- as they subsequently did -- Liberty filed OFS applications to replace the hardwire interconnections. Those applications merely represented that Liberty was eligible for OFS licenses under FCC regulations as a "SMATV" operator proposing to serve "private cable" buildings and subscribers and failed to state that these OFS paths were being sought to replace illegal hardwire connections, or that the New York State Commission on Cable Television's ongoing enforcement proceeding against Liberty was the reason the applications had been filed in the first place. The fact that, a month later, Liberty filed suit against the state commission in an unsuccessful effort to block the enforcement proceeding and that the United States subsequently intervened in that suit on its own accord can not be said to have discharged Liberty's obligation under the Commission's Rules to give sufficient and timely notice to the FCC that it was not, in fact, a "SMATV operator." On the contrary, Liberty followed its customary and now well-established practice of dissembling and concealing adverse information from the Commission and other regulatory authorities until another party exposed the deception and revealed the facts.

After further discovery, this case must be set for a hearing to resolve the issues designated by the Commission.

RECEIVED

SEP 13 1996

BEFORE THE  
**Federal Communications Commission**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

WASHINGTON, D.C. 20554

In Re Requests Of	) File Nos./Call Signs
	)
LIBERTY CABLE CO., INC.	) 708777 (WNTT370)
	) 708778, 713298 (WNTM210)
For Special Temporary Authority	) 708779 (WNTM385)
For Private Operational Fixed	) 708780 (WNTY375)
Microwave Radio Service	) 708781, 709426, 711937 (WNTM212)
	) 709332 (WNTY371)
New York, New York	) 712203 (WNTW782)
	) 712218 (WNTY584)
	) 712219 (WNTY605)
	) 713295 (WNTX889)
	) 713297 (WNTL307)
	) 713300 (WNTY372)
	) New/WPJB384
	) New/WPJB388
	) New/WPJB392

To: Hon. Richard L. Sippel, Administrative Law Judge

**COMBINED OPPOSITION TO JOINT MOTION FOR SUMMARY DECISION**

**I. PRELIMINARY STATEMENT**

Time Warner Cable of New York City and Paragon Cable Manhattan (collectively, "TWCNYC"), together with Cablevision of New York -- Phase I ("Cablevision") hereby oppose the Joint Motion for Summary Decision filed by the respondent, Liberty Cable Company, Inc. ("Liberty")<sup>1</sup> and by the Wireless Bureau (the "Bureau"). This proceeding is primarily concerned not with what happened, but with what Liberty's personnel knew at the

---

<sup>1</sup>TWCNYC and Cablevision are aware that Liberty Cable Company, Inc. is now known as "Bartholdi Cable Company, Inc." following the sale of most of the former Liberty's assets (including its name) to a subsidiary of RCN Corporation. However, for clarity, the applicant for the captioned licenses will be referred to by its former name, "Liberty."

time the undisputed events happened, and what Liberty told -- and failed to tell -- the Commission about what happened. Under these circumstances, Liberty and the Bureau bear a very high burden in showing that there is no need for a hearing -- a burden that the Joint Motion does not meet.<sup>2</sup>

The events that gave rise to the Commission's Hearing Designation Order ("HDO") in this proceeding are simple and undisputed. Beginning in July 1994 and continuing through the last week in April 1995, Liberty activated a total of 19 unlicensed microwave paths, each to apartment buildings, hotels and office buildings in New York City where Liberty wanted to provide its video programming service to customers. Six of these paths were operated before Liberty had even applied for a license; the others were activated while license applications were pending. Liberty never took the initiative in revealing this activity to the Commission. It acknowledged the existence of 15 unlicensed microwave paths on May 17, 1995, only after TWCNYC had informed the Commission of its belief that Liberty was operating two unlicensed microwave paths. Liberty disclosed the other four paths two months later, when it belatedly filed applications and STA requests for them.

---

<sup>2</sup>TWCNYC and Cablevision appreciate the fact that the Bureau's support of the Joint Motion is the product of an agreement between it and Liberty in which Liberty agrees to a forfeiture of \$780,000.00 in exchange for the Bureau's joining the motion for summary decision. While such an agreement may represent a good-faith exercise of the Bureau's judgment about the appropriate use of its limited resources for a hearing, Liberty's willingness to agree to a forfeiture has no bearing on whether or not summary decision is proper here. Indeed, it would be a dangerous and wrong precedent if a respondent in an enforcement proceeding were able to circumvent a hearing simply by reaching an agreement with the Commission staff. The Joint Motion must succeed or fail independently of the amount of the forfeiture to which Liberty has agreed, or even of the fact that Liberty has agreed to any penalty.

Similarly, beginning in 1992, Liberty began using coaxial cable to interconnect some apartment buildings that it served, even though these buildings were not under common ownership, management or control. Although these hardwire interconnections made Liberty a "cable television operator" under the operative federal law, a fact which Liberty had known at least since 1991, Liberty never complied with any of the legal obligations imposed by federal or state law on cable television operators, including the most basic obligation -- to have a franchise from the appropriate state or local government. Nevertheless, Liberty, in its OFS applications to the Commission, continued to describe itself as an "SMATV operator," not an unfranchised cable operator, and concealed the existence of these hardwire interconnections from the Commission. These cable interconnections were revealed to the Commission only after Liberty, under threat of an enforcement action by the New York State Commission on Cable Television, applied for OFS licenses to replace the unfranchised cable interconnections; and TWCNYC advised the Commission of the apparent purpose behind Liberty's applications and STA requests.

The HDO that instigated this proceeding mandates an inquiry into the facts and circumstances surrounding Liberty's use of hardwire interconnections and Liberty's activation of unlicensed microwave facilities. In addition, the HDO directs an inquiry into whether Liberty violated the Commission's Rules or policies by not notifying the Commission of either the hardwire interconnections or the unlicensed, operational microwave facilities. Finally, the HDO mandates an inquiry into whether, with regard to either the hardwire interconnects or the unlicensed microwave facilities, Liberty misrepresented facts, lacked candor or attempted to mislead the Commission.

The position taken in the Joint Motion essentially is that Liberty did not know at the time that it activated each of the 19 unlicensed paths that they were, in fact, unlicensed; that Liberty made timely disclosures to the Commission of its unlicensed operations, once the company knew they were unlicensed; that, despite a Supreme Court decision that is directly on point, Liberty was the victim of "regulatory uncertainty" with respect to its use of cable interconnections; that, in any event, Liberty eventually informed the Commission about the existence of these interconnections and that Liberty has otherwise been candid with the Commission in the explanation of the facts and circumstances surrounding both the company's use of cable interconnections between non-commonly owned buildings and the activation of unlicensed microwave facilities. In essence, the Joint Motion argues that the production of thousands of document pages and the depositions of more than 10 witnesses was nothing but a waste of time, and that its obviously contrived explanation of its transgressions as nothing but the product of an "administrative foul-up" stands unimpeached by any contrary evidence.

TWCNYC and Cablevision respectfully disagree. This case is not proper for summary decision because the record is incomplete and because the partial record that exists contains disputed issues of fact at the heart of the case, as defined by the HDO. Missing from the record here is a Liberty "Internal Audit Report," submitted to the Commission in response to a request from the Wireless Bureau under 47 U.S.C. § 308(b) for information about the captioned applications. The Report is described as the result of a comprehensive investigation into the circumstances surrounding Liberty's activation of unlicensed microwave facilities. Although the Commission has denied Liberty's request for "confidential treatment"

of that Report and has ordered it made public and delivered to counsel for TWCNYC, Liberty has obtained a stay pending appeal of that order to the D.C. Circuit. Because TWCNYC, Cablevision and the Presiding Officer have not had access to the Report, there is no way to determine whether, in the words of the HDO, Liberty "misrepresented facts to the Commission, lacked candor in its dealings with the Commission, or attempted to mislead the Commission" in the Report. Until the accuracy and completeness of the Report are measured against the information developed in discovery, this proceeding cannot be concluded. The appearance of justice certainly would be tarnished if summary decision were granted, the D.C. Circuit were to affirm the Commission's decision ordering release of the Report and the Report, upon comparison with the record here, was found to contain false statements or material omissions. In addition, there are other potential, undeposed witnesses who have contradicted the testimony of Liberty's most senior officials or who have other knowledge of the case.

Contrary to the position taken in the Joint Motion, there is evidence that Liberty knew it had unlicensed microwave paths months before it revealed them to the Commission and that Liberty activated microwave paths to certain addresses even after having been told by its lawyers that the applications for those addresses had not yet been acted upon. In fact, the most plausible scenario that fits the evidence collected thus far is that, in March or April of 1995 Liberty realized that it had a number of operating, unlicensed microwave paths. It filed STA requests for these paths on May 4, 1995 (that failed to mention that the paths were already in operation) hoping that these requests would be granted before anyone discovered its illegal operations. Unfortunately, TWCNYC had discovered two of these unlicensed

paths; and it revealed that discovery in a pleading filed with the Commission on May 5, 1995.

Moreover, there is evidence that impeaches the explanation Liberty gave the Commission as to how these unlicensed operations were commenced. In a "Surreply" filed in support of the captioned applications, Liberty said the majority of the unlicensed paths were activated because its engineering director assumed STA requests for those paths had been granted, and he therefore turned them on. That explanation was known to be false at the time Liberty offered it, and it was offered in an attempt to palliate the Commission by hiding the truth about Liberty's actions. Yet, Liberty had no practice of filing STA requests concurrently with microwave path applications; its engineering director was in charge of filing applications and STA requests (and signed them on behalf of the company), so he would have known that no STA requests had been filed; and, most tellingly, *STA requests for 14 of the paths in question (signed by that same engineering director) were filed on May 4, 1995, months after the paths had been activated and only days before Liberty offered this dubious explanation.*

However, even if the facts were as the Joint Motion alleges them to be, the conduct evidenced in those facts is far more serious than the Joint Motion is willing to admit. First, the Joint Motion makes liberal use of the legally invalid "ignorance of the law" defense. It claims that Liberty's actions were "unintentional" because, in the case of the microwave paths, Liberty did not know that it did not have a license for the path and because, in the case of the unfranchised cable interconnections, there was "regulatory uncertainty" as to whether Liberty could use them. In fact, none of these actions was "unintentional"

violations; they were not accidents or mistakes. Liberty's use of cable interconnections were the result of a deliberate corporate policy to use a cable to feed an apartment building that could not be served by microwave or that was too small to be profitably served by the more expensive microwave system; and there is no basis to support a good faith belief that a franchise was not required. With respect to Liberty's activation of unlicensed microwave paths, at best they were the product of Liberty's reckless disregard of its legal obligations and at worst they were the product of Liberty's desire to "plump up" the number of its subscribers for a prospective buyer that was looking the company over in the first quarter of 1995.

*The Joint Motion should be denied, limited additional discovery should be allowed, and this case should be set for a hearing.*

## **II. DISPUTED ISSUES OF MATERIAL FACT**

The Statement of Facts in the Joint Motion for Summary Decision includes matters that are seriously disputed, as the record evidence below demonstrates.

The Joint Motion argues that the undisputed facts show that Liberty's illegal activation and operation of microwave paths resulted from "administrative foul-ups." Liberty and the Bureau further allege that "there is no evidence that Liberty lacked candor before the Commission in disclosing prematurely activated buildings or that Liberty acted with any intent to deceive in relation to its premature activations."<sup>3</sup> Neither of these claims is supportable.

---

<sup>3</sup>Jt. Mot. at ¶ 109.

A. Illegal Operation Of Microwave Paths.

1. Liberty's President Knew About Liberty's Illegal Microwave Operations In February 1995.

The Joint Motion states that "there is no evidence whatsoever that anyone in Liberty's senior management knew about Nourain's licensing activities and practices."<sup>4</sup> This is not correct. There is evidence that demonstrates that Mr. Price, Liberty's president, was told in late February 1995 that Liberty had no licenses to operate microwave facilities to certain addresses that Mr. Price knew were already being served. In addition, with Mr. Price's knowledge, Liberty began service to additional addresses that he had been told were not licensed.

As one would expect from his title, Peter Price had an oversight role in the licensing process and was informed of license status. Despite Liberty's assertions that Mr. Price had no "formal or written job description,"<sup>5</sup> testimony establishes that Mr. Price was clearly the person responsible for ensuring that Liberty complied with FCC license requirements. As his employer and Liberty co-chairman, Edward Milstein stated:

Q: In your mind, from the period 1993 through first quarter of 1995, who at Liberty was responsible for seeing that the requisite licenses were obtained for Liberty's microwave?

A: Peter Price.<sup>6</sup>

Howard Milstein, Liberty's other co-chairman, similarly testified:

---

<sup>4</sup>Id. at ¶ 105.

<sup>5</sup>Id. at ¶ 17.

<sup>6</sup>E. Milstein Dep. at 41:1-5, Exhibit 1 to Declaration of R. Bruce Beckner dated September 13, 1996, attached hereto (hereinafter, exhibits to this Declaration will be cited as "Ex. \_\_" or Supp. Ex. \_\_).

A: One of Peter's [Peter Price's] responsibilities was to make sure that we were complying with everything we had to comply with.<sup>7</sup>

The evidence demonstrates that as a general matter, Mr. Price had a substantial interest in the licensing process. Mr. Price used weekly Technical Operations Reports in part to coordinate proper licensing for the addresses Liberty served.<sup>8</sup> Mr. Price testified:

Q: Now, can you tell me the use that was made of these technical operations reports at the staff meeting?

A: The use was to coordinate the marketing with the installation procedure and to coordinate any licensing that was required in order to move from contract to installation.<sup>9</sup>

These reports also were furnished to Howard and Edward Milstein. The Reports contained an exhaustive list of (a) the addresses of all buildings at which Liberty planned to install service, (b) the addresses of all buildings where Liberty was currently installing service, and (c) the addresses of all buildings to which Liberty had completed installation and was providing service.<sup>10</sup> Anthony Ontiveros, Liberty's General Manager, testified in his deposition:

Q: Who receives this report once it's printed out?

. . . .

A: The marketing staff, customer service, legal, executive management.

---

<sup>7</sup>H. Milstein Dep. at 48:18-21 (Ex. 2). Mr. Price, in contrast to the Milsteins' testimony, has asserted that he had no particular job description other than to "manage and grow the business." Price May 28 Dep. at 11:13-12:2 (Ex. 3).

<sup>8</sup>Price May 28 Dep. at 66:8-14 (Ex. 3).

<sup>9</sup>Id. (emphasis added).

<sup>10</sup>See Ex. 7 to Ontiveros Dep. (Ex. 4).

Q: And the executive management, that would be Mr. Price and the two Milstein brothers also?

A: Correct.<sup>11</sup>

Mr. Price also instructed Pepper & Corazzini, in addition to its other duties as FCC counsel, to conduct periodic audits of Liberty's operations.<sup>12</sup> Pepper & Corazzini appears to have followed these orders, providing FCC licensing audits or inventories to Mr. Price (and Mr. Nourain) in April 1993, December 1993, January 1994 and February 1995.<sup>13</sup>

The February 24, 1995 Liberty license inventory was prepared by Michael Lehmkuhl, of Pepper & Corazzini (hereinafter "Lehmkuhl Memorandum"), who sent it to Mr. Price and to Mr. Nourain. The Lehmkuhl Memorandum makes two critical points -- (1) that as of February 24, 1995, Liberty had pending applications for the 13 addresses that are listed in Appendix A to the HDO as being activated without authorization, and (2) that as of February 24, 1995, Liberty had no STAs.<sup>14</sup>

The Lehmkuhl Memorandum states that the applications for each of the 13 addresses are "pending" (i.e., not granted):<sup>15</sup>

---

<sup>11</sup>Ontiveros Dep. at 85:2-10 (Ex. 4).

<sup>12</sup>H. Milstein Dep. at 40:13-16 (Ex. 2).

<sup>13</sup>See Exs. 16-20 to Price Aug. 1 Dep. (Ex. 3).

<sup>14</sup>Lehmkuhl Mem. at FCC/CP 016139 (Ex. 5); HDO, App. A.

<sup>15</sup>The Memorandum designates pending applications with a "P" and granted applications with a "G." Each of the following sites also appear in Appendix A to the Commission's HDO.

<u>Path Name</u>	<u>Status</u>
16 West 16th St.	P <sup>16</sup>
Resident Hall, NYU Campus	P <sup>17</sup>
Greenburg Hall, NYU Campus	P <sup>18</sup>
6 East 44th Street	P <sup>19</sup>
25 West 54th Street	P <sup>20</sup>
30 Waterside	P <sup>21</sup>
114 East 72d Street	P <sup>22</sup>
524 East 72d Street	P <sup>23</sup>
433 East 56th Street	P <sup>24</sup>
639 West End Avenue	P <sup>25</sup>
35 West End Avenue	P <sup>26</sup>
441 East 92d Street	P <sup>27</sup>
567 Fifth Avenue	P <sup>28</sup>

---

<sup>16</sup>Lehmkuhl Mem. at FCC/CP 016146 (Ex. 5).

<sup>17</sup>Id. at FCC/CP 016147.

<sup>18</sup>Id.

<sup>19</sup>Id. at FCC/CP 016148.

<sup>20</sup>Id. at FCC/CP 016151.

<sup>21</sup>Id. at FCC/CP 016152.

<sup>22</sup>Id.

<sup>23</sup>Id.

<sup>24</sup>Id.

<sup>25</sup>Id. at FCC/CP 016158.

<sup>26</sup>Id.

<sup>27</sup>Id. at FCC/CP 016162.

<sup>28</sup>Id. In some documents, 567 Fifth Avenue is listed as 767 Fifth Avenue. The 567 Fifth Avenue address appears to be the correct one.

Consequently, the Lehmkuhl Memorandum made clear that Liberty had no legal right whatsoever to operate microwave paths to these identified addresses.

Nevertheless, Liberty already had commenced service to some of these addresses. The February 23, 1995 weekly Technical Operations Report, which Liberty and Mr. Price used to coordinate FCC licensing, lists five of the 13 unlicensed addresses in the Lehmkuhl Memorandum as being operational.<sup>29</sup> The next week's report, dated March 2, 1995, lists seven of the 13 as being operational; and by the end of April, Liberty had in place service to all of the 13 addresses listed.<sup>30</sup>

Mr. Price had a notably unfocused recollection of the discovery of Liberty's unlicensed operations, an important event in the life of his company. When asked when he first learned that Liberty was operating unlicensed microwave systems, Mr. Price testified that he learned about Liberty's illegal operations in early January 1995:

Q: Now, did there come a time in 1995 when you became aware that Liberty was operating some microwave paths for which it had not yet received an FCC license?

A: That's correct.

Q: Approximately when did that come to your attention, if you remember?

A: I believe it was in January of '95, in that early January -- early 1995. I'm not clear when. Somewhere in that area.<sup>31</sup>

Then, Mr. Price changed his answer:

---

<sup>29</sup>Price Aug. 1 Dep. Ex. 21 (Supp. Ex. 1).

<sup>30</sup>Price Aug. Dep. Ex. 22 (Supp. Ex. 2); see HDO, App. A.

<sup>31</sup>Price May 28 Dep. at 93:15-94:2 (Ex. 3).

A: Just to clarify, it was early in '95. When in '95? Sometime in the first quarter, I believe, of '95.

Q: Sometime between January and the end of March? Would that be fair?

A: Yes. Sometime in the first three or four months of '95.

Q: Could have been as late as April?

A: Could have been as late as April.<sup>32</sup>

At last, Mr. Price arrived at his final answer:

Q: I think we established through your testimony that you became aware of the fact that Liberty was providing unauthorized service as a result of the May 5th filing by Time Warner with the FCC.

A: Yes.

. . . .

Q: The question is, to your personal knowledge, did you, yourself -- meaning Peter Price, not necessarily Liberty Cable as an entity -- have any knowledge prior to hearing or learning of the allegations in Time Warner's pleading?

A: No, I did not. Absolutely no, I did not.<sup>33</sup>

Therefore, even if the contradictions in Mr. Price's testimony are overlooked, independent documentary evidence -- the Lehmkuhl Memorandum and the Weekly Operations Reports -- establishes that Mr. Price knew in late February 1995 that Liberty did not have licenses to operate microwave paths to some of the addresses he had been told it was serving as of that date.<sup>34</sup>

---

<sup>32</sup>Id. at 94:14-95:1.

<sup>33</sup>Id. at 208:2-17 (emphasis added); see also id. at 182-185 (Ex. 3).

<sup>34</sup>Moreover, as discussed in subpart 3, infra, even the Joint Motion is internally inconsistent about when Liberty knew it was operating unlicensed paths.

2. Liberty's Claim That Its Chief Engineer, Mr. Nourain, Activated Unlicensed Microwave Paths Because He Assumed That STA Requests Had Been Granted Is False.

The Joint Motion also asserts that Behrooz Nourain, Liberty's Chief of Engineering, was, like Mr. Price, unaware that Liberty had activated unlicensed microwave paths.

Nourain merely assumed that within a particular period of time after he had sent his data to Comsearch, the Commission license would be applied for.

. . . .

Nourain . . . assumed that Pepper & Corazzini would regularly apply for STAs and that such authority would be received in sufficient time to activate a building to receive Liberty service. . . . After the hand-off of the frequency coordinates to Pepper & Corazzini, Nourain did not monitor the status or progress of the pending license applications.<sup>35</sup>

The evidence contradicts these arguments. First, Mr. Nourain, like Mr. Price, was advised by the Lehmkuhl Memorandum in February 1995 that several microwave paths that he had activated were unlicensed; but, within weeks of having received this information, he intentionally activated several more unlicensed paths. Second, the evidence shows that Mr. Nourain could not have assumed the existence of STA grants for the illegally activated paths as Liberty claims, because (1) Mr. Nourain was the person who customarily signed STA requests<sup>36</sup> and therefore he would have known that no STA requests were on file when he activated the unlicensed facilities because he had not signed any such requests; and (2) there is no evidence -- other than Mr. Nourain's post hoc testimony -- even suggesting that Liberty had a regular practice of filing STA requests concurrently with applications. Third, the

---

<sup>35</sup>Jt. Mot. at ¶¶ 31, 94 (citations omitted).

<sup>36</sup>See Ex. 9 to Nourain Dep. (Ex. 6).

evidence shows that Mr. Nourain did not even wait the amount of time he testified was required for action on an application before he activated certain microwave paths. Fourth, three of the transmitters that served some of the illegally operated paths were not licensed to serve any path. Knowing the FCC requirement that a license be physically posted at the transmitter location, Mr. Nourain necessarily knew that he had no authority to activate the transmitters that served some of the unlicensed paths when he was physically present at the transmitter site and observed no posted license. Finally, the testimony is that, rather than misunderstanding and ignoring the licensing process, Mr. Nourain understood and monitored the process at every stage. Mr. Nourain therefore knew about Liberty's illegal operations much earlier than he or Liberty has admitted, and Liberty gave the Commission a false and deceptive explanation of how he came to activate microwave facilities before they were licensed.

Mr. Nourain, like Mr. Price, received the Lehmkuhl Memorandum.<sup>37</sup> Liberty, through Mr. Nourain, had already activated paths to nine of the 13 sites listed in the Lehmkuhl Memorandum as having applications "pending" at the time Mr. Nourain and Mr. Price received the Lehmkuhl Memorandum in February 1995.<sup>38</sup> By mid-April 1995, Mr. Nourain activated pathways to four additional sites also listed in the Lehmkuhl Memorandum, still without having received authorization from the Commission, and without Liberty having filed STA requests for any of the sites.<sup>39</sup>

---

<sup>37</sup>See Lehmkuhl Mem. at FCC/CP 016139 (Ex. 5).

<sup>38</sup>See HDO, App. A.

<sup>39</sup>HDO, App. A.

The evidence shows that Mr. Nourain could not have assumed that the Commission had granted Liberty STAs for any of these illegally activated pathways. On the first page, the Lehmkuhl Memorandum states that "Liberty is no longer operating under any STAs."<sup>40</sup> Mr. Nourain therefore knew that as of February 24, 1995, Liberty had no authority to operate microwave paths under STAs. Liberty did not file STA requests for any of the illegally operated paths until May 4, 1995, when it filed STA requests for 14 of the 19 illegal paths, and Mr. Nourain was the person who signed those requests.<sup>41</sup>

Liberty also did not have a practice of routinely filing STA requests concurrently with license applications.<sup>42</sup> Michael Lehmkuhl, the Pepper & Corazzini lawyer who dealt with Mr. Nourain and made FCC filings on Liberty's behalf, testified:

Q: Do you think you filed STAs simultaneously with license applications in a significant number of those cases?

. . . .

A: No.

. . . .

Q: So if I might characterize your answer, subject to your counsel's objection, was it your understanding that you were not to file an STA with an FCC license application unless you were instructed to do so by your client?

---

<sup>40</sup>Lehmkuhl Mem. at FCC/CP 016139 (Ex. 5) (emphasis added).

<sup>41</sup>See, e.g., Ex. 9 to Nourain Dep. (Ex. 6). These requests covered all of the paths identified in the Lehmkuhl Memorandum, plus the path to 200 E. 32nd Street, which was the subject of an application filed on March 23, 1995 and which was turned on only four days later.

<sup>42</sup>Liberty's counsel in this proceeding made strenuous efforts to block this line of questioning. See Lehmkuhl Aug. 7 Dep. 153:9-164:12 (Ex. 7).

A: That is correct.<sup>43</sup>

Mr. Nourain was the person at Liberty who regularly dealt with Mr. Lehmkuhl.<sup>44</sup> Based on Mr. Lehmkuhl's testimony, Mr. Nourain had every reason to know that STA requests would not be filed routinely; in fact, it appears that if an STA request were to be made, Mr. Nourain himself would be the one to request it. There is no basis, therefore, for Mr. Nourain to have assumed that STA requests for the paths in question had been filed -- leave alone granted.

Moreover, Liberty's arguments that Mr. Nourain was ignorant of and disconnected from the licensing processes are contradicted by the evidence as well. The facts show that Mr. Nourain was intimately familiar with and paid close attention to the license application process. The evidence is that Mr. Nourain (1) acutely understood the application process; (2) signed the applications; (3) received copies of the completed applications after filing; (4) checked on the status of the applications; and (5) regularly received licenses from the FCC following grant. Mr. Nourain gave Liberty assurances that he understood the licensing process when he first started work at Liberty. Mr. Nourain assured Mr. Stern, the contractor for Liberty who had recommended Mr. Nourain for hire, that he thoroughly understood FCC licensing procedures.<sup>45</sup> In fact, Mr. Nourain explicitly told Mr. Stern not to worry about FCC licensing, since it was no longer Mr. Stern's responsibility.<sup>46</sup> Bruce

---

<sup>43</sup>Lehmkuhl Aug. 7 Dep. at 156:15-20, 159:3-8 (emphasis added) (Ex. 7).

<sup>44</sup>See Lehmkuhl May 22 Dep. at 10:8-13; 54:15-55:4 (Ex. 7).

<sup>45</sup>Stern Dep. at 70:14-71:4 (Ex. 9); see also Jt. Mot. at ¶ 28.

<sup>46</sup>Stern Dep. at 77:1-21 (Ex. 9).