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October 23, 1996

VIA HAND DELIVERY

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OCT 24 1996
Federal Communications Commission
Office of Secretary

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Supplemental Memorandum by Bartholdi Cable Co., Inc. in Support of the Joint Motion by Bartholdi Cable Co., Inc. and the Wireless Telecommunications Bureau for Summary Decision

Dear Mr. Caton:

On October 22, 1996, Bartholdi Cable Co., Inc. filed a facsimile copy of the above-referenced Supplemental Memorandum pursuant to the Presiding Judge's Order, FCC 96M-234 (released October 18, 1996). Submitted herewith, for association with Bartholdi's October 22, 1996 filing, is the original, signed copy of the Supplemental Memorandum and the required number of copies.

Please do not hesitate to call me if you have any questions.

Sincerely,

Vipul N. Nishawala

cc: Hon. Richard L. Sippel

Enclosure

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ORIGINAL

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

RECEIVED

OCT 2 4 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

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To: Hon. Richard L. Sippel
Administrative Law Judge

SUPPLEMENTAL MEMORANDUM BY BARTHOLDI CABLE CO., INC.
IN SUPPORT OF THE JOINT MOTION BY BARTHOLDI CABLE CO., INC. AND THE
WIRELESS TELECOMMUNICATIONS BUREAU FOR SUMMARY DECISION

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SUMMARY

Since the Wireless Telecommunications Bureau (the "Bureau") and Bartholdi Cable Co., Inc., formerly known as Liberty Cable Co., Inc. ("Liberty"), filed their Joint Motion for Summary Decision (the "Joint Motion") on July 15, 1996, additional discovery has been sought and granted. This continued discovery confirms the conclusions set forth in the Joint Motion: Liberty's violations, while serious, do not justify a finding that Liberty is not qualified to be granted the licenses at issue. Rather, the appropriate sanction is the forfeiture recommended by the Bureau and Liberty in the Joint Motion. The recent depositions of Behrooz Nourain, Peter Price, Michael Lehmkuhl and Stephen Coran establish once again the merit of the arguments set forth at length in the Joint Motion. The record in this entire proceeding, especially the recent discovery, establish that Liberty has been truthful in its representations to the Bureau and that Liberty has acted promptly to remedy the structural failures and misunderstandings that led to the admitted violations.

Time Warner Cable of New York City, Paragon Cable Manhattan (together, "Time Warner") and Cablevision of New York City - Phase I ("Cablevision") moved for the renewed depositions based upon claims that these depositions would unmask falsehoods that, according to them, permeated the Joint Motion. Every one of the arguments for seeking renewed discovery has proven to be a chimera; every alleged untruth that Time Warner and Cablevision claimed would be revealed was again established to be truthful and accurate by uncontroverted testimony. The conspiracy theories woven by Time Warner and Cablevision in support of their motions for renewed discovery have now been shown to be no more than the product of Time Warner's and Cablevision's vivid imaginations.

The issue on which Time Warner's and Cablevision's Opposition to the Joint Motion rises or falls, and the issue which formed the basis of their repetitive demands for discovery, is that Liberty knew of premature service before the end of April 1995, the period when Liberty has acknowledged first becoming aware of the premature service. Every submission by Time Warner and Cablevision has revolved around this central argument. Yet the undisputed record now establishes even more conclusively that there was no knowledge of premature service before the time frame acknowledged by Liberty. Despite Time Warner's and Cablevision's predictions and conjecture to the contrary, this statement of fact is now also corroborated by the testimony of Coran, an independent third-party witness. The facts as recited in the Bureau's and Liberty's Joint Motion, as further confirmed in continued discovery, are accurate and truthful. Therefore, Time Warner and Cablevision have been indulged long enough in their fishing expedition, and the Presiding Judge should forthwith grant summary decision in accordance with the Joint Motion submitted by the Bureau and Liberty.

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

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	)	713295	WNTX889
	)	713300	NEW
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To: Hon. Richard L. Sippel
Administrative Law Judge

SUPPLEMENTAL MEMORANDUM BY BARTHOLDI CABLE CO., INC. IN SUPPORT OF THE JOINT MOTION BY BARTHOLDI CABLE CO., INC. AND THE WIRELESS TELECOMMUNICATIONS BUREAU FOR SUMMARY DECISION

Pursuant to the Presiding Judge's Order, FCC 96M-234 (released October 18, 1996), Liberty Cable Co., Inc. ("Liberty"), now known as Bartholdi Cable Co., Inc., submits this supplemental memorandum in further support of the Joint Motion for Summary Decision (the "Joint Motion") filed by Liberty and the Wireless Telecommunications Bureau (the "Bureau").

As set forth below, the continued depositions indulged the wild theories and conjecture propounded by Time Warner Cable of New York City and Paragon Cable Manhattan (together, "Time Warner") along with Cablevision of New York City - Phase I ("Cablevision"). However, the testimony and evidence revealed by the continued depositions, including one of a

disinterested third-party attorney, produced no proof that the February 24, 1995 license inventory created by Michael Lehmkuhl (the "Lehmkuhl Inventory") informed Liberty of premature activations before late April or May of 1995. Indeed, the additional testimony only served to confirm that it was the disjointed internal flow of licensing information at Liberty that led to the premature activations. Therefore, rather than undermining the Joint Motion, the continued depositions lend further support to granting the Joint Motion in its entirety.

BACKGROUND

On July 12, 1996, when the Bureau and Liberty were due to file their Joint Motion seeking to resolve this matter without further litigation, Time Warner and Cablevision filed another motion to enlarge issues in this case (the "Joint Motion to Enlarge"). Thus began the series of motions culminating in a new round of depositions after discovery closed at the beginning of June.

The premise of the Joint Motion to Enlarge was that Price and Nourain lied during their depositions because the Lehmkuhl Inventory, which was addressed to Price and Nourain, had alerted them to premature activations months before the time period these two witnesses claimed they learned about the problem. Time Warner theorized that the Lehmkuhl Inventory, when considered together with Liberty's weekly reports concerning the progress of Liberty's installations (the "Weekly Reports"), must have informed Liberty as early as February 1995 that there were unauthorized operations. The following passage typifies Time Warner's and Cablevision's argument: "[w]hen he [Price] received the Lehmkuhl [Inventory], Mr. Price must have known from the weekly Operations Report (that he personally reviewed and discussed with his staff every Thursday) that Liberty, without a license, had activated most of the pathways identified as the subject of pending applications." Joint Motion to Enlarge at 13 (footnote

omitted).

A week later, on July 19, 1996, Time Warner moved for an Order to Take the Deposition of Howard J. Barr, Esq. (the "Barr Motion"). The premise for this motion was the same as the Joint Motion to Enlarge: Barr, as Liberty's licensing attorney and Lehmkuhl's supervisor, *must have known* from the Lehmkuhl Inventory about premature activations prior to April 1995.

By Order 96M-184 (released July 24, 1996), the Presiding Judge set a Prehearing Conference to resolve the issues raised by the Joint Motion to Enlarge and the Barr Motion. By Order 96M-188 (released July 29, 1996), the Presiding Judge denied both motions. The Presiding Judge ordered that Price, Nourain and Lehmkuhl should each be deposed again by August 8. The Presiding Judge's Order limited the scope of the depositions to "the facts and circumstances surrounding the preparation, knowledge and use of [the Lehmkuhl Inventory.]" Order FCC 96M-188 n.1. The Presiding Judge further ordered Liberty to produce copies of the Weekly Reports from February and March 1995 for use at these continued depositions. Liberty fully complied with the Presiding Judge's Order.

Price, who had been deposed twice before, on May 28 and May 31, was deposed two more times, on August 1 and 2. Nourain, who had been deposed on May 29, was deposed again on August 2. Lehmkuhl, who had been deposed on May 22, was deposed again on August 7.

Two weeks after this round of depositions had closed, Time Warner and Cablevision filed yet another Joint Motion, this time seeking to depose a third-party attorney, Stephen Coran (the "Coran Motion"). Time Warner and Cablevision claimed this time that Lehmkuhl's disclosure at his second deposition of due diligence conducted by Coran as attorney for a prospective purchaser of Liberty would shed new light on when Liberty actually found out about premature activations. Although the person sought to be deposed was different, the Coran Motion was

based on the same speculative hypothesis first trotted out in the Joint Motion to Enlarge:

> Although it has not yet been established as a fact, it is certainly likely, that, in the course of conducting such due diligence for his client, Coran also attempted to match up Liberty's FCC licenses with the address of buildings to which Liberty was supplying its programming service by microwave. Had he done so in the first half of 1995, Coran would have determined that Liberty was serving some buildings by means of unlicensed microwave facilities. Coran would know whether or not he or anyone at his client advised Liberty Cable of even the possibility that Liberty was operating unlicensed microwave facilities in the spring of 1995.

Coran Motion at 3. The requested discovery, Time Warner and Cablevision argued, would fill the following factual gap: "whether Mr. Coran matched his list of Liberty FCC microwave licenses with buildings to which Liberty was providing its video programming service and whether he --or his client-- told Liberty about the results of that match before May 5, 1995." Coran Motion at 6.

By Order FCC 96M-218 (released September 16, 1996), the Presiding Judge granted the Coran Motion. In ordering that Coran's deposition be taken, the Presiding Judge observed that "Mr. Coran is a disinterested witness to a decisionally significant event [whose] disinterested testimony should be reliable and is clearly relevant." Order FCC 96M-212 at 2.

On October 9, 1996, Coran's deposition was taken. Time Warner, Cablevision and the Bureau each had an opportunity to ask Coran questions consistent with the Presiding Judge's September 16 Order. Thereafter, by Order FCC 96 M-234 (released October 18, 1996), the Presiding Judge authorized the parties to file this supplemental memorandum addressed to the post-Joint Motion depositions.

ARGUMENT

I. The Continued Depositions of Lehmkuhl, Nourain and Price Confirm that the Lehmkuhl Inventory Did Not Alert Anyone at Liberty of Premature Activations

The continued depositions of Price, Nourain and Lehmkuhl about the Lehmkuhl Inventory failed to controvert the facts established in the Joint Motion. As Price testified, the Lehmkuhl Inventory was a routine document that he would have passed along to operations personnel since there was nothing in that document which required any action by him (Price 135:19-24, 160:4-9, 162:14-163:5).[1] Nourain testified that the Lehmkuhl Inventory was a document that he "might just glance through[.]" (Nourain 21:16-17.) He did not pass it on to Anthony Ontiveros (Nourain 31:21-25), who was Liberty's General Manager in charge of operations (Ontiveros 7:1-4, 7:13-8:2).

Lehmkuhl, who prepared the document, himself characterized it as "a fairly minor document[.]" (Lehmkuhl 115:15.) Neither Price nor Nourain, who were addressees on the Lehmkuhl Inventory, disagreed with Lehmkuhl's characterization, since neither of them recalled ever focussing on it. Indeed, Lehmkuhl testified that he did not recall discussing the inventory with anyone at Liberty (Lehmkuhl 181:5-7). Moreover, when Price issued his July 13, 1995 memorandum directing Nourain and others to conduct a reconciliation of license applications with buildings being activated (Joint Exhibit (JX) 7 to the Joint Motion), Nourain testified that he did not use the Lehmkuhl Inventory to answer the questions posed in Price's July 13, 1995 memorandum (Nourain 34:14-19). Therefore, the testimony adduced in the continued

---

[1] References to deposition testimony take the form of the deponent's last name followed by a page and line number, separated by a colon. All deposition references herein, except for the reference to the Ontiveros deposition, are to the depositions ordered by the Presiding Judge following the filing of the Joint Motion.

depositions shows that, while the Lehmkuhl Inventory should have played a more significant part in Liberty's licensing practices, it in fact did not.

The other essential prong of Time Warner's and Cablevision's theory -- that Liberty cross-referenced the data in the Lehmkuhl Inventory with information on when Liberty activated buildings for service -- also proved to be unfounded. Lehmkuhl testified that when he prepared the inventory he did not ascertain which Liberty facilities were actually in operation (Lehmkuhl 164:14-17). Furthermore, the Weekly Reports which Time Warner and Cablevision argued necessarily provided the other piece of the puzzle, in fact served no such function. Price testified that the purpose of these reports was not to verify that a license or other authorization had been obtained to serve a particular address (Price 193:2-13). When Time Warner's counsel asked Price whether, hypothetically, the Lehmkuhl Inventory together with the Weekly Reports could have informed Liberty that buildings were receiving unauthorized service (Price 175:8-18), Price acknowledged that it was possible if someone took the trouble of coordinating the volumes of paper and the detailed reconciliation, but "it's a reach [and] a pretty strained hypothetical." (Price 177:2-22.)

Price also testified that while the Weekly Reports were a topic of discussion at the weekly Thursday meetings (Price 213:2-5), whether particular buildings had been activated was not typically discussed (Price 213:23-214:10). Nourain did not attend those meetings (Nourain 54:25-55:3). Moreover, Nourain was unable to determine, without checking his records, which buildings were turned on at any given point in time (Nourain 57:23-58:4). Nourain also acknowledged that he did not have precise records of when buildings were activated (Nourain 57:9-12). Price confirmed that he did not know of any regularly generated documents at Liberty which would definitively establish the date on which a particular address began receiving Liberty

service (Price 181:20-25).

In sum, the additional depositions only served to verify the disjointed nature of Liberty's license application process which existed before mid-1995. While the various pieces may have existed for Liberty to discover the problem before it actually did, no one at Liberty put the disparate pieces together. Moreover, testimony from the continued depositions showed that the necessary piece, *i.e.*, the actual dates when Liberty began service at any given location, may not even have been available for cross-referencing with the Lehmkuhl Inventory. Only such a cross-reference would have revealed the premature service.

Liberty and the Bureau have clearly argued in their Joint Motion that this disjointed flow of information lay at the root of the problem (Joint Motion at 15, 42-43). Liberty has cured this structural defect by instituting an effective compliance program (Joint Motion at 20-21, 44). Therefore, rather than contradict the uncontroverted facts set out in the Joint Motion regarding the cause of Liberty's premature activations , the continued depositions only revealed once again Liberty's disjointed licensing process which lay at the root of the problem but which has since been corrected.

II. The Coran Deposition Demonstrates that the Due Diligence Played No Part in Informing Liberty of the Premature Activations

Time Warner and Cablevision, unable to validate their theories through the continued depositions of Price, Nourain and Lehmkuhl, prolonged their fishing expedition with the Coran deposition. This effort also proved unavailing.

Coran testified that he conducted a general due diligence of Liberty's license applications along with other issues related to a proposed purchase of Liberty, such as pending litigation (Coran 20:22-21:15, 35:22-36:2). Coran stated expressly that whether a path was operational at

the time he compiled his own lists of licensed paths was beyond the scope of his due diligence (Coran 106:1-7).

A fundamental premise of Time Warner's and Cablevision's Coran Motion was that Coran communicated the results of his due diligence to Liberty and that this due diligence would have revealed the premature service. Coran Motion at 3. Coran's testimony revealed that he knew of no communications between Liberty and his client, or anyone representing his client, about Liberty's licenses or authorizations (Coran 53:8-13). Coran also stated that by May 1995, his firm was no longer working on the transaction, because the prospective purchaser had changed counsel (Coran 43:13-45:3). By that time, Coran had not completed his due diligence of Liberty's licenses, although he concluded that Liberty's licenses appeared to be in good order (Coran 78:19-80:21). Most important, Coran testified that he had no knowledge of any problems with Liberty's licenses and authorizations until he saw the public notice of the Hearing Designation Order in this case (Coran 77:19-78:11, 107:16-108:11), which was issued many months after Coran ceased working on the transaction. Thus, the testimony adduced at the Coran deposition directly undercuts Time Warner's and Cablevision's hypotheses.[2]

In addition, while Coran got the Lehmkuhl Inventory (Coran 22:19-23:9), that fact alone did not lead Coran to the conclusion that Liberty had prematurely activated buildings even assuming, contrary to Coran's own testimony, such an inquiry was part of the due diligence. Again, additional discovery showed that the key piece to the puzzle -- a list showing when Liberty had activated particular buildings -- did not exist. As Coran clearly stated:

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[2] The Coran Motion suggested that a possible reason for the deal not being concluded was the potential purchaser's learning about the premature activations through Coran's due diligence (Coran Motion at 3). However, Coran testified that he did not know why the transaction was not consummated and, indeed, did not know what transpired with the deal after his involvement ended (Coran 43:20-44:10, 67:3-5, 77:10-13).

> As I said, we were dispatched with only looking at -- we looked only at the FCC call signs and the FCC documents to the extent they related to a particular building or a particular address. It was only to identify it for purposes of the call sign.
>
> So as far as there was an independent list of buildings that were being served, that was a list I never saw, nor was there any effort on my part to try to match up the licenses with any buildings that Liberty claimed or did not claim be served.

(Coran 91:8-19.)

As is true of Time Warner's and Cablevision's entire Opposition to the Joint Motion and their repetitious motions for renewed discovery, Time Warner and Cablevision built supposition upon presumption upon hypothesis, in complete disregard of the uncontroverted testimony set forth in all prior depositions, in vain hope of eliciting testimony from somebody that contradicted the uniform testimony of Liberty's witnesses. However, as "a disinterested witness to a decisionally significant event [whose] disinterested testimony should be reliable[,]" Order FCC 96M-218 at 2, Coran has flatly contradicted each and every presumption and innuendo raised in Time Warner's and Cablevision's motions. Thus, the additional discovery that was granted and conducted brings the case back to where it was three months ago at the filing of the Joint Motion: Liberty learned about the premature activations in late April 1995. Time Warner's and Cablevision's failure to develop any contrary evidence, despite the fact that they have been given more than ample opportunity to develop their case by the Presiding Judge, makes this proceeding ripe for summary decision in favor of Liberty and the Bureau.

CONCLUSION

Based on the foregoing, as well as the Joint Motion for Summary Decision, Liberty respectfully urges the Presiding Judge to grant the Joint Motion for Summary Decision in its entirety, grant the license applications subject to this proceeding, and adopt the Bureau's and Liberty's proposal that Liberty be assessed a forfeiture penalty as previously set forth in the Joint Motion for Summary Decision.

Dated: New York, New York
October 22, 1996

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CERTIFICATE OF SERVICE

I, Mamie Mellerson, certifies and says that I am not a party to the action and am over 18 years of age, have on this 22nd day of October 1996, caused to be served by facsimile and by pre-paid First Class United States mail (except as otherwise noted below) copies of *Supplemental Memorandum by Bartholdi Cable Co., Inc. In Support Of The Joint Motion By Bartholdi Cable Co., Inc. and The Wireless Telecommunications Bureau For Summary Decision* upon:

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2000 L Street, N.W. Suite 220
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Dated: New York, New York
October 22, 1996

Mamie Mellerson

* By hand delivery by Wiley, Rein & Fielding

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