

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

FCC MAIL SECTION FCC 96M-265

70357

DEC 11 10 37 AM '96

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

MEMORANDUM OPINION AND ORDER

Issued: December 6, 1996

; Released: December 10, 1996

1. Supplemental Memorandums were filed on October 22, 1996, commenting on a deposition that was taken in the preceding month. There were no replies. Order FCC 96M-234, released October 18, 1996.

Questions Of Credibility

2. The Bureau's Supplemental Memorandum raises questions with respect to the candor of Liberty's President.¹ The Bureau states:

- A. [T]he Bureau has some concerns that Mr. Price may not have been fully candid in this deposition.
- B. Mr. Price claimed that he had not seen the Lehmkuhl Memo. Based upon the fact that the memo was prepared pursuant to Mr. Price's request and that he is a named recipient, it is not entirely credible that he did not receive it.
- C. [I]t also seems likely that because Mr. Price is the one who initially requested that such inventories be created, and because the document represented some significant work for which Liberty was billed by its FCC counsel, Mr. Price would have also reviewed the document itself.

¹The Wireless Telecommunications Bureau ("Bureau") has joined with Liberty in a Joint Motion For Summary Decision.

3. The Bureau also states that it finds no evidence to support a conclusion that from a review of the Lehmkuhl Memorandum (which the Bureau believes was done even though Mr. Price has denied seeing the document), Mr. Price learned of the unauthorized operations on a date that preceded late April 1995, the date which is represented in the Constantine Affidavit as the date that Liberty's Chairman, Mr. Howard Milstein, first became aware of the premature activations. The Bureau argues that only if Mr. Price made a comparison of the paths identified in the Lehmkuhl Memorandum with a list of Liberty's operating facilities could it be shown that Mr. Price knew of the unauthorized operations as of February 24, 1995, the date of the Lehmkuhl Memorandum. Time Warner and Cablevision have been arguing since the Lehmkuhl Memorandum was first discovered in June 1996, that Mr. Price's credibility is in issue. The Presiding Judge will address credibility and candor after a hearing session to be held as an ancillary procedure for resolving the issues by summary decision. 47 C.F.R. §1.251(d) (presiding judge has discretion to use supplemental procedures that are just).²

4. The parties have taken 19 depositions and Liberty has produced numerous documents. The most recent production included the Lehmkuhl Memorandum which had been initially withheld on grounds of privilege. See Memorandum Opinion and Order, FCC 96M-164, released June 27, 1996 at Para. 8. The parties have submitted substantial portions of the deposition transcripts, numerous documents and detailed briefs on the issues for which Liberty and the Bureau request summary disposition. After careful review and consideration of all of these materials, as well as the focused concerns of the Bureau and Time Warner/Cablevision, it is deemed necessary to make independent findings of credibility and candor with respect to the testimony of Mr. Price, Mr. Nourain, Mr. Lehmkuhl and Mr. Howard Milstein on the factual issue of actual date(s) that knowledge was first obtained by Liberty of the premature activations. Cf. Garden State Broadcasting LP v. F.C.C., 996 F.2d 386, 393-394 (D.C. Cir. 1993) (lack of candor in failing to disclose information that would establish date). Cf. also Herbert L. Schoenbohm, 11 F.C.C. Rcd 12537, released September 27, 1996 (Commission required demeanor hearing and credibility findings). The scope of the testimony will be thorough but focused. It will cover, with certain limitations, the factual/credibility issues raised by Time Warner and Cablevision in their

² The proceeding prescribed by the Presiding Judge is a focused "mini hearing" on credibility issues surrounding the facts and circumstances of the premature microwave activations. It is a procedure that allows for resolving this case by summary decision, assuming that issues of credibility and candor (which have been narrowed here) are resolved in favor of Liberty and its management. There will be no testimony on the other issues in this case concerning the unfranchised hardwire systems and the allegedly conflicting Nourain statements which are also the subject of the Liberty/Bureau motion for summary decision.

Combined Opposition to Joint Motion for Summary Decision on when Liberty learned of the premature activations. The concerns of the Bureau as noted above also shall be addressed.³

Testimony To Be Taken

5. Mr. Howard Milstein testified in his deposition to facts that seem to contradict the "late April" date of the Constantine affidavit. Therefore, he must testify in open court as to the true date that he first learned of the unlawful activations. Mr. Lehmkuhl has been identified as the attorney who was in regular contact with Mr. Nourain. Mr. Lehmkuhl has been twice deposed. Alleged credibility weaknesses are contained in the transcripts of his testimony. And it is Mr. Lehmkuhl's testimony on Liberty's STA practices, of which he has considerable knowledge, that was cut off by objection with an instruction not to answer the question. Mr. Nourain had a first-line responsibility for resolving engineering conflicts and interferences before activations. Nourain also had some responsibility for the coordination of applications and STA requests and authorizations with Mr. Lehmkuhl before activations. Mr. Nourain will testify in open court about his knowledge of the premature activations, the Lehmkuhl Memorandum and the status of license applications and STA requests. It is necessary to hear the testimonial evidence in open court in an effort to resolve how such meaningful and reliable information that was paid for and made available to Liberty in February 1995, could have been overlooked or ignored.

Testimony Not To Be Taken

6. Time Warner seeks evidence of Liberty's custodian of records. There will be no testimony taken of a custodian of Liberty's records because it would be too speculative and too remote. To be of decisional value, the custodian must recall specifics about the receipt, storage and distribution of the document. Nor is such detailed evidence necessary. Given the significance of the Lehmkuhl Memorandum and the cost incurred by Liberty to obtain such operationally significant information from an outside counsel, there is a presumption of regularity in its delivery to the addressees: Mr. Price and Mr. Nourain. A presumption imposes on the party against whom it is directed the burden of going forward with evidence that rebuts or meets the presumption. FRE 301. The presumption is not overcome by a mere denial. Id. Cf. Scutieri v. Miller, 584 SO. 2d 15 (Fla. App. 1991) (denial of receipt only creates question of fact to be resolved by trial court). The source of the document (an FCC law firm), its importance to Liberty and its cost of preparation are circumstances that enhance the presumption.

³ There is no need to add issues. The HDO has set issues on misrepresentation and/or lack of candor. And once a hearing commences, candor is continuously an issue. Old Time Religion Hour, Inc.; 95 F.C.C. 2d 713 (Review Bd 1983). Maria M. Ochoa, 8 F.C.C. Rcd 3135 (1993).

7. Time Warner has identified other persons who might have relevant information: Mr. Coran, Mr. Barr and Mr. Constantine. The deposition testimony of Mr. Coran was taken in September 1996, and there was no substantially relevant evidence established. Mr. Coran will not testify. And there will be no testimony taken of Mr. Barr. There is no evidence that Mr. Barr discussed the status of applications with Messrs. Milstein, Price or Nourain.⁴ The testimony of Mr. Constantine also will not be taken. Mr. Constantine's testimony would not be reliable evidence without disclosure of the Internal Audit Report which was referenced throughout his Affidavit of September 20, 1995.

Status Of Internal Audit Report

8. The Internal Audit Report was presented to the Commission on August 14, 1995, and has been used as a basis for requesting the Commission to grant pending applications and STAs which are the subject of this proceeding. Liberty also asks that the fact of the preparation and the submission to the Commission of an Internal Audit Report be relied upon by the Presiding Judge in finding that Liberty acted diligently and thoroughly to uncover the facts and circumstances of the admitted premature activations and that the facts and circumstances were fully and accurately reported to the Commission. (Joint Motion for Summary Decision at p.19, ¶40, n.7; p.45, ¶98; p.47, ¶103; p.53, ¶114; p.55, ¶120.) The Commission addressed the questions of privilege with respect to the Report and, on January 26, 1996, the Commission ruled against Liberty. On Request for Confidentiality, 11 F.C.C. Rcd 2475 (1996). Liberty has taken the question of privilege to the United States Circuit Court of Appeals.⁵ Without the document's availability, it is not possible to adequately test Liberty's conclusory arguments with respect to the Internal Audit Report's significance in this case.

Order

Accordingly, IT IS ORDERED that a Prehearing Conference will be held in a Commission Courtroom at 9:30 a.m on December 12, 1996, to establish dates and procedures for the taking of testimony.

⁴ If Liberty desires to call Mr. Barr or other witnesses to clarify questions of credibility, Liberty should present a list of its additional witnesses at the Prehearing Conference and a brief description of the testimony that is expected from each.

⁵ The Circuit Court issued an Order on December 2, 1996, setting the case for oral argument on May 9, 1997.

IT IS FURTHER ORDERED that counsel for the parties shall confer in advance of the conference in an effort to agree to procedures that will expedite the testimony,⁶ proposed hearing dates, and a schedule for the submission of proposed findings and conclusions on credibility and candor.⁷

IT IS FURTHER ORDERED that by 2:00 p.m. on December 11, 1996, the parties will submit to the Presiding Judge individual or joint Prehearing Memoranda on procedural and/or evidentiary matters that may be discussed and resolved at the Prehearing Conference.

FEDERAL COMMUNICATIONS COMMISSION⁸



Richard L. Sippel
Administrative Law Judge

⁶ For example, testimony is expected to be limited to cross-examination of Messrs. H. Milstein, Price, Nourain and Lehmkuhl on documents and deposition testimony that are exhibits to the summary decision motion papers. To best expedite the testimony, all exhibits related to summary decision should be placed on the public record before the hearing and thereby avoid the need for ad hoc bench rulings on confidentiality.

⁷ In addition to the issues of credibility and candor, the proposed findings and conclusions must address the question of how summary decision can be granted to Liberty without production of the Internal Audit Report.

⁸ Copies of this Order were faxed/e-mailed to counsel on the date of issuance.