

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	
)		
	)	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

To: Administrative Law Judge Richard L. Sippel

**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
OF BARTHOLDI CABLE COMPANY, INC.**

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SUMMARY

On December 10, 1996, the Presiding Judge released his Supplemental Order that "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 [the] actual date[s] that knowledge was first obtained by Liberty of the premature activations The scope of the testimony will be thorough but focused."

Testimony was taken in the last two weeks of January of the following witnesses: Howard Milstein, Behrooz Nourain, Michael Lehmkuhl, Peter Price, Edward Milstein, Anthony Ontiveros and Howard Barr. Thus, there was testimony at the mini-hearing beyond the four witnesses initially designated in the Supplemental Order.

On January 13, 1997, the first day of the mini-hearing, Liberty belatedly produced a memorandum dated April 26, 1995 from Mr. Nourain to Mr. Edward Milstein (the "April 26 Nourain Memorandum"). This document refreshed the recollections of certain witnesses as to when they learned about the possibility that Liberty had unlawfully operated microwave paths. With the aid of the April 26 Nourain Memorandum, the testimony adduced at the mini-hearing established April 27, 1995 as the earliest date that Liberty's principals first discovered that Liberty may have prematurely activated certain buildings.

Prior to the mini-hearing, without the benefit of the April 26 Nourain Memorandum, the best recollection of Liberty's witnesses regarding when they first learned about premature activations was late April or early May. The other parties to the proceeding argued, based on an inventory prepared on February 24, 1995 by Michael Lehmkuhl, Esq. of Pepper & Corazzini, that Liberty should have or could have made the discovery long before late April

or early May. The April 26 Nourain Memorandum and the testimony at the mini-hearing finally put to rest the notion that anyone at Liberty learned about the existence of premature activations based on a review of the February 24 Inventory.

In addition, the testimony adduced at the mini-hearing confirmed the Bureau's and Liberty's consistent position, as articulated in the Joint Motion for Summary Decision, that the premature activations resulted not from any intent to violate the law, but from a slipshod, disjointed and inadequately supervised licensing process. Furthermore, the testimony at the mini-hearing confirmed that Liberty's principals reacted with shock and disbelief at the discovery of unauthorized operations and moved quickly to gather and verify the facts, with the full intention of disclosing fully to the Commission after investigation. Indeed, the record is undisputed that after Time Warner disclosed two instances of premature activation, Liberty disclosed thirteen additional unauthorized operations within two weeks. Moreover, Liberty uncovered four additional instances of premature activation which Liberty again disclosed to the Commission shortly thereafter. The testimony at the mini-hearing further confirmed that Liberty was candid and forthright in its dealings with the Commission in uncovering the facts and circumstances of the premature activations, and that Liberty has taken steps, such as the institution of an effective compliance program, to remedy the violations of law.

The evidence adduced demonstrates that Liberty's principals were at all times truthful and candid with the Commission. Under applicable case law, misrepresentation and lack of candor may be inferred only if an intent to deceive the Commission is demonstrated by substantial evidence in the record. Moreover, intent is also a *sine qua non* to find untruthfulness in testimonial evidence.

No facts in the record, however, show that Liberty ever had such an intent at any time. Indeed, with respect to Liberty's STA requests, Commission precedent states that deceptive intent may not be inferred by the submission of incorrect information to the FCC through mere carelessness, inadvertence, or even gross negligence. While Liberty's licensing procedure was flawed, the miscommunication that occurred between Liberty and its engineer and FCC counsel was simply that: careless, inadvertent, and negligent, and -- as the record makes clear -- nothing more.

Furthermore, the Commission has been reluctant to impute a disqualifying lack of candor to a licensee where the record demonstrates that principals relied in good faith on counsel or employees. There is ample evidence in the record to show that Liberty's principals were entirely unaware of the premature activations before April 27, 1995 and that until that time, they relied on the expertise of Liberty's engineer and FCC counsel. Moreover, Liberty's principals have been forthright with the Commission on all matters, not just the premature operations. Unlike other cases where the Commission has found an applicant disqualified for untruthfulness, there is simply no contrary testimony in this case. Indeed, an intent to deceive the Commission can be found here only if one presumes an entirely unlikely, and for that matter, unsupported, conspiracy involving dozens of individuals in New York and Washington, D.C.

For the most part, the principals' actions were entirely responsible: they retained a highly-recommended engineer and two well-regarded law firms expert in communications law and relied on them to ensure compliance with FCC requirements. That Liberty's principals put their trust in these experts, however, cannot impute a deceptive intent in any way. Moreover, FCC case law also precludes a finding that Liberty had a flagrant disregard for

Commission requirements, regardless of deceptive intent. Indeed, such findings are rare and, in this case, Liberty's principals had no actual knowledge before April 27, 1995 that the law had been violated.

Lastly, it is entirely proper for the Presiding Judge to grant the -pending Joint Motion for Summary Decision without reference to the contents of Liberty's Internal Audit Report. The record is thus complete now and the case is ripe for decision. As it stands, this case is essentially in a similar procedural posture as other cases where documents are privileged. In all adversarial proceedings, although privilege always has the effect of withholding relevant information from factfinders, it is well-settled that these decision-makers must nevertheless make determinations based on the record before them and not on the possibility of additional record evidence. Indeed, as the Findings of Fact demonstrate, the record in this case is immense and exhaustive.

Finally, since discovery in this case -- like any other case -- has been limited only by relevance and privilege claims, the existence of the Report is irrelevant to the fact that throughout this proceeding, the other parties have had full and open opportunity to discover all relevant, non-privileged materials. Therefore, the Presiding Judge has an ample record before him to decide the Joint Motion without reference to privileged and non-discoverable matter outside the record.

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**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
OF BARTHOLDI CABLE COMPANY, INC.**

Pursuant to 47 CFR § 1.263, Bartholdi Cable Co., Inc., formerly known as Liberty Cable Company, Inc. ("Liberty"), by its counsel, hereby submits its proposed findings of fact and conclusions of law in the above-referenced proceeding. Based on the extensive evidence, Liberty respectfully requests that the Presiding Judge grant the Joint Motion for Summary Decision filed by Liberty and the Wireless Telecommunications Bureau ("Joint Motion").

I. INTRODUCTION AND PROCEDURAL HISTORY

1. On March 5, 1996, the Federal Communications Commission ("Commission" or "FCC") released an order designating issues for hearing relating to the qualifications of Liberty, as an applicant for certain private operational-fixed microwave service (OFS)

licenses.¹ One of the issues designated for hearing concerned the facts and circumstances surrounding Liberty's premature activation of its microwave paths.²

2. Pursuant to the HDO, ¶ 33, the Commission's Wireless Telecommunications Bureau (the "Bureau"), Time Warner Cable of New York City, Paragon Cable Manhattan (together, "Time Warner") and Cablevision of New York City - Phase I and Cablevision of Hudson County, Inc. (together, "Cablevision") were made parties to the proceeding. Administrative Law Judge Richard L. Sippel was appointed to serve as Presiding Judge and the hearing date was set for June 25, 1996.³

3. In accordance with the HDO's directive to "expedite these proceedings to the greatest extent possible, consistent with due process,"⁴ the Presiding Judge established an expedited discovery schedule which required all document discovery to be completed during the month of April and depositions to be taken during the month of May.⁵ In response to discovery demands, Liberty produced numerous documents, answered interrogatories and made available eleven witnesses for deposition, all within the time frame set by the Presiding Judge. In addition, two employees of Comsearch, the company that provided frequency

¹ *Liberty Cable Co., Inc.*, FCC 96-85, ¶ 30(2) (Hearing Designation Order and Notice of Opportunity for Hearing) ("HDO") (rel. March 5, 1996).

² HDO, ¶ 30(2).

³ *Order*, FCC 96-34 (rel. March 15, 1996)

⁴ HDO ¶ 27.

⁵ *Order*, FCC 96M-53 (rel. March 28, 1996).

coordination for Liberty, and Joseph Stern, a former consultant who performed engineering services for Liberty, were deposed at the beginning of June.⁶

4. Upon the close of the expedited discovery, the Bureau and Liberty agreed to resolve the proceeding by Joint Motion for Summary Decision. Accordingly, on June 11, 1996, the Presiding Judge canceled all prior scheduled dates and established a briefing schedule for the filing of the Joint Motion for Summary Decision.⁷ In the same order, Liberty was directed to produce a log of documents withheld from production as privileged.

5. In the process of reviewing documents to generate the privilege log, Liberty discovered that it inadvertently withheld as privileged certain license path inventories prepared by Pepper & Corazzini, Liberty's licensing counsel. Liberty then produced these inventories on June 17, 1996 with the privilege log. Liberty produced these inventories voluntarily and not in response to any motion to compel production. Included in this production was a February 24, 1995 Inventory prepared by Michael Lehmkuhl, an attorney at Pepper & Corazzini (the "February 24 Inventory") (L/B 1)⁸

6. The Bureau and Liberty filed the Joint Motion for Summary Decision on July 15, 1996. In the Joint Motion for Summary Decision, the Bureau and Liberty argued that based on the uncontroverted record developed through discovery, no material issues of fact were left to be tried on any of the matters raised in the HDO, including whether Liberty

⁶ See Order, FCC 96M-136 (rel. June 3, 1996) and FCC 96M-138 (rel. June 4, 1996).

⁷ Order, FCC 96M-153 (rel. June 13, 1996).

⁸ Numbers followed by "L/B" refer to exhibits introduced into evidence by Liberty and the Bureau at the mini-hearing.

possessed the requisite character qualifications to be a Commission licensee based on the premature activations of the buildings listed in Appendix A of the HDO. Furthermore, the Bureau and Liberty agreed that the appropriate sanction was forfeiture rather than revocation, and Liberty agreed to pay to the Commission a forfeiture in the amount of \$790,000.

7. Time Warner and Cablevision then filed a series of motions seeking to reopen discovery based on the February 24 Inventory. The testimony adduced at the depositions indicated that Liberty discovered the premature activations around late April or early May 1995. Based on the February 24 Inventory, however, Time Warner and Cablevision asserted that Liberty knew about the unauthorized activations many weeks prior to this period, and thus Liberty misrepresented facts and lacked candor before the Commission.

8. The Presiding Judge granted the continued discovery.⁹ Liberty again made available for deposition Peter Price (August 1-2), Behrooz Nourain (August 1), and Michael Lehmkuhl (August 7). The depositions were limited to the facts surrounding the preparation, knowledge and use of the February 24 Inventory. Mr. Lehmkuhl testified that Stephen Coran, a third-party attorney, had conducted due diligence into Liberty's licenses as part of a proposed transaction between his client and Liberty. Time Warner and Cablevision speculated that Mr. Coran's findings might have alerted Liberty to the premature activations before the late April to early May time frame. On October 9, 1996, pursuant to Order, FCC 96M-218 (rel. September 16, 1996), Coran appeared for a deposition regarding his purported knowledge of Liberty's premature activations. This continued deposition established that Time Warner and Cablevision's conjecture was unfounded, since Coran did not learn about

⁹ Order, FCC 96M-188 (rel. July 29, 1996).

Liberty's unauthorized operation of microwave paths in the course of the due diligence he conducted.¹⁰

9. The Presiding Judge permitted supplemental briefing, to be completed by October 22, 1996, to allow the parties to incorporate the findings of the continued discovery into the Joint Motion.¹¹

10. After the supplemental briefing, the Presiding Judge ordered a mini-hearing to assist in resolving the case by summary decision, stating that "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. . . . The scope of the testimony will be thorough but focused."¹²

11. On January 6, 1997, Michael Lehmkuhl, in preparation for his testimony at the mini-hearing, showed Liberty's attorneys an April 28, 1995 memorandum which he wrote and sent to Behrooz Nourain and Peter Price regarding the status of license applications (the "April 28 Lehmkuhl Memorandum"). Liberty's attorneys immediately realized that they had never seen this document before and quickly confirmed that Pepper & Corazzini had not produced it to them previously for review in connection with the initial document production in April 1996. Realizing that this was a responsive document which the parties would deem

¹⁰ See Order, FCC 96M-265, ¶ 7 (rel. December 10, 1996) ("there was no substantially relevant evidence established" through Coran's deposition) ("Supplemental Order").

¹¹ Order, FCC 96M-234 (rel. October 18, 1996).

¹² Supplemental Order, ¶ 4 (citations omitted).

to be significant, Liberty's attorneys produced the April 28. Lehmkuhl Memorandum by facsimile on January 6 within one or two hours of their first seeing it.

12. On January 10, 1997, in response to the Presiding Judge's request that Liberty's attorneys report the results of a search of Liberty's files for the April 28. Lehmkuhl Memorandum,¹³ Liberty's attorneys learned that there were additional files in Mr. Nourain's offices that had not been previously searched.

13. Liberty's attorneys voluntarily searched Mr. Nourain's entire files on the weekend of January 11-12, 1997, and they discovered a copy of the April 28. Lehmkuhl Memorandum. They also discovered for the first time an April 26, 1995 memorandum from Mr. Nourain to Edward Milstein regarding licensing delays due to an emission designator problem (the "April 26 Nourain Memorandum"). On January 13, 1997, Liberty produced copies of these memoranda, and several hundred pages of additional documents.

14. Testimony in the mini-hearing began on January 13, 1997 and concluded on January 28, 1997. The following individuals testified: Howard Milstein (January 13), Behrooz Nourain (January 13-14), Michael Lehmkuhl (January 15-16), Peter Price (January 16 and 21), Anthony Ontiveros (January 27), Edward Milstein (January 27), and Howard Barr (January 28). Pursuant to Order 96M-272 (rel. December 16, 1996), the witnesses were subject to an order of sequestration until all testimony was taken. The witnesses complied with the sequestration order.

15. After the conclusion of the testimonial phase of the mini-hearing, in response to an on-the-record document request at the hearing on January 28, 1997, Liberty produced the

¹³ Order, FCC 97M-4 (rel. January 14, 1997).

June 22, 1995 handwritten notes of Howard Barr pursuant to Order 97M-13 (rel. February 3, 1997). Mr. Barr's handwritten notes related to four additional instances of premature activation discovered at the end of June 1995 (TW/CV 50).¹⁴

16. Mr. Barr's notes referenced an April 20, 1993 letter by Jennifer Richter and the Presiding Judge ordered that this document be produced for in camera inspection Order FCC 97M- 13. The Presiding Judge then ordered this letter produced, pursuant to Order FCC 97M-14 (rel. February 5, 1997). The Richter letter told Liberty's then-Chief Operating Officer, Bruce McKinnon, of a conversation she had with Behrooz Nourain which "gave [them] pause." Ms. Richter proceeded to inform McKinnon about Commission procedures and timetables for obtaining a license and STA. The letter was copied to Behrooz Nourain who in turn hand wrote on it a note dated April 28, 1993 asking Peter Price to review and advise (TW/CV 51).

17. The Presiding Judge, in Order FCC 97M-16 (rel. February 10, 1997), held that no further discovery was warranted in this case and closed the record as of February 12, 1997.¹⁵

II. STATEMENT OF FACTS

18. The record evidence developed at the hearing and in this proceeding establishes the following facts:

¹⁴ Numbers following "TW/CV" refer to exhibits introduced by Time Warner and Cablevision at the mini-hearing.

¹⁵ On February 18, 1997, Freedom New York LLC filed for licenses to operate microwave channels in the New York area and, as stated in Liberty's letter to the Presiding Judge dated

(Continued...)

COMPANY STRUCTURE

19. Liberty was effectively founded in the early 1980s when Howard Milstein was unable to obtain favorable economic proposals from Time Warner's predecessor cable operator to service the Milford Plaza, a Milstein hotel.¹⁶ Prior to 1991, Liberty presented an alternative to cable television by distributing video programming to a small number of buildings in New York City through a satellite master antenna television (SMATV) system.¹⁷

20. In February 1991, the Commission took action to increase the competitive potential in the market for delivery of multichannel video programming by opening up the 18 GHz spectrum for use by private cable operators, like Liberty.¹⁸ Liberty was able to expand its operations throughout New York City based on its access to the 18 GHz band.¹⁹

21. The Milsteins hired Peter Price in early 1991²⁰ to run Liberty as it expanded its

(...Continued)

February 26, 1997, certain of these applications cover the buildings included in Appendix A of the HDO.

¹⁶ Tr. 509:21-510:3 [H. Milstein]. References to the transcript of the mini-hearing take the following form: "Tr. page:line number" generally followed by the last name of the witness in brackets.

¹⁷ Price Dep. 12:10-14, 19:16-20:1 [L/B 9]. All references to deposition testimony are to those entered into evidence, and these references take the following form: "[Name of Deponent] Dep. [page:line number]" with the exhibit cite added in brackets at the end.

¹⁸ *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) ("*18 GHz Order*"). Liberty submitted comments in response to the Notice of Rulemaking culminating in the 18 GHz Order. *Id.* at 1274, App. B. Tr. 1351:16-1352:14 [Price].

¹⁹ Price Dep. 14:13-19, 16:15-22 [L/B 9].

²⁰ Tr. 1344:10-11, 1345:19-1346:1 [Price]; Price Dep. 10:5-10 [L/B 9].

operations.²¹ Mr. Price was a graduate of Princeton University and Yale Law School and had served in the United States Air Force.²² Throughout his professional career, he held varied and prominent positions, including general counsel to the New York City Taxi Commission during the administration of Hon. John V. Lindsay, Publisher of the New York Post, and President of "The National" sports daily.²³

22. Commencing in 1991 and through the period relevant to this proceeding, the principals of Liberty consisted only of Howard Milstein, Edward Milstein and Peter Price.²⁴ Howard Milstein was the Chairman and Co-Chief Executive Officer.²⁵ Peter Price was President and Co-Chief Executive Officer.²⁶ Edward Milstein assumed the title of Vice Chairman and then Co-Chairman.²⁷

23. Since the Milsteins were also involved in the management of other significant businesses, including Emigrant Savings Bank and Douglas Elliman Capital Company, they

²¹ Price Dep. 20:6-19, 21:5-10 [L/B 9].

²² Tr. 1344:4-7, 1344:14-18 [Price]; Price Dep. 5:5-6:3 [L/B 9].

²³ Tr. 1344:19-23, 1345:17-19 [Price]; Price Dep. 6:20-22, 8:3-20, 9:17-18 [L/B 9].

²⁴ Price Dep. 26:13-21, 29:1-10, 30:22-31:5 [L/B 9].

²⁵ Tr. 1346:5-6 [Price]; H. Milstein Dep. 6:5-7 [L/B 4]; Price Dep. 26:21 [L/B 9]. Mr. Howard Milstein owns 34% of Liberty. Tr. 511:23-512:18 [H. Milstein].

²⁶ Tr. 1346:5-6 [Price]; Price Dep. 4:20-22, 28:20-29:4 [L/B 9].

²⁷ E. Milstein Dep. 6:16-19 [TW/CV 46]; Price Dep. 28:7-16, 29:5-8 [L/B 9]. Mr. Edward Milstein owns 33% of Liberty. Tr. 1613:25 [E. Milstein].

devoted only a small percentage of their time to Liberty.²⁸ Accordingly, Mr. Price was charged with day-to-day responsibility for Liberty's overall operations.²⁹ Included in the scope of Mr. Price's duties was managing the application for access to the 18 GHz frequency.³⁰

24. In 1991, Liberty's management structure also included Bruce McKinnon, who was the Executive Vice President and Chief Operating Officer with day-to-day responsibility for operations and installations of buildings that contracted for Liberty service.³¹ McKinnon left the company in May 1993,³² and his position was not filled.³³ Anthony Ontiveros, who was the General Manager of Technical Operations, assumed McKinnon's responsibilities³⁴ and reported to Mr. Price.³⁵ By 1994, a number of other department heads also reported to Mr. Price, including Bertina Ceccarelli as Director of Marketing and Anne Rosenberg as

²⁸ Tr. 511:8-512:2 [H. Milstein], 1614:5-18 [E. Milstein]; E. Milstein Dep. 8:7-22 [TW/CV 46]; H. Milstein Dep. 7:18-8:10 [L/B 4]; Price Dep. 27:4-28:3, 29:13-30:6 [L/B 9].

²⁹ Tr. 513:1-5, 515:5 [H. Milstein], 1346:6-12 [Price]; E. Milstein Dep. 10:8-11 [TW/CV 46]; H. Milstein Dep. 9:3-5 [L/B 4].

³⁰ Tr. 513:5-7, 515:13-516:4 [H. Milstein], 1346:13-17 [Price], 1617:3-12 [E. Milstein].

³¹ Tr. 521:16-522:5 [H. Milstein], 1347:17-18 [Price]; McKinnon Dep. 5:6-19 [TW/CV 41].)

³² Tr. 613:11-13 [Nourain], 1347:17-18 [Price], 1697:16-17 [Ontiveros]; McKinnon Dep. 24:16-19 [TW/CV 41].

³³ Tr. 1698:4-8 [Ontiveros]; Price Dep. 33:22-34:12 [L/B 9].

³⁴ Tr. 1698:11-12 [Ontiveros]; Nourain Dep. 27:17-28:6 [L/B 7].

³⁵ Tr. 1347:22-23, 1350:10-11, 1572:16-1573:15 [Price], 1690:18-19 [Ontiveros]; Ontiveros Dep. 8:11-14 [TW/CV 1]; Price Dep. 32:18-19 [L/B 9].

Director of Customer Service.³⁶

25. Liberty's principals and employees were well aware that it operated in a regulated environment and knew that a license from the Commission was necessary to operate its microwave paths.³⁷ Liberty retained a number of law firms to deal with these regulatory issues. Pepper & Corazzini handled licensing applications filed with the Commission as well as copyright issues.³⁸ Liberty also retained a number of other firms to handle a variety of litigation and general corporate matters.³⁹ Liberty's outside counsel all reported directly to Mr. Price.⁴⁰ The firm of Constantine & Partners also reported to Howard Milstein.⁴¹

26. At all times, Liberty's principals sought to operate its business in full compliance with the law and all applicable regulations.⁴² At no time did anyone at Liberty encourage anyone else at Liberty to engage in unauthorized activation of service at buildings

³⁶ Tr. 514:12-18 [H. Milstein], 1347:19-22, 1350:5-9, 1350:12-13 [Price]; Price Dep. 32:3-33:3 [L/B 9]. These individuals comprised the entirety of Liberty's principals for the relevant time period. With the exception of Anne Rosenberg, whom Liberty made available, all these individuals were deposed, and some were deposed numerous times.

³⁷ Tr. 515:13-15 [H. Milstein]; 661:9 [Nourain]; 1615:17-1616:5 [E. Milstein], 1687:14-16 [Ontiveros]; McKinnon Dep. 8:17-9:3 [TW/CV 41]; Nourain Dep. 24:21-22 [L/B/7]. Howard Milstein was no stranger to operating in a regulated environment. The Milsteins' primary areas of business activity, banking and real estate, are intensely regulated by federal, state and local entities (Tr. 516:16-25 [H. Milstein]).

³⁸ Tr. 513:7-24, 515:19 [H. Milstein], 1348:11-12 [Price], 1791:23-24, 1792:10-12 [Barr]; Lehmkuhl Dep. 5:15-6:9 [L/B 5]; Price Dep. 37:1-12 [L/B 9].

³⁹ Tr. 1348:15-1349:19 [Price]; Price Dep. 40:11-44:1 [L/B 9].

⁴⁰ Tr. 513:5-9 [H. Milstein], 1349:22 [Price].

⁴¹ Tr. 514:6-7 [H. Milstein].

⁴² Tr. 515:13-16, 517:22-24, 519:16-19 [H. Milstein], 1351:16-1352:25 [Price]; H. Milstein Dep. 29:13-15 [L/B 4].

served by Liberty.⁴³ Nor is there any evidence to show that anyone in Liberty's principals approved or encouraged the activation of a building for service prior to receiving authorization from the Commission.⁴⁴

THE LICENSING PROCESS: 1991 THROUGH END OF APRIL 1995

27. When Liberty began transmitting its multichannel video programming on the 18 GHz band, Liberty retained Joseph Stern of Stern Telecommunications Corp. as an outside consultant to obtain the proper authorization.⁴⁵ At that time, no one within Liberty had day-to-day responsibility for getting the necessary licenses. Given the limited amount of time that the Milsteins devoted to managing Liberty, neither Howard nor Edward Milstein was closely involved with or knowledgeable of the licensing process.⁴⁶ Mr. Price, as the company's President, had overall responsibility for Liberty's operations, including the licensing function.

28. Mr. Price created the structure within Liberty for licensing, but did not deal with that aspect of the business on a daily basis.⁴⁷ Mr. Price would get directly involved in the licensing process only if an issue was specifically brought to his attention as a matter

⁴³ Tr. 1626:13-21 [E. Milstein], 1705:16-1706:4 [Ontiveros].

⁴⁴ Tr. 639:5-6 [Nourain], 1362:7-15, 1418:11-13 [Price], 1618:22-23, 1626:22-25 [E. Milstein], 1701:13-24 [Ontiveros].

⁴⁵ Tr. 515:16-25 [H. Milstein], 1350:19-24 [Price]; Price Dep. 38:22-39:4 [L/B 9].

⁴⁶ Tr. 511:23-512:2, 514:22-515:8, 516:1-4, 532:2-19 [H. Milstein]; E. Milstein Dep. 9:12-18 [TW/CV 46]; H Milstein Dep. 7:18-8:10 [L/B 4]; Price Dep. 27:4-28:3, 29:13-30:6 [L/B 9].

⁴⁷ Tr. 1352:19-1353:1, 1355:20-1356:3, 1358:22-1359:16 [Price]; Price Dep. 234:22-235:16 [L/B 9].

which required his intervention.⁴⁸ There was only one instance in the pre-April 1995 time frame when a licensing issue escalated to his level. At some point from 1991 to 1992, Mr. Price learned that Liberty was experiencing delays in acquiring licenses.⁴⁹ He was told about a “Brown Bag Lunch” hosted by one of the Commission’s Bureaus which was open to the public.⁵⁰ Mr. Price attended this lunch to ask Commission personnel why Liberty’s licenses were being delayed.⁵¹ The Commission representative suggested to Mr. Price that he should file requests for special temporary authority (STA) which would allow Liberty to operate pending the grant of licenses. This meeting was the first time that Mr. Price learned about the STA procedure.⁵²

29. Armed with the knowledge gained at the Brown Bag Lunch, Mr. Price returned to New York and began to develop a licensing procedure, after consultation with Pepper & Corazzini, Stern and McKinnon.⁵³ On February 26, 1992, Mr. Price wrote a memorandum to McKinnon regarding license procedures.⁵⁴ Mr. Price wanted Stern to audit Liberty’s license applications and then develop a “maintenance procedure going forward[.]”⁵⁵ Mr. Price’s

⁴⁸ Tr. 1356:3-10 [Price].

⁴⁹ Tr. 1356:14-1357:3 [Price]; Price Dep. 254:19-255:4 [L/B 9].

⁵⁰ Tr. 1357:7-8 [Price]; Price Dep. 255:6-14 [L/B 9].

⁵¹ Tr. 1357:9-1358:8 [Price], Price Dep. 255:21-256:2 [L/B 9].

⁵² Tr. 1358:10-13 [Price]; Price Dep. 256:12-14, 257:2-5 [L/B 9].

⁵³ Tr. 1352:22-1353:1 [Price]; Price Dep. 102:3-103:17 [L/B 9].

⁵⁴ Tr. 1353:2-4 [Price]; L/B 2; McKinnon Dep. 19:14-20:7 [TW/CV 41].

⁵⁵ L/B 2; Price Dep. 102:20-103:17 [L/B 9].

memorandum contemplated that the procedures developed by Stern would be integrated into Liberty's in-house engineering department.⁵⁶ Also, Mr. Price expected Stern to coordinate his function with Pepper & Corazzini.⁵⁷ Mr. Price anticipated this interaction between Liberty's engineer and outside licensing counsel to continue once the engineering function was brought in-house.⁵⁸ Unfortunately, as detailed below, Mr. Price did not follow through to make sure that his procedure was being carried out in the way that he wanted it to be.⁵⁹

30. In line with the movement to establish an in-house engineering capability at Liberty, Stern was charged with the task of hiring a microwave engineer for Liberty.⁶⁰ Stern, after interviewing a number of candidates, recommended that Liberty hire Behrooz Nourain.⁶¹ Mr. Price and Mr. Ontiveros also concurred in Mr. Stern's recommendation.⁶²

31. Mr. Nourain started at Liberty in the spring of 1992.⁶³ His prior job experience involved transmission along the 18 GHz band and he thus seemed well-qualified to work on

⁵⁶ L/B 2; McKinnon Dep. 20:19-21:8, 24:11-12 [TW/CV 41].

⁵⁷ Tr. 1353:23-1354:5 [Price]; L/B 2.

⁵⁸ Tr. 555:18-557:7 [H. Milstein].

⁵⁹ Tr. 588:24-590:6 [H. Milstein] 1396:10-22 [Price]; H. Milstein Dep. 49:4-10 [L/B 4]; Price Dep. 101:6-104:1, 235:10-16 [L/B 9].

⁶⁰ Tr. 515:19-21 [H. Milstein], 1351:1-9 [Price].

⁶¹ Tr. 515:19-21 [H. Milstein], 611:18-612:1 [Nourain], 1351:9-11 [Price], 1692:17-20 [Ontiveros]; Price Dep. 265:6-19 [L/B 9].

⁶² Tr. 1692:11-16; 1693:12-15 [Ontiveros].

⁶³ Tr. 611:15-17 [Nourain]; Nourain Dep. 16:3-19 [L/B 7].

Liberty's microwave network.⁶⁴ However, the licensing aspect of Mr. Nourain's prior position was handled by in-house counsel, and Mr. Nourain was concerned only with the engineering aspect of that job.⁶⁵ Mr. Nourain maintained this division of labor in fulfilling his role at Liberty.⁶⁶

32. According to Mr. Nourain, he did not discuss Liberty licensing procedures with Mr. Stern upon commencement of employment.⁶⁷ Mr. Nourain felt no need to be instructed about the process, because he knew what steps to follow in designing a system for a building.⁶⁸ Mr. Nourain thus became Liberty's in-house engineer and had day-to-day responsibility for installing and constructing the microwave network, as well as ensuring that Liberty got the necessary authorization from the Commission.⁶⁹

33. Mr. Nourain reported to Mr. McKinnon until his departure in May 1993.⁷⁰ Mr. Ontiveros assumed Mr. McKinnon's responsibilities and was in charge of technical operations, which subsumed Mr. Nourain's microwave department.⁷¹ Under this structure, Mr. Nourain reported to Mr. Ontiveros, but he did not actively supervise Mr. Nourain day-

⁶⁴ Tr. 610:11-19 [Nourain], 1693:12-15 [Ontiveros]; Nourain Dep. 11:10-12:5, [L/B 7].

⁶⁵ Tr. 610:19-611:1, 611:11-14, 612:23-613:4 [Nourain]; Nourain Dep. 52:5-54:21 [L/B 7].

⁶⁶ Tr. 612:11-19, 612:23-613:4, 628:2-22 [Nourain]; Nourain Dep. 52:20-53:9, 216:3-217:1 [L/B 7].

⁶⁷ Tr. 612:2-5, 657:23-658:8, 661:1-663:25 [Nourain]; Nourain Dep. 51:17-52:4 [L/B 7].

⁶⁸ Nourain Dep. 40:19-41:7 [L/B 7].

⁶⁹ Tr. 612:6-613:4 [Nourain].

⁷⁰ Tr. 613:7-13 [Nourain]; 1698:2-3 [Ontiveros]; Nourain Dep. 20:7-8 [L/B 7].

⁷¹ Tr. 1572:13-16 [Price], 1690:20-1691:13 [Ontiveros].

to-day in the performance of his licensing function.⁷² Mr. Ontiveros was fully occupied in the other aspects of his position as General Manager, which encompassed installation, construction, marketing and customer support.⁷³ Mr. Ontiveros assumed that Mr. Nourain knew what he was doing and left Mr. Nourain alone to run the microwave department.⁷⁴ Ontiveros, given his deference to Mr. Nourain's expertise, was not familiar with the licensing process.⁷⁵

34. Mr. Nourain proceeded to construct Liberty's microwave network in this unsupervised manner, working long hours with little support.⁷⁶ Mr. Nourain saw his function primarily as constructing the network and doing the engineering for that.⁷⁷ Consistent with his prior job experience, he saw the licensing aspect as something for the lawyers to do.⁷⁸ Mr. Nourain estimated that only about 3% of his time was devoted to applying for licenses.⁷⁹

35. As part of the licensing process, Liberty retained Comsearch to perform frequency coordinations to make sure that Liberty's microwave paths did not interfere with

⁷² Tr. 1691:23-25, 1694:18-22, 1698:13-16 [Ontiveros]; Ontiveros Dep. 8:20-22, 26:13-18 [TW/CV 1].

⁷³ Tr. 1687:22-1690:11 [Ontiveros]; Ontiveros Dep. 7:16-8:10, 54:5-19 [TW/CV 1].

⁷⁴ Tr. 1692:1-3, 1693:12-15, 1697:2-10 [Ontiveros]; Ontiveros Dep. 26:13-18 [TW/CV 1].

⁷⁵ Tr. 1693:16-1694:3, 1696:18-20 [Ontiveros]; Ontiveros Dep. 12:7-17 [TW/CV 1].

⁷⁶ Tr. 612:20-22, 616:11-24, 617:10-16, 681:2-5 [Nourain], 1691:14-17 [Ontiveros].

⁷⁷ Tr. 675:21-676:6, 940:7-10, 943:6-8, 943:25-944:1 [Nourain]; Nourain Dep. 41:2-3 [L/B 7].

⁷⁸ Tr. 710:4-9, 940:7-10, 943:8-12, 944:1-5 [Nourain]; Nourain Dep. 52:5-54:21 [L/B 7].

⁷⁹ Tr. 613:3-4 [Nourain].

those of any other Commission licensee.⁸⁰ Mr. Nourain and Comsearch would be in contact to discuss any issues regarding the accuracy of the technical information supplied by Mr. Nourain to Comsearch.⁸¹ Thereafter, Comsearch would pass the information along to Pepper & Corazzini to begin the application process.⁸² Comsearch would then issue a prior coordination notice and another thirty days would pass to allow licensees to object to Liberty's proposed paths.⁸³ After that, Comsearch would prepare a supplemental showing.⁸⁴ Once this was done, Comsearch would send the additional information to Pepper & Corazzini for the applications.⁸⁵ At this point, Pepper & Corazzini had all the necessary data for the applications,⁸⁶ without needing to interact directly or substantively with Mr. Nourain.

36. The attorneys at Pepper & Corazzini with whom Mr. Nourain dealt on the license applications were Jennifer Richter and Michael Lehmkuhl.⁸⁷ Mr. Nourain worked with Ms. Richter until about June 1994, when she left the firm.⁸⁸ Mr. Lehmkuhl succeeded

⁸⁰ Tr. 618:15-619:13, 620:6-9 [Nourain], 1029:2-22 [Lehmkuhl], Nourain Dep. 52:2-53:9 [L/B 7].

⁸¹ Tr. 620:19-21, 628:9-15 [Nourain]; Nourain Dep. 25:4-9, 41:15-22 [L/B 7].

⁸² Tr. 621:4-12, 630:11-14 [Nourain], 1028:10-24, 1030:13-18 [Lehmkuhl]; Lehmkuhl Dep. 6:4-9, 7:21-8:3 [L/B 5]; McKinnon Dep. 7:14-20, 27:10-13 [TW/CV 41]; Nourain Dep. 43:2-8, 48:16-18, 57:11-21, [L/B 7].

⁸³ Tr. 1031:18-24 [Lehmkuhl]; Lehmkuhl Dep. 8:12-14, [L/B 5].

⁸⁴ Tr. 621:16-622:14 [Nourain]; Nourain Dep. 58:16-59:3, 117:22-118:15 [L/B 7].

⁸⁵ Tr. 621:23-24 [Nourain]; Nourain Dep. 58:16-59:3, 117:22-118:15 [L/B 7].

⁸⁶ Tr. 628:9-20 [Nourain], 1032:15-20 [Lehmkuhl]; Nourain Dep. 57:15-21 [L/B 7].

⁸⁷ Tr. 1031:4-6 [Lehmkuhl], 1792:8-22 [Barr]; Nourain Dep. 49:10-13 [L/B 7].

⁸⁸ Tr. 1792:15 [Barr]; Nourain Dep. 49:15 [L/B 7].

her and worked with Mr. Nourain on licensing starting in June 1994⁸⁹. Mr. Nourain did not deal with Howard Barr at all on license applications.⁹⁰

37. Mr. Nourain's direct contact with Mr. Lehmkuhl was limited. After receiving the necessary information from Comsearch, Mr. Lehmkuhl would call Mr. Nourain only to verify the accuracy of the data, and such calls were not made in every instance.⁹¹ Also, to expedite the application process, Mr. Nourain had a practice of pre-signing the applications.⁹² From time to time, as the supply of pre-signed forms ran low, Mr. Nourain would forward an additional batch at Mr. Lehmkuhl's request.⁹³ This practice, which began before Mr. Lehmkuhl's tenure and was continued by him,⁹⁴ ensured that Mr. Nourain would not have to deal directly with Pepper & Corazzini throughout the application process.

38. After Comsearch had passed along the requisite data to Pepper & Corazzini, Mr. Nourain assumed that the law firm filled out the applications and would at the same time apply for STAs.⁹⁵ Mr. Nourain's assumption was based on a course of conduct he developed

⁸⁹ Tr. 1025:18-1026:7, 1031:4-6 [Lehmkuhl]; 1792:18-22 [Barr]; Lehmkuhl Dep. 94:6-7 [L/B 6]; Nourain Dep. 49:15 [L/B 7].

⁹⁰ Tr. 1795:4-7 [Barr]; Nourain Dep. 49:20-50:17 [L/B 7].

⁹¹ Tr. 1030:22-1031:6 [Lehmkuhl]; Nourain Dep. 57:4-10 [L/B 7].

⁹² Tr. 629:8-630:6, 631:10-632:8, 848:20-849:1, 940:14-16 [Nourain], 1033:6-24, 1080:20-22, 1099:8-12 [Lehmkuhl], 1821:5-11 [Barr]; Nourain Dep. 43:9-17, 44:12-45:1 [L/B 7]; Lehmkuhl Dep. 72:4-8 [L/B 5].

⁹³ Tr. 632:9-633:4, 848:20-22 [Nourain].

⁹⁴ Tr. 714:4-6, 848:20-22 [Nourain], 1033:25-10 34:2, 1080:21-22, 1100:14-18 [Lehmkuhl].

⁹⁵ Tr. 640:20-25, 641:22-25, 644:5-6, 644:20-645:5, 714:4-715:4, 936:10-940:3, 941:21-23 [Nourain]; Nourain Dep. 90:18-22 [L/B 7].