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BEFORE THE

Federal Communications Commission

WASHINGTON, DC 20554

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Federal Communications Commission
Office of Secretary

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

JOINT MEMORANDUM OF TIME WARNER CABLE OF NEW YORK CITY, PARAGON CABLE MANHATTAN AND CABLEVISION OF NEW YORK CITY — PHASE I IN RESPONSE TO THE ORDER OF THE PRESIDING JUDGE (FCC 96M-265)

As directed by the Presiding Judge in the Memorandum Opinion and Order issued December 6, 1996 (FCC 96M-265), Time Warner Cable of New York City and Paragon Cable Manhattan (“TWCNYC”) together with Cablevision of New York City -- Phase I (“Cablevision”) submit this prehearing conference Memorandum. This Memorandum addresses two questions: the propriety of a partial or mini-hearing in conjunction with a pending motion for summary decision, and assuming such a “mini-hearing” goes forward, the manner in which it should be accomplished.

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I. An Evidentiary Mini-hearing or a Credibility Hearing is not a Proper Method for Evaluating a Motion for Summary Decision.

Before the prehearing conference mandated by the Presiding Judge's Order released December 10, 1996 is held, TWCNYC and Cablevision wish to make clear for the record their objection to the holding of any sort of "mini-hearing" or "credibility hearing" in this case. Cablevision and TWCNYC do this in order that their participation in such a mini-hearing or similar proceeding not be deemed a waiver of the right to make such an objection on review. Inasmuch as the Order of December 6, 1996 adopts TWCNYC's and Cablevision's view that there are significant factual inconsistencies in the record compiled to date, they believe that the best course of action under these circumstances — and the one mandated by the Commission's Rules — is to hold a full hearing on the designated issues.

The existence of contradictory pieces of admissible evidence precludes summary decision, without regard to the weight that the factfinder might give any particular piece of evidence. The credibility of any particular witness who supplies admissible testimony is not a "preliminary question" that is to be resolved as part of consideration of a motion for summary decision. Under the Federal Rules of Evidence, "preliminary questions" go only to a determination of the admissibility of the evidence. See generally, Fed. R. Evid. 104. Here, there is no question regarding the admissibility of the evidence that contradicts the testimony of Messrs. Price, Nourain and Milstein. There is, therefore, no reason to have a preliminary hearing.

The Commission's Rules permit the hearing examiner to decide, in ruling on a motion for summary decision, that a particular witness is "credible;" and, therefore, that all conflicts between that witness's testimony and some other evidence will be resolved in favor of that witness's

version of the facts and to the exclusion of the version attributable to that other evidence. Rather, the Commission's Rules afford the Presiding Judge two and only two responses to a motion for summary decision. If the Presiding Judge finds that there are disputed issues of material fact, the Rules require that the motion be denied. If the Presiding Judge finds that there are no such disputed issues of fact, then the Rules allow the motion to be granted.

As a secondary matter, a determination of a witness's credibility at a trial is properly made after the fact finder's exposure to *all* of the relevant, admissible evidence from all available sources. A "mini-hearing" in which a single witness's testimony alone is received, including cross-examination and some documentary evidence, is not a sufficient substitute for a trial in which *all* of the other evidence, including other witnesses' testimony about the same facts and circumstances to which the first witness has testified, is put before the trier of fact. Moreover, the determination of credibility at a trial is only an incidental function of the fact finder in a trial. The primary function of the fact finder at trial is to determine the facts. The fact finder necessarily makes determinations of credibility and weight in the process of resolving disputed issues of fact. However, there is no recognized procedure in which a fact finder makes credibility determinations first and then resolves disputed issues of fact, or decides there are no disputed issues of fact. If there are disputed issues of fact, the process of resolving these disputes and making credibility determinations takes place concurrently; and it takes place in a trial.

The "Lehmkuhl Memorandum" of February 28, 1995 creates an issue of fact with respect to several of the witnesses' testimony about whether they or anyone at Liberty knew that the microwave facilities they activated were unlicensed at the time Liberty turned them on. However, the significance of the "Lehmkuhl Memorandum" goes beyond the "what-did-they-know-and-

when-did-they-know-it” question with respect to Messrs. Price and Nourain. It also goes to the heart of an equally important question: whether or not Liberty’s subsequent explanations for these occurrences, first offered in a pleading filed on May 17, 1995 and then repeated at much greater length in a June 16, 1995 response to request for more information under Section 308(b) of the Communications Act, are not also knowingly false.

The Commission’s *Hearing Designation Order* in this case mandates an inquiry not only into the “facts and circumstances” surrounding the “premature activation” of Liberty’s unlicensed microwave facilities, but also into the veracity of Liberty’s subsequent explanations to the Commission as to how this happened. The gist of the explanations Liberty gave to the Commission was that Mr. Nourain was “confused.” He thought STA requests for the paths in question not only were on file but also had been granted, Liberty asserted. The reason for this mistaken belief, Liberty claimed, was that the “administration department” had failed to inform the “engineering department” of certain developments regarding the applications. Of course, the STA requests that Mr. Nourain says he believed were already on file were, in fact, filed only on May 4, 1995, well after Mr Nourain placed the unlicensed paths in service and just days before Liberty offered this implausible explanation for its conduct. Moreover, the Lehmkuhl Memorandum advised Messrs. Price and Nourain on February 28 that Liberty was not operating under any STAs, and it identified all but four of the addresses to which Liberty recently had commenced, or in the next few weeks would commence, unlicensed service as the subject of “pending” applications. It is difficult to conceive of evidence that would more strongly create an issue of fact regarding the truth of the explanations Liberty gave the FCC for its misconduct than the Lehmkuhl Memorandum.

Under these circumstances, neither a mini-hearing nor a credibility hearing is a sufficient substitute for the full hearing on the merits that is mandated by the Commission's Rules and its *HDO* in this case. TWCNYC and Cablevision will, of course, participate in any mini-hearing within the framework mandated by the Presiding Judge's orders. By this Memorandum, they are noting their objection to such a procedure for the Record.

II. Suggested Procedures for the "Mini-Hearing"

The Presiding Judge has already established the framework for evidentiary hearings in this case, with the concurrence of all parties. That framework, which follows the typical custom in formal Commission adjudications, provides for submission of pre-filed written direct testimony from all witnesses.¹ At the hearing, these witnesses are available for oral cross examination and re-direct. Cablevision and TWCNYC believe those previously-established procedures for this case should be followed. This has a number of advantages. First, it allows the Bartholdi witnesses to tell their story in a coherent, concise fashion. Thus far, they have had only the opportunity to answer deposition questions from examiners whose clients are, in varying degrees, adverse to Bartholdi's interests. Secondly, it reduces the amount of time that must be spent in actual hearings — a benefit to the witnesses and to the Presiding Judge. Third, it allows for a more focused cross-examination, which is a benefit to everyone.

Accordingly, TWCNYC and Cablevision propose the following schedule of events:
Submission of Bartholdi witnesses' written direct testimony and exhibits to Judge Sippel and to the other parties.

¹Order of March 28, 1996 (FCC 96-M53); "Joint Report pursuant to Pre-Hearing Conference Order" (March 25, 1996) at ¶ 9.

1. Submission of Bartholdi witnesses' written direct testimony and exhibits to the Presiding Judge and to the other parties — January 6, 1997.²
2. Non-Bartholdi parties' designation of any cross-examination exhibits currently designated as "confidential" that were not previously identified, and identification of potential rebuttal witnesses whom those parties might desire to call in their case. — January 9, 1997.
3. Submission to the Presiding Judge of Bartholdi's objections to public disclosure of other parties' proposed "confidential" exhibits — January 13, 1997.
4. Submission of responses to Bartholdi's objections to public disclosure of other parties' proposed exhibits — January 16, 1997.
5. Hearing for the purpose of live cross examination and redirect of witnesses -- January 21, 1997. The taking of live testimony will be preceded by an "admission session" to determine the admissibility of the proposed written direct testimony and exhibits.
6. Simultaneous submission of proposed findings of fact and conclusions of law from Bartholdi and from other parties together with submission of comment on whether case may proceed to summary judgment in the absence of the "Internal Audit Report" — two weeks following delivery of hearing transcript.

²The Order identifies only four witnesses to be called. The Order also appears to give Bartholdi the option of calling additional witnesses (at least Howard Barr). If Bartholdi intends to call any witnesses other than the four identified in the Judge's Order, these witnesses should be identified at this time.

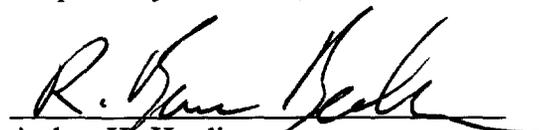
7. Simultaneous submission of replies to proposed findings of fact and conclusions of law previously submitted — three weeks following delivery of hearing transcript.

Although TWCNYC and Cablevision believe that a full hearing is required under the Commission's Rules, they submit that the proposed procedure is most consistent with procedures already established in this case and the orderly execution of the actions called for in the Presiding Judge's December 6, 1996 Order.

Respectfully submitted,


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