

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 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.:
)	708777
For Private Operational Fixed)	708778, 713296
Microwave Service Authorization)	708779
and Modifications)	708780
)	708781, 709426, 711937
New York, New York)	709332
)	712203
)	712218
)	712219
)	713295
)	713300
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		Call Signs:
		WNTT370
		WNTM210
		WNTM385
		WNTM555
		WNTM212
		(NEW)
		WNTW782
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		WNTY605
		WNTX889
		(NEW)
		(NEW)

To: The Honorable Richard L. Sippel
Administrative Law Judge

WIRELESS TELECOMMUNICATIONS BUREAU'S
PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW

February 28, 1997

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SUMMARY

On July 15, 1996, Liberty Cable Co., Inc., now known as Bartholdi Cable Company, Inc. (Liberty) and the Wireless Telecommunications Bureau filed a Joint Motion for Summary Decision to resolve a proceeding designated for a hearing by the Federal Communications Commission. *Hearing Designation Order and Notice of Opportunity for Hearing*, FCC No. 96-85, WT Docket No. 96-41 (released Mar. 5, 1996). Time Warner Cable of New York City and Paragon Cable Manhattan (together, Time Warner) and Cablevision of New York City - Phase I (Cablevision) filed a Combined Opposition to the Joint Motion for Summary Decision.

Before resolving the pending Motion before him, the Presiding Judge allowed further discovery of a few Liberty witnesses in the form of additional depositions. The parties submitted supplemental pleadings on the relevance of the new information learned from these additional depositions. Based on these new submissions, the Presiding Judge held a hearing on the limited issue of examining the candor of certain witnesses. The scope of the hearing was limited to the timeframe when they first learned of Liberty's premature activation of OFS paths. Four witnesses who testified at the hearing, Michael Lehmkuhl, Howard Milstein, Peter Price and Behrooz Nourain, had all given depositions earlier in the proceeding, and Messrs. Lehmkuhl, Milstein and Price said that they had first learned of Liberty's activations of OFS paths without Commission authority through a Time Warner pleading filed May 5, 1995. Mr. Nourain claims he had learned though material sent to him from Liberty headquarters in the last week in April, 1995.

In their testimony at the mini-hearing, Messrs. Price and Milstein changed their testimony from their depositions to say they first learned of the premature activations the last week in April,

1995. Messrs. Nourain and Lehmkuhl maintained the same response, that they learned at that same time in April. In order to gain more clarification on this issue, the Presiding Judge ordered additional witnesses to testify -- Anthony Ontiveros, Edward Milstein and Howard Barr. These three witnesses confirmed the testimony of the witnesses earlier in the hearing, that Liberty discovered the premature activations the last week of April, 1995, *before* Time Warner's pleading which was filed on May 5, 1995.

The date when Liberty became aware of its violations is significant to the Bureau, because of the numerous STA requests Liberty filed on May 4, 1995. Before the hearing testimony, the Bureau understood from the witnesses' depositions that they did *not* know of the premature activations when Liberty filed its STA requests. Now, they have admitted that they were aware of the violations when they filed the STAs. The Bureau cannot condone, nor do the Commission Rules permit, less than full disclosures on applications and amendments to the Commission. Therefore, the Bureau requests that a forfeiture in the amount of \$20,000 per violation, for a total of \$300,000 be assessed against Liberty in addition to the forfeiture amount sought in the Joint Motion.

Notwithstanding this penalty, the Bureau believes that Liberty should not be disqualified as a licensee. It still supports the tenets of the Joint Motion, where it states that it does not believe Liberty intentionally turned on the paths without Commission approval. The Commission's *Character Policy Statement* holds two traits in particular to be crucial to a character determination -- truthfulness and reliability. Because of the compliance program Liberty has set up, the Bureau has every reason to believe that Liberty will be reliable in the future, in following the Commission's Rules and policies.

The Presiding Judge also ordered the parties to separately brief the legal issue concerning the propriety of granting the pending Joint Motion without the benefit of a highly relevant evidence known as the "internal audit report." Because the Bureau trial staff has reviewed the report, it is difficult for the Bureau to state a detailed discussion on this issue. However, upon review of the extensive discovery and record generated in this proceeding, the Bureau believes that there is adequate information before the Presiding Judge to decide on the Motion.

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To: The Honorable Richard L. Sippel
Administrative Law Judge

**WIRELESS TELECOMMUNICATIONS BUREAU'S
PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW**

I. INTRODUCTION

Pursuant to the Presiding Judge's *Memorandum Opinion and Order*, 96M-265 (released December 10, 1996), and *Order*, 97M-12 (released January 31, 1997), the Chief, Wireless Telecommunications Bureau (Bureau), hereby submits the Bureau's Proposed Findings of Facts and Conclusions of Law on the limited hearing held to address credibility and candor of certain former or current employees and agents of Liberty Cable Co., Inc., now known as Bartholdi Cable Co., Inc. (Liberty).

II. BACKGROUND

A. Liberty Cable Co., Inc.

1. Liberty was founded in 1985 by Howard Milstein, Edward Milstein and Philip Milstein as a satellite master antenna television (SMATV) service provider, serving approximately 5,000 subscribers in buildings owned by the Milstein family in New York City and Jersey City. (Joint Motion by Bartholdi Cable Co., Inc., and Wireless Telecommunications Bureau for Summary Decision (Jt. Mot.) ¶ 15.)

2. In 1991, the Commission authorized private cable systems to access the private operational-fixed microwave service (OFS) spectrum in the 18 GHz band. *In re Amendment of Part 94 of the Commission's Rules to Permit Private Video Distribution Systems of Video Entertainment Access to the 18 GHz Band*, 6 FCC Rcd 1270 (1991). This revision in the Commission's rules enabled Liberty to utilize the 18GHz OFS spectrum to expand its SMATV business. Since 1991, Liberty applied for and was granted forty-three OFS licenses from the Commission, with which Liberty now serves approximately 30,000 New York area subscribers in 150 buildings. HDO ¶ 2.

3. With its OFS operations, Liberty relied on two different methods for providing video services. One method was to send point-to-point transmission from a single "headend" to multiple buildings using microwave antennas as receivers. The other method was to interconnect a building with coaxial cables from a nearby building which was already receiving service from a microwave receiver. Some of these pairs of hardwired buildings were commonly owned, controlled or managed, while others were not. The hardwire interconnection option was utilized much less frequently than the point-to-point microwave transmission option. However, the

hardwiring aspect of Liberty business practice was what brought the company before New York's governmental authorities, the courts, and ultimately, the Commission in the instant proceeding.

B. Filings Before the Commission

4. On January 9, 1995, Time Warner Cable of New York City and Paragon Cable Manhattan (Time Warner) filed with the Commission a petition to deny or condition grant of Liberty's application for OFS licenses, which alleged that Liberty was unqualified to remain a Commission licensee. Specifically, Time Warner alleged that Liberty was unlawfully operating a "cable system" in violation of the Communications Act and the Commission's cable television rules. Further, Time Warner alleged that Liberty lacked candor before the Commission because in its license applications Liberty claimed it was a private cable (SMATV) operator when, in fact, it was a "cable system" as defined by 47 U.S.C. § 522(7). Liberty opposed this pleading on January 24, 1995, claiming that it is eligible to be a licensee and it has filed all of its applications candidly and in good faith.

5. On February 3, 1995, Time Warner filed a reply to this opposition, this time, arguing that Liberty has been obtaining OFS authorizations from the Commission under false pretenses because Liberty has admitted in the New York Federal court that it is, in fact, a cable system under the definition of the law. Both parties filed additional petitions and oppositions with the Commission until May 1995 arguing the question of the legality of hardwire interconnection and Liberty's candor.

6. On May 5, 1995, Time Warner filed another document with the Commission, and for the first time, reporting that upon reviewing the status of Liberty's licenses, Time Warner discovered two buildings at which Liberty was providing point-to-point OFS transmission service,

possibly without having obtained prior authorization from the Commission.

7. On May 17, 1995, Liberty filed a response to Time Warner's filing, and for the first time, admitted that it had, in fact, prematurely activated OFS service to those two buildings. In this filing, Liberty also disclosed an additional thirteen buildings to which it was already providing OFS service without having obtained Commission authorization. Liberty advised that on May 4, 1995, and May 17, 1995, it had filed with the Bureau requests for special temporary authority (STA) for all of these paths which were prematurely activated. Liberty, however, never filed any amendments to the then pending STA requests.

8. Time Warner later alleged that one of Liberty's employees, Mr. Behrooz Nourain, lacked candor before the Commission. According to Time Warner, on February 21, 1995, Liberty filed an affidavit of Behrooz Nourain in the Federal court litigation which stated, "I am advised that Time Warner has opposed Liberty's pending applications to the Federal Communications Commission for various 18 [GHz] microwave licenses." However, in Liberty's Surreply filed with the Commission on May 17, 1995, Nourain signed a declaration attesting the truth of a statement contained therein that "Mr. Nourain was unaware of the petitions against Liberty's applications until late April of 1995." Because the two statements on their faces contradict each other, Time Warner argued that Liberty misrepresented to the Commission.

9. On June 9, 1995, the Chief of the Bureau's Microwave Branch sent a request to Liberty for more information pursuant to Section 308 of the Communications Act. The letter specifically ordered Liberty to explain the purported inconsistency between Nourain's February 21, 1995 affidavit and his declaration in support of Liberty's May 17, 1995 Surreply.

10. Liberty submitted its response to the Bureau's letter on June 16, 1995, which

explained that the affidavit and the declaration were submitted in two different contexts, and when considered in their proper settings, the statements were not inconsistent. According to Liberty, the February 21 affidavit was offered as Liberty's rebuttal to Time Warner's statements regarding the feasibility of serving certain hardwire locations by microwave, and thus addressed only the first of Time Warner's petitions to deny, while the May 17 declaration addressed the fifteen prematurely activated buildings, none of which was served by hardwire and none of which was subject to the January 9, 1995 petition to deny referenced in the February 21 affidavit.

11. On July 24, 1995, Liberty disclosed four additional instances of buildings which were activated by Liberty prior to obtaining Commission authorization which brought the total number of buildings prematurely activated to nineteen.

12. On September 5, 1995, Cablevision of New York City - Phase I (Cablevision) joined the Liberty licensing proceeding by filing a petition to deny or condition grant of Liberty's application for an OFS license in Riverdale, New York, which is a Cablevision franchise area.

13. On September 7, 1995, the Bureau granted all pending STA requests to Liberty in order to authorize Liberty to serve its customers during the pendency of the license proceedings. The grants, however, were conditioned on the Commission's resolution of the pending petitions to deny or "any other action the Commission may take against Liberty in light of its numerous violations of the Commission's Rules." The STAs were periodically renewed until March 4, 1996, the day prior to the release of the Commission's *Hearing Designation Order and Notice of Opportunity for Hearing*, FCC No. 96-85, WT Docket No. 96-41 (released March 5, 1996) (HDO).

C. Hearing Designation

14. On March 5, 1996, the Commission designated the instant proceeding for hearing to determine whether Liberty is qualified to be granted the fifteen pending applications for OFS licenses. The hearing was to address the substantial and material questions of fact concerning circumstances surrounding the hardwiring of buildings and Liberty's admitted premature activations. The hearing was also to determine "whether Liberty engaged in misrepresentation before the Commission in connection with these applications." HDO ¶ 1. The following specific issues were designated:

- (1)
 - (a) To determine the facts and circumstances surrounding Liberty Cable Co., Inc.'s operation of hardwired interconnected, non-commonly owned buildings, without first obtaining a franchise. See 47 U.S.C. § 541(b)(1), 47 U.S.C. Title VI and 47 C.F.R. § 76 *et seq.*
 - (b) To determine whether Liberty Cable Co., Inc. has violated Section 1.65 of the Commission's Rules, 47 C.F.R. § 1.65, by failing to notify the Commission of its provision of service to interconnected, non-commonly owned buildings.
 - (c) To determine whether, based on (1)(a) and (b) above, Liberty is qualified to be granted the above-captioned private operational fixed microwave authorizations.
- (2)
 - (a) To determine the facts and circumstances surrounding Liberty Cable Co., Inc.'s admitted violations of Section 301 of the Communications Act and Section 94.23 of the Commission's Rules, 47 U.S.C. § 301, 47 C.F.R. § 94.23, by operating certain private operational fixed microwave facilities without first obtaining Commission authorization.
 - (b) To determine whether Liberty Cable Co., Inc. has violated Section 1.65 of the Commission's Rules, 47 C.F.R. 15. § 1.65, by failing to notify the Commission of its premature operation of service in either its underlying applications or its requests for special temporary authority.
 - (c) To determine whether, based on (2)(a) and (b) above, Liberty is qualified to be granted the above-captioned private operational

fixed microwave authorizations.

- (3) (a) To determine whether Liberty Cable Co., Inc., in relation to its interconnection of non-commonly owned buildings and its premature operation of facilities, misrepresented facts to the Commission, lacked candor in its dealings with the Commission, or attempted to mislead the Commission, and in this regard, whether Liberty Cable Co., Inc. has violated Section 1.17 of the Commission's Rules, 47 C.F.R. § 1.17.

(b) To determine whether, based on (3)(a), above, Liberty is qualified to be granted the above-captioned private operational fixed microwave authorizations.

- (4) To determine, based on the evidence adduced in issues (1) through (3) above, whether Liberty Cable Co., Inc. possesses the requisite character qualifications to be granted the above-captioned private operational fixed microwave authorizations for which it has applied and, accordingly, whether grant of its applications would serve the public interest, convenience and necessity.

HDO ¶ 30.

16. The HDO authorized the Bureau to grant these pending and any future OFS applications to Liberty, conditioned upon the outcome of this proceeding. It further provided interim operating authority for Liberty to continue serving its customers until the final resolution of this proceeding. HDO ¶¶ 2, 21-26, 38-39.

17. The HDO named the Bureau, Time Warner and Cablevision be parties to this proceeding, and each party filed a notice of appearance.

D. The Proceedings and Discovery

18. On March 11, 1996, the Chief Administrative Law Judge issued an Order, appointing Administrative Law Judge Richard L. Sippel to serve as Presiding Judge, and a hearing date was set for June 25, 1996. *See Order*, 96M-34 (released March 13, 1996).

19. On March 13, 1996, the Presiding Judge issued an Order setting forth the schedule

for discovery. *See Order*, 96M-53 (released March 28, 1996). Interrogatories and document requests were served on April 3, 1996, among all the parties and discovery was concluded on June 5, 1996 upon completion of the depositions of fourteen witnesses.¹

E. Joint Motion for Summary Decision

20. At the conclusion of discovery, on June 5, 1996, the Bureau and Liberty informed the Presiding Judge of the parties intent to pursue a motion for summary decision. On June 10, 1996, the Bureau, on behalf of all the parties of record, requested a stay of all procedural and filing dates, and on June 11, 1996, the Presiding Judge ordered the schedule temporarily suspended to further consider the suggestion to proceed by a motion for summary decision. *See Order* 96M-15 (released June 11).

21. The Presiding Judge cancelled the June 25, 1996, hearing date, and required a Liberty-Bureau joint motion for summary decision pursuant to Section 1.251 to be filed. *See Order*, 96M-153 (released June 13, 1996). On July 15, 1996, Liberty and the Bureau filed its Joint Motion and on September 13, 1996, Time Warner and Cablevision filed a combined opposition to the Joint Motion.

22. The Joint Motion concludes that after extensive discovery, the record amply supports the conclusions that: (1) Liberty operated non-common hardwired cable systems without receiving a local franchise; (2) Liberty prematurely activated service to nineteen buildings using OFS services for which Commission authorization was required; and, (3) Liberty submitted separate

¹ The following former and current Liberty employees were deposed: Edward Foy, Anthony Ontiveros, Andrew Berkman, Peter Price, Behrooz Nourain, Edward Milstein, Howard Milstein, Jennifer Walden, Bertina Ceccarelli and Bruce McKinnon. In addition, the following former agents of Liberty were deposed: Michael Lehmkuhl, Thomas Courtney and Duy Duong of Comsearch, and Joseph Stern of Stern Telecommunications Corp.

statements to two governmental tribunals that, while appearing contradictory, are consistent when considered in the proper context.

23. The Joint Motion also concludes that the record establishes that the violations of Commission Rules by Liberty were unintentional. Regarding the issues designated on hardwire interconnections, Liberty admits that the violation of cable franchising requirements resulted from a misunderstanding about the legal consequences of providing service to customers by hardwire interconnections.

24. Regarding the premature OFS operations, Liberty admits that the violations resulted from a failure to properly supervise employees. No one in Liberty's senior management was aware of, encouraged, or condoned the provision of premature service. Moreover, Mr. Nourain inadvisably and incorrectly assumed that the processing of OFS applications took a set amount of time and once that amount of time had passed, he could activate the path.

25. Regarding the candor issues, Liberty claims that it has sought to be forthright and candid with the Commission at all times. Once it realized the extent of its unauthorized service, Liberty came forward and informed the Commission of this in detail.

26. The Joint Motion concludes that upon discovery of the violations, Liberty acted promptly to address the problems and established a compliance program that was designed to avoid any similar future violations. The program is headed by an attorney who ensures that a Path License Check List of sixteen separate areas has been met before he will give authority for service to begin to a building. Because of this compliance program the Joint Motion concludes that Liberty can be trusted to fully comply with the Commission Rules in the future. Therefore, the Bureau and Liberty submitted that there are no material issues of fact in controversy relating

to the issues designated in the HDO, and a full hearing on these issues is unnecessary.

27. Furthermore, while Liberty's violations are serious, the Joint Motion asserts that the facts show those actions do not justify a finding that Liberty is not qualified to be granted the licenses that are at issue in this proceeding. Rather, the appropriate remedy is for Liberty to pay a substantial forfeiture for its violations. Therefore, the Bureau and Liberty have determined that the appropriate forfeiture in this proceeding is seven hundred and ninety thousand dollars (\$790,000.00).

F. Additional Discovery

28. On July 24, 1996, a Prehearing Conference was held at which the Presiding Judge ordered that second depositions be taken of Peter Price, Behrooz Nourain, and Michael Lehmkuhl by August 8, 1996, and that Liberty's Weekly Reports for the months of February and March be made available to counsel for use in those depositions. *See Order*, 96M-188 (released July 29, 1996). These depositions were taken on August 1, 2 and 7.

29. On September 16, 1996, the Presiding Judge granted a Joint Motion of Time Warner and Cable Vision to take the deposition of Steven Coran, a third party who represented a prospective buyer for Liberty's services. Mr. Coran's deposition was taken on October 9, 1996. *See Order*, 96M-218 (released September 16, 1996) .

30. As a result of the four additional depositions taken after the Summary Decision Motion was filed, the parties moved to file supplemental memoranda which would address this testimony. The Presiding Judge granted the motion. *See Order*, 96M-234 (released October 18, 1996).

31. Based on these supplemental submissions, the Summary Decision Motion, the

Opposition to the Summary Decision Motion, and other information he received,² on December 10, 1996, the Presiding Judge issued an order for a candor hearing on credibility issues. *See Order*, 96M-265 (released December 10, 1996). He designated four witnesses to testify -- Behrooz Nourain, Michael Lehmkuhl, Peter Price and Howard Milstein -- on the "factual issue of actual date(s) that knowledge was first obtained by Liberty of the premature activations." *Id.*, 2. He stated that the hearing session was to be an ancillary procedure for resolving the issues by summary decision. Further, the Presiding Judge advised that the scope of the witness' testimony should be focused on factual and credibility issues Time Warner and Cablevision raised in their Combined Opposition to the Summary Decision Joint Motion, as well as concerns the Bureau had concerning Peter Price's testimony on his failure to see the memorandum prepared by Michael Lehmkuhl on February 24, 1995. The Order specifically noted that there should be no testimony on the unfranchised hardwire systems, and the alleged conflicting statements by Behrooz Nourain which are included as issues in the HDO. *Id.*, fn 2.

32. The Presiding Judge ordered the date for the document admissions as January 10, 1997, and the testimony of the four named witnesses to begin on January 13, 1997. *See Order*, 96M-272 (released December 17, 1996). Later in the proceedings, the Presiding Judge ordered the Proposed findings of Fact and Conclusions of Law and the Reply on the enumerated credibility and candor issues to be submitted on February 28, 1997, and March 7, 1997, respectively. *See Order* 97M-12 (released January 31, 1997).

² On December 5, 1996, Counsel for Time Warner advised the Presiding Law Judge in a letter, sent to all parties, that the D.C. Circuit had scheduled Bartholdi Cable Co. v. FCC for oral argument on May 9, 1997. This case concerns disclosure of the internal audit report filed by Liberty at the Commission on August 14, 1995.

33. On January 6, 1997, Liberty Cable submitted a document which previously had not been produced. It was a memorandum prepared by Michael Lehmkuhl, dated April 28, 1995, to Peter Price and Behrooz Nourain, setting out a summary of the status of Liberty's 18 GHz applications which were pending before the Commission.

34. On January 9, 1997, in response to Liberty's submitting the document at that stage of the proceeding, Time Warner and Cablevision filed a joint motion for an investigation into the adequacy of Liberty's compliance with the document requests. Liberty opposed the joint motion, as did the Bureau in its Comments filed later.³

35. On January 14, 1997, the Presiding Judge ordered Michael Lehmkuhl and Howard Barr, both attorneys at the law firm of Pepper & Corazzini law firm, to submit declarations explaining the circumstances which gave rise to the discovery of the April 28, 1995 memorandum. *See Order, 97M-4* (released January 14, 1997).

36. The testimony of the witnesses began with Howard Milstein on January 13, 1997. He was followed on that same day by Behrooz Nourain, who continued testifying through the next day, January 14, 1997. On January 15 and 16, 1997, Michael Lehmkuhl testified. On January 16, Peter Price began his testimony which he finished on Tuesday, January 21, 1997. During the latter part of the testimony, the Presiding Judge determined that from the testimony given, there were three additional people so involved in the events that transpired during the week of April 24, 1995, that they needed to be called as witnesses. Edward Milstein and Anthony

³ Liberty filed its Opposition to the Motion for Inquiry on Discovery on February 14, 1997, and the Bureau filed its Comments on the Joint Motion on February 21, 1997.

Ontiveros testified on January 27, 1997, and Howard Barr testified on January 28, 1997.⁴

37. During Mr. Barr's testimony, he acknowledged making notes during a telephone conference call with Mr. Price and others on June 22, 1995. After an *in camera* review, the Presiding Judge ordered those notes produced. *See Order*, 97M-13 (released February 3, 1997). In those notes, there was a reference to a letter dated April 20, 1993, prepared by Jennifer Richter (the attorney at Pepper & Corazzini who worked on Liberty applications prior to Michael Lehmkuhl), written to Bruce McKinnon at Liberty. After an *in camera* review, the presiding judge ordered that letter be produced. *See Order*, 97M-14 (released February 5, 1997). Both documents were received into evidence by the Presiding Judge on February 14, 1997. *See Order*, 97M-19 (released February 14, 1997). The Presiding Judge observed that the letter from Ms. Richter "relates to advice and warning about FCC compliance and the avoidance of unauthorized activations. The hand written notation of Mr. Nourain's establishes his awareness of the advice and the probable awareness of Mr. Peter Price, Liberty's President and the officer immediately responsible for compliance." *Id.* at 2.

III. PROPOSED FINDINGS OF FACT

A. Deposition Testimony

38. The witnesses during the candor hearing were questioned extensively on *when* they learned that Liberty was operating several microwave paths without authorization and *how* they learned that fact. As will be shown herein, the stories of the witnesses of how and when they

⁴ *See* discussions on January 16, and January 21, 1997 (Tr. at 1456, Tr. at 1476).

learned changed from the discovery period to the candor hearing.⁵ Those changes are significant in that the evidence now decisively shows that when Liberty filed the 14 requests for Special Temporary Authority on May 4, 1995, it knowingly filed incomplete information with the Commission. Because of this infraction, Bureau will be asking that an additional forfeiture be imposed on Liberty. But as will additionally be demonstrated herein, nothing developed in the candor hearing detracts from the Joint Motion. Accordingly, the Bureau remains in support of the motion and urges its adoption.

1. Howard Milstein

39. Howard Milstein was deposed on May 30, 1996.⁶ In his deposition, Mr. Howard Milstein testified that he did not remember exactly when he learned about the unauthorized operations, but that he thought that it was brought to his "attention because Time Warner made a complaint to some regulatory agency." (Dep. Tr. at 28) He stated further, that upon hearing of the allegation he called Lloyd Constantine, the lead outside counsel, and asked him to investigate. (Dep. Tr at 29)

40. Mr. Howard Milstein stated that upon learning of the Time Warner allegations he wanted to make sure it was true because he believed that Liberty "had gone to great lengths to comply with all the rules and regulations." (Dep. Tr. at 29) He stated that he, therefore, called Liberty's lead counsel to have him investigate "the scope of the problem [and] whether it was more or less than what was alleged." (Dep. Tr. at 29) Mr. Howard Milstein testified that he then

⁵ It should be noted that Anthony Ontiveros never testified in his deposition how or when he learned of the unauthorized operations and Howard Barr was not deposed.

⁶ The transcript of Howard Milstein's Deposition has been admitted as Liberty/Bureau Ex. 4.

learned within two or three days that there was a real problem. (Dep. Tr. at 30)

2. Peter Price

41. Mr. Price was deposed three times during this proceeding -- On May 28, 1996; May 31, 1996; and August 1-2, 1996.⁷ During his depositions he testified that he learned of the unauthorized operations in January 1995, although he was not clear of exactly when. (May 28 Dep. Tr. at 93-4) Later during the deposition, he attempted to clarify the answer by saying he learned sometime in the first quarter of 1995, and it could have been as late as April. (May 28 Dep. Tr. at 94-5)

42. Mr. Price stated that the first information he received about unlicensed paths was from counsel. (May 28 Dep. Tr. at 95, 97) Mr. Price believed that counsel got their information about the unlicensed operations from a pleading filed by Time Warner. (May 28 Dep. Tr. at 96) Mr. Price further stated that the information was conveyed to him in a conversation as opposed to his being given a memorandum. (May 28 Dep. Tr. at 96)

3. Behrooz Nourain

43. Behrooz Nourain was deposed twice during this proceeding -- on May 29, 1996 and August 1, 1996.⁸ Mr. Nourain was unclear about when he first learned of the unauthorized operations. He stated first that he learned on April 20, 1995, or at the end of April 1995. (May

⁷ The transcript of the May 28 Deposition of Mr. Price has been admitted as Liberty/Bureau Ex. 9. The transcript May 31 Deposition of Mr. Price has been admitted as Liberty/Bureau Ex. 10. The transcript of the first day of the August 1-2 Deposition has been admitted as Liberty/Bureau Ex. 11, and the transcript of the second day has been admitted as Liberty/Bureau Ex. 12.

⁸ The transcript of the May 29, 1996, Deposition of Mr. Nourain has been admitted as Liberty/Bureau Ex. 7. The transcript of the August 1, 1996, Deposition of Mr. Nourain has been admitted as Liberty/Bureau Ex. 8.

29 Dep. Tr. at 76-77) He stated that he became aware of the unauthorized service because information came from Time Warner that Liberty was operating some buildings without authorization. (May 29 Dep. Tr. at 77)

4. Michael Lehmkuhl

44. Michael Lehmkuhl was deposed twice during this proceeding -- on May 22, 1996 and August 7, 1996.⁹ Mr. Lehmkuhl definitively stated in his May 22, 1996, deposition that he learned about the unauthorized operations through Time Warner's petitions filed May 5, 1995. (May 22 Dep. Tr. at 23) Mr. Lehmkuhl further states that he was never aware of an instance in which an application was filed for a path that was already in operation. (May 22 Dep. Tr. at 20-22)

5. Edward Milstein

45. Edward Milstein was deposed once during this proceeding on May 30, 1996.¹⁰ Mr. Edward Milstein testified in his deposition that he first became aware of Liberty's unauthorized operation of certain microwave paths when Time Warner made the filing with the Commission. (Dep. Tr. at 41) However, he did not recall whether he heard about it in a conversation that he was a part of, or whether it was something he had overheard. (Dep. Tr. at 42) Mr. Edward Milstein went on to state that no one at Liberty was aware of the operation of unlicensed microwave paths before the allegation was raised by Time Warner. (Dep. Tr. at 44-5)

⁹ The transcript of the May 22 Deposition of Mr. Lehmkuhl has been admitted as Liberty/Bureau Ex. 5. The transcript of the August 7 Deposition of Mr. Lehmkuhl has been admitted as Liberty/Bureau Ex. 6.

¹⁰ The transcript of the May 30 Deposition of Mr. Edward Milstein's has been admitted as TW/CV Ex. 46.

B. Hearing Testimony

1. Howard Milstein

46. Mr. Howard Milstein testified during the candor hearing that he first became aware that there was a possibility that Liberty was operating some paths without proper authorizations in late April of 1995. (Tr. at 517, 518) He additionally testified that he had no firm recollection of the date, but that he now believed that late April 1995 was correct because he reviewed the affidavit submitted to the Commission by Lloyd Constantine. (Tr. at 544-45, 548) He further stated that he believed that he learned about the unauthorized activation of paths prior to Time Warner raising the issue. (Tr. at 553-54)

47. He believed that it would likely have been Mr. Price who would have given him the information about the unauthorized operation of OFS paths, although he does not specifically remember Mr. Price doing so. (Tr. at 549)

48. In questioning about why his testimony during the deposition did not refer to any source independent of Time Warner's petition, Mr. Howard Milstein stated that Time Warner was objecting to all of Liberty's filings and in dealing with the Time Warner petitions, counsel "figured out there was a problem . . . with the licenses." (Tr. at 544-45) Therefore, he stated that "it was in response to what Time Warner was doing that our team found out there was a problem with the licenses." (Tr. at 547)

49. Mr. Howard Milstein also testified that he knew that Time Warner had filed a petition in the first week of May alleging that paths to certain buildings were being operated by Liberty without proper authorizations. (Tr. at 546) His memory on that point was refreshed by his counsel. (Tr. at 546)

2. Peter Price

50. In his testimony during the candor hearing, Mr. Price stated that he learned about Liberty's unauthorized provision of microwave service in late April 1995. (Tr. at 1362) He learned about the unauthorized service from TW/CV Ex. 35, (Nourain Memorandum) which he believes he saw on April 27, 1995. (Tr. at 1363) Mr. Price stated that he knew there was a problem because the Nourain Memorandum listed paths for which STA applications were being filed and for which he knew Liberty was already operating. (Tr. at 1374-75) Mr. Price knew from his personal knowledge that some of the buildings listed in the Nourain Memorandum were already providing service to customers. (1363-64) It was the Nourain Memorandum which gave Mr. Price the first inkling that there was a problem of operating without licenses. (Tr. at 1417-18)

51. Additionally, Mr. Price stated that from the face of the Nourain Memorandum it was evident that Liberty was operating some OFS paths without authorization and that anyone within Liberty who saw the Nourain Memorandum would be aware that there was a problem. (Tr. at 1373)

52. After seeing the Nourain Memorandum, Mr. Price stated he immediately called the regulatory counsel and arranged for a conference call to be held the following day. (Tr. 1365) According to Mr. Price, the conference call was one which was already scheduled to discuss Time Warner's petitions against Liberty. (Tr. at 1372) Mr. Price stated that he knew that someone from the law firm of Pepper & Corazzini, someone from the law firm of Ginsburg, Feldman & Bress, and Lloyd Constantine participated in the conference call. (Tr. 1366) The conference call lasted about an hour. (Tr. at 1376-77)

53. Mr. Price further testified that he had a meeting with Edward Milstein, Mr. Nourain, and Mr. Ontiveros on April 28, 1995, to discuss the Nourain Memorandum. (Tr. at 1369-70) Mr. Price stated that he does not believe that Howard Milstein was a part of the meeting as he may have been out of town. (Tr. at 1370) He does believe, however, that he had another meeting on this matter with Howard and Edward Milstein on May 1, 1995. (Tr. at 1371) And there were actually, Mr. Price testified, several meetings on the subject. (Tr. at 1376)

54. Additionally, Mr. Price stated that he received TW/CV Ex. 34 (April 28 Lehmkuhl Memorandum). (Tr. at 1384-85) He stated that he believes that he received the April 28 Lehmkuhl Memorandum on Monday, May 1. (Tr. at 1385, 1429) Mr. Price stated that the April 28 Lehmkuhl Memorandum assisted him in determining that Liberty had a problem, because "putting [the April 28 Lehmkuhl Memorandum] together with the [Nourain Memorandum], . . . said we were in jeopardy here of providing several sites with service where we didn't have authorization." (Tr. at 1385-86)

55. After seeing the April 28 Lehmkuhl Memorandum, Mr. Price testified either he or Howard Milstein set up a meeting with Lloyd Constantine to discuss the problem. (Tr. at 1386) Mr. Price stated he believes that Edward Milstein was also there. (Tr. at 1387)

56. Mr. Price testified that he was aware that Liberty filed a number of STA requests in early May 1995. (Tr. at 1431) He stated in his testimony during the candor hearing, however, that he was pessimistic about the chances of any of the STAs being granted, based upon his reading of the April 28 Lehmkuhl Memorandum. (Tr. at 1430) Upon reflection, Mr. Price testified that "it probably would have been a pretty good idea" to have revealed in the STA requests that Liberty had already activated the paths. (Tr. at 1432-33)