through working with Pepper & Corazzini.[96] Mr. Nourain also assumed that the Commission would grant a license after a number of days had passed, after which he would activate a building for service.[97]

39. Contrary to the procedure Mr. Price attempted to establish in February 1992, the interaction between Mr. Nourain and Pepper & Corazzini was disjointed. Pepper & Corazzini sent as-filed copies of the license and STA applications to Mr. Nourain.[98] Once he got the copies, Mr. Nourain would file them by transmitter site only,[99] even though a single transmitter might apply to several different receive sites.[100] Under this method of filing, Mr. Nourain could not monitor the status of license and STA applications for Liberty's numerous receive sites.[101] Furthermore, Mr. Nourain admitted to having a disorderly way of filing these significant documents in his office and that he followed no coherent system of recordkeeping.[102]

40. The Commission, once it granted a license or STA to Liberty, sent these authorizations directly to Mr. Nourain.[103] He, in turn, did not have a regular practice of

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[96] Tr. 847:13-25, 849:16-850:16 [Nourain], Nourain Dep. 130:15-19 [L/B 7].

[97] Tr. 640:5-644:9, 696:8-697:15 [Nourain]; Nourain Dep. 128:13-130:19 [L/B 7].

[98] Tr. 630:16-631:1 [Nourain]; Lehmkuhl Dep. 10:8-13 [L/B 5].

[99] Tr. 633:20-21, 637:9-14 [Nourain].

[100] Tr. 633:21-634:2, 637:21-24 [Nourain].

[101] Tr. 637:25-638:8, 695:15-25 [Nourain].

[102] Tr. 696:1-3, 926:10-927:5 [Nourain].

[103] Tr. 652:25-653:15, 704:16-24 [Nourain], 1036:17-25 [Lehmkuhl]; Lehmkuhl Dep. 14:6-13 [L/B 5]; Nourain Dep. 70:20-71:2 [L/B 7], 21:12-19 [L/B 8].

sending copies of these grants to Pepper & Corazzini.[104] In addition, the grants listed only file numbers, not addresses, and Mr. Nourain could not tell from the face of these grants which buildings they covered.[105] Pepper & Corazzini would be able to tell Mr. Nourain, but he never called to find out.[106] To compound the situation, original granted licenses were filed haphazardly[107] and commingled with other assorted papers. This inattention to detail reflected Mr. Nourain's belief that the licensing function was not a significant part of his job.

41. Most critically, Mr. Nourain did not inform Pepper & Corazzini before he activated a microwave path.[108] Consequently, Pepper & Corazzini did not verify -- nor could they have -- that Liberty had a license before a building received its first microwave signal.[109]

42. Pepper & Corazzini did have a practice of periodically sending to Mr. Nourain and Mr. Price an inventory of Liberty's licenses.[110] However, neither Mr. Nourain nor Mr. Price paid much attention to these inventories.[111] Mr. Price, believing that the inventories did

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[104] Tr. 653:16-20 [Nourain].

[105] Tr. 637:21-24 [Nourain].

[106] Tr. 637:25-638:8, 707:15-21 [Nourain].

[107] Tr. 925:1-927:5 [Nourain].

[108] Tr. 654:4-8, 716:3-25 [Nourain], 1039:14-20 [Lehmkuhl], 1805:11-15 [Barr].

[109] Tr. 1039:21-23 [Lehmkuhl].

[110] Tr. 652:14-16 [Nourain], 1059:8-13 [Lehmkuhl], 1808:14-19 [Barr]; Lehmkuhl Dep. 90:12-21, 94:1-7 [L/B 6].

[111] Tr. 652:17-25 [Nourain], 1434:24-1435:18 [Price]; Nourain Dep. 21:2-20 [L/B 8].

not require action on his part, would forward them to Mr. Nourain.[112] Mr. Nourain saw no relevance of these inventories to his engineering function and would merely file them away.[113]

43. The licensing process was also characterized by disjuncture within the company. Mr. Nourain told no one about his assumptions regarding his timetable for getting Commission authorizations and his consequent initiation of service.[114] All of Mr. Nourain's supervisors assumed that he knew what he was doing and never verified the correctness of that assumption.[115]

44. On Thursdays, Liberty typically held a meeting among principals and department heads to discuss various business issues.[116] The Milsteins, Mr. Price and Mr. Ontiveros usually attended these meetings.[117] Mr. Nourain never did.[118] Licensing issues were not among the topics routinely discussed at the weekly meetings.[119] Mr. Ontiveros

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[112] Tr. 1434:24-1435:18 [Price]; Price Dep. 137:25-138-24 [L/B 11].

[113] Nourain Dep. 21:16-22:3 [L/B 8].

[114] Tr. 975:18-976:10 [Nourain].

[115] Tr. 947:6-9, 978:5-979:9 [Nourain], 1396:16-22, 1413:2-5, 1575:18-24 [Price], 1691:23-25 [Ontiveros].

[116] Tr. 522:18-24 [H. Milstein], 1714:17-21 [Ontiveros]; E. Milstein Dep. 12:10-14:2 [TW/CV 46]; H. Milstein Dep. 8:11-15 [L/B 4]; Ontiveros Dep. 69:20-70:1 [TW/CV 1]; Price Dep. 65:7-66:20 [L/B 9].

[117] Tr. 522:25-523:3 [H. Milstein], 1714:17-1715:1 [Ontiveros]; H. Milstein Dep. 8:11-15 [L/B 4]; Ontiveros Dep. 69:16-71:10 [TW/CV 1]; Price Dep. 65:7-66:3 [L/B 9].

[118] Tr. 1716:15-17 [Ontiveros]; Nourain Dep. 54:25-55:3 [L/B 8]; Ontiveros Dep. 70:11-12 [TW/CV 1]; Price Dep. 262:18-22 [L/B 9]. In fact, Nourain's contacts with the principals were few and far between. Tr. 563:5-8 [H. Milstein]; 1437:17-1438:17 [Price]; 1646:22-25 [E. Milstein].

[119] Tr. 1361:7-1362:6 [Price]; Price Dep. 73:10-13[L/B 9].

distributed at these weekly meetings a weekly progress report (the "Weekly Reports") concerning the status of Liberty installations.[120] The Weekly Reports contained comprehensive information on the status of installations, but it did not provide any information about the status of license applications.[121]

45. Ontiveros also held periodic meetings with his staff to discuss the status of construction and installation of buildings that had contracted to receive Liberty's service.[122] Mr. Nourain attended these meetings and would speak on the status of construction and installation of microwave facilities.[123] He did not talk about the status of license applications.[124]

46. The foregoing describes Liberty's licensing process from late 1991 through the end of April 1995. Mr. Nourain, who was Liberty's sole microwave engineer, was unsupervised in the performance of his function. Neither Liberty's president, Mr. Price, nor Mr. Nourain's immediate supervisor, Mr. Ontiveros, were aware of Mr. Nourain's practices with respect to the handling of license applications. No one in the company actually knew how Mr. Nourain operated, nor did they know about his operative assumptions about the licensing process. Furthermore, the interaction between Pepper & Corazzini and Liberty's

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[120] Tr. 523:8-14 [H. Milstein]; 1715:4-10 [Ontiveros]; Ontiveros Dep. 84:9-87:16 [TW/CV 1].

[121] Tr. 530:12-531:20 [H. Milstein], 1699:5-1701:9 [Ontiveros]; Price Dep. 69:10-21 [L/B 9].

[122] Tr. 533:22-24 [H. Milstein], 688:17-690:1 [Nourain], 1716:18-20 [Ontiveros].

[123] Tr. 1716:21-1717:5 [Ontiveros].

[124] Tr. 976:13-978:4 [Nourain], 1717:6-1718:13 [Ontiveros].

engineering department that Mr. Price contemplated in his February 26, 1992 memorandum was not followed. Instead, the working relationship between Mr. Nourain and Pepper & Corazzini was marred by disjuncture, exemplified by the fact that Pepper & Corazzini did not regularly receive copies of license or STA grants from Mr. Nourain as well as by Mr. Nourain's pre-signing of applications, which further limited direct contact between Mr. Nourain and Pepper & Corazzini.

DISCOVERY OF PREMATURE ACTIVATIONS

47. The disjointed licensing process in place at Liberty before mid-1995 was a prescription for disaster. The license inventory prepared by Mr. Lehmkuhl and sent to Mr. Price and Mr. Nourain on February 24, 1995 (the "February 24 Inventory") represented a potential warning that went unheeded.

48. Mr. Lehmkuhl created the February 24 Inventory on his own initiative, not in response to any request by Liberty, to try out a new software program.[125] The February 24 Inventory differed from prior inventories prepared by Ms. Richter because for the first time, Pepper & Corazzini listed the license status (pending or granted) for each of Liberty's paths subject to an application.[126] This new piece of information in the Inventory, if compared to Mr. Ontiveros' Weekly Reports, would have shown to Liberty that there were buildings being activated without a granted license or STA, a fact not disputed by Liberty.[127] However, there is no evidence that such a reconciliation was ever done.

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[125] Tr. 1061:2-7 [Lehmkuhl]; Lehmkuhl Dep. 111:2-12, 130:5-11 [L/B 6].

[126] Tr. 1060:2-12 [Lehmkuhl]; Lehmkuhl Dep. 111:2-9 [L/B 6].

[127] Tr. 563:1-564:23 [H. Milstein]; Price Dep. 177:2-17 [L/B 11].

49. Moreover, in a cover memorandum to the February 24 Inventory, Mr. Lehmkuhl informed Mr. Price and Mr. Nourain that Liberty was no longer operating under STAs.[128] Neither Mr. Price nor Mr. Nourain denies receiving this memorandum or the February 24 Inventory; they simply did not focus on it and did nothing in response.[129] In this way, significant information about the status of Liberty's license and STA applications was ignored.

50. Two mutually exclusive but significant events that occurred during the first quarter of 1995 brought matters to a head. First, on January 9, 1995, in response to Liberty's practice of providing service to certain buildings by hardwire interconnection instead of direct microwave transmission, Time Warner filed its first in a series of petitions to deny or condition the grant of Liberty's licenses.[130] Time Warner claimed that Liberty, by virtue of its hardwire interconnections, was a cable system as defined by the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521-559, and that Liberty lacked candor before the Commission by failing to disclose the fact of these hardwire interconnections and also by calling itself a private cable operator.[131]

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[128] L/B 1.

[129] Tr. 652:8-653:3 [Nourain], 1434:10-1435:18 [Price]; Nourain Dep. 20:12-16, 21:16-20 [L/B 8]; Price Dep. 133:24-134:4; 160:2-9; 162:14-163:5 [L/B 11].

[130] Tr. 1401:1-11 [Price].

[131] While the facts and circumstances of Liberty's use of hardwire interconnections is an issue in the HDO, it was not an issue for the mini-hearing. Supplemental Order, n.2. The Telecommunications Act of 1996 has amended the law so as to leave no question about the legality of Liberty's current provision of service by hardwire interconnection. HDO, ¶ 12. Liberty respectfully refers the Presiding Judge to the Joint Motion for Summary Decision for

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51. Mr. Price and Howard Barr of Pepper & Corazzini discussed this first petition in January.[132] Mr. Barr informed Mr. Price that Time Warner's filing, regardless of its substantive merits, would delay the grant of Liberty's licenses.[133] Mr. Price viewed Time Warner's allegations with skepticism and told no one else in the company about the delaying effect the pleading would have on the grant of Liberty's licenses.[134] Time Warner continued to file petitions to deny against Liberty's license application throughout the coming months.

52. Mr. Lehmkuhl also spoke briefly with Mr. Nourain about the Time Warner petition around January 1995.[135] Mr. Nourain appeared to understand that this pleading related only to the hardwired buildings.[136] Not until later in April, when he spoke again with Mr. Lehmkuhl about filing for STAs did Mr. Nourain realize that all the paths were affected, not just the proposed paths to the hardwired buildings.[137]

(...Continued)
a fuller discussion of the reasons why the Bureau and Liberty should be entitled to summary decision in their favor on this issue.

[132] Tr. 1795:13-18 [Barr].

[133] Tr. 1795:19-1796:2 [Barr].

[134] Tr. 1503:20-1504:17, 1512:20-1514:24 [Price].

[135] Tr. 1086:1-18 [Lehmkuhl].

[136] Tr. 986:15-20, 996:22-997:4 [Nourain], 1048:20-21 [Lehmkuhl].

[137] Tr. 720:11-723:9 [Nourain]. The issue of Mr. Nourain's allegedly inconsistent statements regarding his knowledge of Time Warner's petitions was designated in the HDO at ¶ 30(3). However, it was not an issue for the mini-hearing. Supplemental Order, p.2 n.2. In any event, the hearing testimony comports with the position taken in the Joint Motion that, taken in context, Mr. Nourain's statements were in fact consistent, and accordingly, there is no material issue of fact concerning the allegedly inconsistent statements. Liberty respectfully refers the Presiding Judge to the Joint Motion for a fuller discussion of the reasons why the
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53. Then, at the beginning of March 1995, Mr. Lehmkuhl learned that grants for all the applications filed at the end of November 1994 and at the beginning of 1995 were being delayed because the applications contained incorrect emission designators for these paths.[138] This problem was nothing more than a typographical error in which letters and numbers in an alphanumeric string were transposed.[139] The Commission informed Mr. Lehmkuhl of the problem, after which he was in contact with Comsearch in an attempt to resolve the issue.[140] The Commission, however, required that Liberty file for modifications, which meant that the entire process of Comsearch sending out prior coordinations notices had to be re-done, leading to delay in the Commission's granting licenses for the applications filed at the end of 1994 and the beginning of 1995.[141]

54. On March 21, 1995, Mr. Lehmkuhl filed the modifications to the applications for the licenses affected by the emission designator error.[142] Most of the prematurely activated sites appearing in the HDO were affected by the emission designator error.[143] In theory, if Liberty had a single listing of all these affected buildings as of the date the license

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Joint Motion should also be granted on the issue of the allegedly inconsistent Nourain statements.

[138] Tr. 1042:1-1043:25 [Lehmkuhl].

[139] Tr. 1042:12-16, 1046:7-10 [Lehmkuhl].

[140] Tr. 1042:23-25 [Lehmkuhl], 1123:12-1124:17 [Lehmkuhl]; TW/CV 34.

[141] Tr. 1043:1-4, 1046:15-23 [Lehmkuhl]; TW/CV 34; TW/CV 37.

[142] Tr. 1046:15-23 [Lehmkuhl]; TW/CV 34; TW/CV 37.

[143] TW/CV 30; TW/CV 34.

modification was filed, a reconciliation could have been performed against the Weekly Reports and Liberty's principals could have learned through this process that certain buildings were receiving service prematurely. However, there is no evidence that such a comparison was done. Indeed, in the modification filed by Mr. Lehmkuhl, a single list of Liberty's 18 GHz applications was appended, but this list contained only transmitter sites, not receiver sites.[144] Receiver site information was buried in the March 21, 1995 modification among the pages and pages of technical data prepared by Comsearch.[145] In short, even assuming a reason existed at the end of March for someone at Liberty to check the emission designator error buildings against the Weekly Report, there was no convenient way to do so.

55. Until April 1995, the Time Warner petitions to deny and the emission designator error were separate events having no apparent connection other than their delaying effect on Liberty's license applications. In fact, there is no evidence that anyone other than Mr. Nourain and Mr. Lehmkuhl knew about the emission designator error and its effect before late April 1995;[146] moreover, there is no evidence that anyone at Liberty other than Mr. Price realized the impact of the Time Warner petitions on Liberty's license applications.[147] By the

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[144] TW/CV 37.

[145] TW/CV 37.

[146] Tr. 913:16-915:14 [Nourain].

[147] Tr. 722:1-19, 861:3-863:12 [Nourain], 1426:7-1427:25 [Price], 1895:9-14 [Barr]. The Commission did send by mail a letter to Nourain dated April 24, 1995 informing Liberty that action on its license applications was being suspended and a prior grant was being withdrawn because of Time Warner's petitions to deny (TW/CV 36). However, there is no definitive evidence that Nourain received that letter on or about April 24, 1995. In fact, the letter contains a handwritten note from Nourain to Edward Milstein and Ontiveros, dated May 3, 1995. Nourain does not attribute this letter as the source of his investigation on April 26,

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end of April 1995, Liberty had to resolve the problem of delay caused by these two distinct events.

56. On April 26, 1995, Mr. Nourain sent a memorandum to Edward Milstein regarding the emission designator error and its impact on Liberty licenses (the "April 26 Mr. Nourain Memorandum").[148] This memorandum listed all the sites affected by the error and informed Mr. Edward Milstein that Pepper & Corazzini would be filing for STAs to cover these buildings. There was no mention in the memorandum of the fact that certain of the listed buildings were already receiving service. Since Mr. Edward Milstein was not fully familiar with the licensing process, he turned the memorandum over to Mr. Price to handle.[149]

(...Continued)
1995 into the status of Liberty's license applications. (Tr. 645:18-22, 744:5-19, 842:6-25 [Nourain]).

[148] TW/CV 35. The record is unclear as to the circumstances by which Mr. Nourain drafted this memorandum for Edward Milstein. According to Mr. Milstein, Mr. Ontiveros told him that an emission designator problem was delaying the grant of licenses (Tr. 1631:7-9 [E. Milstein]). Not knowing what an emission designator was, Mr. Milstein asked Mr. Nourain to investigate the problem and to report to him in writing (Tr. 1619:12-1620:4, 1631:10-12 [E. Milstein]). Ontiveros does not recall such a conversation with Mr. Milstein. (Tr. 1713:16-1714:5 [Ontiveros]). According to Mr. Nourain, his April 26 memorandum was written as a result of a facsimile he received from Liberty's corporate headquarters regarding Time Warner's petitions to deny which listed a number of buildings (Tr. 744:15-746:8, 821:4-12 [Nourain]). Mr. Nourain was then directed to investigate and report about the status of these buildings, which he proceeded to do in his memorandum (Tr. 821:4-12 [Nourain]; 1631:7-12 [E. Milstein]). As previously stated by Liberty, in the February 6, 1997 letter to the Presiding Judge (the "February 6, 1997 Letter"), it is not relying on Mr. Nourain's testimony regarding when he found out about premature activations.

[149] Tr. 1631:20 - 1632:8 [E. Milstein].

57. In the process of preparing the memorandum, Mr. Nourain spoke with Mr. Lehmkuhl around April 26, 1995.[150] During this conversation, Mr. Nourain realized for the first time that Pepper & Corazzini was not filing STAs routinely with license applications.[151] Mr. Nourain then demanded that Mr. Lehmkuhl prepare STAs for filing right away.[152] Mr. Lehmkuhl proceeded to do so.[153]

58. At the same that the emission designator error was being addressed, Liberty had to confront the impact of Time Warner's petitions to deny. A conference call with counsel had been scheduled for the afternoon of April 27 to discuss an appropriate response to Time Warner's petitions.[154] The conference call proceeded as scheduled, with Mr. Price participating from his office in New York and with counsel present at the offices of Ginsburg, Feldman and Bress.[155] The following attorneys took part in the conference call: Howard Barr of Pepper & Corazzini, Lloyd Constantine of Constantine & Partners, and Henry Rivera of

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[150] Tr. 743:3-745:12, 832:8-833:16 [Nourain]; TW/CV 44.

[151] Tr. 745:8-23 [Nourain].

[152] Tr. 650:4-8 [Nourain], 1142:8-11 [Lehmkuhl].

[153] Tr. 650:9-10 [Nourain], 1057:14-16 [Lehmkuhl]. On April 28, 1995, Michael Lehmkuhl sent a memorandum to Mr. Price and Mr. Nourain regarding the status of Liberty's new and pending applications (TW/CV 34). Mr. Lehmkuhl attached, per Mr. Nourain's request, a summary of the status of the pending applications. The memorandum reflected the decision to proceed with the filing of the requests for STA despite the impediments presented by Time Warner's petitions to deny. The memorandum referred to the fact that most of the applications had to be placed on public notice again due to the emission designator error. In addition, the memorandum set forth a processing timetable for future applications, indicating that in the normal course, the licensing process would take about 90 to 120 days to complete.

[154] Tr. 1365:9-11 [Price], 1797:3-5, 1804:6-14 [Barr].

[155] Tr. 1366:1-1367:3 [Price], 1796:23-24 [Barr].

Ginsburg, Feldman and Bress.[156]

59. According to Mr. Barr, sometime in the course of discussing appropriate responses to Time Warner's petitions to deny, a document like the April 26 Mr. Nourain Memorandum was introduced.[157] Mr. Price was apparently referring to it to point out the buildings that were affected by the delay caused by Time Warner's petitions.[158] Mr. Price, based on personal knowledge, stated his belief that some of the listed buildings were already receiving service from Liberty.[159] At that point, Liberty's counsel realized that Liberty may have activated certain microwave paths without Commission authorization.[160] One of those counsel who participated in the April 27 conference call, Mr. Barr testified: "[K]nowing that [the buildings in question] were petitioned [by Time Warner] and therefore no grant had been issued on the other hand, and then being informed [by Mr. Price] on the other that service was in fact being provided to those locations, I put two and two together and deduced that service was being provided to these locations without authorization."[161]

60. Liberty's counsel were shocked by the discovery.[162] If Mr. Price's belief was confirmed, then Liberty had engaged in a serious violation of the Commission's rules and

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[156] Tr. 1796:24-25 [Barr].

[157] Tr. 1858:9-13 [Barr].

[158] Tr. 1860:1-6 [Barr].

[159] Tr. 1364:13-21 [Price], 1797:6-7 [Barr].

[160] Tr. 1796:8-1797:7 [Barr].

[161] Tr. 1833:10-15 [Barr].

[162] Tr. 1798:9-17 [Barr].

regulations, and this fact had to be disclosed.[163] The determination was made to disclose only after all the facts were gathered, to avoid piecemeal disclosure to the Commission.[164] At no time was there an intent not to disclose fully to the Commission.[165]

LIBERTY'S RESPONSE TO THE DISCOVERY

61. Upon discovery of the premature activations, Liberty stopped activating any new paths.[166] By May 1, Howard Milstein was informed of the possibility that Liberty had unlawfully provided service to certain buildings without Commission authorization.[167] Immediately, Howard called Lloyd Constantine and ordered him to investigate this matter to confirm whether and to what extent Liberty had done "something that stupid."[168] Mr. Milstein's initial reaction, similar to others at Liberty, was one of incredulity and skepticism.[169]

62. On May 4, 1995, Liberty filed fourteen requests for STA, covering the sites listed in Mr. Lehmkuhl's April 28 memorandum that were held up both by the emission designator error and Time Warner's petitions to deny.[170] These STA requests did not disclose

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[163] Tr. 1368:6-10 [Price], 1798:22-1799:13 [Barr].

[164] Tr. 1367:11-1369:3 [Price], 586:3-25 [H. Milstein], 1801:20-25 [Barr].

[165] Tr. 582:25-583:6 [H. Milstein], 1367:6-1369:4 [Price], 1625:14-16 [E. Milstein], 1960:4-9 [Barr]; Price Dep. 209:18-210:19 [L/B 9].

[166] Nourain Dep. 85:15-16, 87:3-13 [L/B 7]

[167] Tr. 517:5-7 [H. Milstein], 1370:23-1371:12 [Price].

[168] Tr. 517:16-20 [H. Milstein]; 1624:1 [E. Milstein]; H. Milstein Dep. 29:15-30:10 [L/B 4].

[169] Tr. 518:12-20, 588:23-24 [H. Milstein], 1624:23-24 [E. Milstein].

[170] Tr. 1178:10-16 [Lehmkuhl], 1801:2-7 [Barr]; TW/CV 17, TW/CV 34.

that Liberty had prematurely activated those microwave paths.[171]

63. On May 5, 1995, in a reply submitted by Time Warner in connection with its April 10, 1995 petition to deny, Time Warner disclosed two sites at which it believed Liberty was providing service without license or STA.[172]

64. On May 17, 1995, Liberty submitted a surreply in response to Time Warner's May 5 reply.[173] Liberty acknowledged the premature activation at the two buildings identified by Time Warner and then proceeded to disclose an additional thirteen instances of premature activation. Liberty also attempted to provide a full explanation for this inadvertent violation of Commission rules and regulations.

65. After the initial investigation confirmed that Liberty did indeed engage in unauthorized activation of microwave paths, Howard Milstein requested outside counsel to develop a compliance program to prevent future unlawful transmission of microwave signals.[174] Even before the compliance program was implemented, Mr. Price undertook to audit and monitor the status of Liberty's license applications.[175]

66. On June 16, 1995, in response to an inquiry from Michael Hayden, Chief of the Commission's Microwave Branch, Liberty provided additional information regarding the

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[171] Tr. 1801:15-18 [Barr], 1057:20-22 [Lehmkuhl]; TW/CV 17.

[172] Tr. 1057:9-13 [Lehmkuhl].

[173] Tr. 1802:1-4 [Barr]; TW/CV 18.

[174] Tr. 520:17-19 [H. Milstein].

[175] TW/CV 23, 24.

fifteen prematurely activated buildings.[176] In connection with that submission, Mr. Price sent a letter to Hayden acknowledging the seriousness of the violation and accepting responsibility for Liberty's dereliction. Mr. Price also informed Mr. Hayden that pending the resolution of the matter, Liberty would suspend billing to the fifteen prematurely activated buildings. Liberty in fact did suspend billing to those buildings.[177]

67. Toward the end of June, four additional instances of premature activation were discovered.[178] The prior coordination notice for these sites were provided more than a year before, and Comsearch had apparently not forwarded that information to Pepper & Corazzini to file for licenses.[179] Liberty then proceeded to file for licenses and STAs for these four buildings and disclosed the fact of the premature activations in the requests for STA, dated July 17, 1995 and filed on July 24, 1995.[180]

68. After outside counsel completed the internal investigation into Liberty's premature activation of paths, Howard Milstein was fully apprised of the findings.[181] Howard then took appropriate action against those involved. Mr. Price, Mr. Ontiveros and Mr.

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[176] L/B 3; TW/CV 21.

[177] Tr. 1541:1-10 [Price]; E. Milstein Dep. 59:20-60:7 [TW/CV 46]; Price Dep. 173:3-20 [L/B 9].

[178] Tr. 871:12-873:12 [Nourain], TW/CV 50].

[179] Tr. 871:13-17 [Nourain]; Nourain Dep. 103:9-104:4 [L/B 7].

[180] Tr. 1192:2-1194:21 [Lehmkuhl]; TW/CV 25, 27.

[181] Tr. 601:11-15 [H. Milstein]; H. Milstein Dep. 30:14-31:7 [L/B 4].

Nourain were reprimanded and were deprived of their bonuses that year.[182] Mr. Nourain was effectively demoted.[183]

69. Liberty also instituted a compliance program. The licensing process now involved Liberty's in-house counsel, Andrew Berkman, who must certify in writing that there is an actual license before any buildings are activated to receive service.[184] The practice of pre-signing applications was put to an end, and Mr. Price would now sign the applications, not Mr. Nourain.[185] The Weekly Reports now track the progress of license applications under a column headed "License."[186] Liberty has not engaged in any unauthorized activation of microwave paths or buildings since April 1995.[187]

III. PROPOSED FINDINGS OF FACT

70. Based on the foregoing record evidence developed at the hearing and in this proceeding, Liberty proposes the following findings of fact:

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[182] Tr. 599:13-600:8 [H. Milstein], 1399:15-1400:2 [Price]; E. Milstein Dep. 55:20-22 [TW/CV 46]; H. Milstein Dep. 58:8-59:9 [L/B 4]; Price Dep. 223:17-226:3, 227:10-15 [L/B 9].

[183] Tr. 600:4 [H. Milstein]; Price Dep. 225:1-226:3 [L/B 9].

[184] Tr. 655:4-13 [H. Milstein], 1626:8-12 [E. Milstein], 1703:13-16 [Ontiveros], 1393:10-1395:4 [Price]; H. Milstein Dep. 43:9-20 [L/B 4]; Nourain Dep. 217:2-12 [L/B 7]; Ontiveros Dep. 27:11-28:4 [TW/CV 1]; Price Dep. 36:17-22 [L/B 9].

[185] Tr. 1394:20-24 [Price], 1058:13-18 [Lehmkuhl]; 24:20 - 25:19 [L/B 5].

[186] Tr. 1700:13-1701:9 [Ontiveros], 1395:5-1396:4 [Price]; Ontiveros Dep. 108:15-110:16 [TW/CV 1]; TW/CV 11.

[187] Tr. 1563:2-12 [Price].

A. Prior to the institution of a compliance program in mid-1995, Liberty had a disjointed licensing process without proper checks and balances to ensure against violation of the Commission's rules and regulations.

71. Mr. Price and Mr. Ontiveros, Mr. Nourain's supervisors, assumed incorrectly that Mr. Nourain knew what he was doing. They did not properly supervise Mr. Nourain in the performance of his licensing function. There was no effort made to track the status of licenses at various stages during the process of constructing the microwave network and installing a building to receive service. Mr. Nourain, as Liberty's sole microwave engineer, essentially worked alone. He also operated under certain faulty assumptions about the licensing process and no one at Liberty was aware that Mr. Nourain held these assumptions and acted in accordance with them.

72. Mr. Nourain viewed his position primarily as an engineering rather than a licensing function. He deferred to Pepper & Corazzini for handling the application process. Unfortunately, the flow of information between Mr. Nourain and Pepper & Corazzini was less than ideal. Mr. Nourain received the actual grants from the Commission but he did not have a regular practice of sending copies to Pepper & Corazzini. Mr. Nourain never informed Pepper & Corazzini when he would activate a microwave path. Consequently, Pepper & Corazzini did not and could not check to make sure that Mr. Nourain waited until he had an actual grant before transmitting signals to a building. To compound matters, Mr. Nourain did not file the granted licenses or STAs in any kind of coherent or systematic manner.

73. The licensing process prevalent at Liberty before April 1995 was thus characterized by disjuncture within the company as well as between Mr. Nourain, as the microwave engineer, and Pepper & Corazzini as licensing counsel. Liberty's premature

activation of buildings was a direct result of this disjointed process and not the product of any intent to violate the Commission's rules and regulations.

B. Liberty's principals neither approved nor encouraged the activation of any paths without Commission authorization.

74. Everyone at Liberty was aware that a license was required from the Commission before an 18 GHz path was activated. No one at Liberty directed or encouraged anyone else in the company to activate any buildings without Commission authorization.

75. Liberty had no incentive or motive to violate the law. Liberty was not driven to break the law in order to meet contractual commitments to install a building to receive Liberty service. While Liberty was motivated to install its customers as soon as possible within contractual requirements, Liberty always sought to do so within legal and regulatory constraints.[188] In any event, Liberty has never lost a customer for failing to install within contractual time frames.[189] Liberty's experience in installing buildings was that the customers were not "highly sensitive to demanding service on the day it was guaranteed."[190]

76. The proposed sale of Liberty's assets to Videotron around March 1995 did not provide any incentive to violate the law. Liberty was not spurred to sign up more customers at that time in order to boost its sales.[191] As a going concern, Liberty was constantly

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[188] Tr. 594:4-5 [H. Milstein]; H. Milstein Dep. 18:1-4 [L/B 4].

[189] Tr. 1582:5-11 [Price]; Price Dep. 51:18-52:5, 235:17-236:14 [L/B 9].

[190] Tr. 1587: 13-15 [Price].

[191] Tr. 540:9-541:13 [H. Milstein].

interested in maximizing its value, whether or not a sale of the company's assets was in process or under contemplation.[192]

77. Finally, as Mr. Price testified, Liberty openly advertised -- before April 1995 -- on the front page of *The New York Times* the fact that Liberty was providing service to buildings, including those listed in the HDO:

> Q. Did you in fact advertise the fact that particular buildings were being serviced by Liberty Cable?
>
> A. Every day. In today's New York Times, you'll see an ad on page 1 indicating that we've liberated another building by – by the address of the building. And in fact I – yesterday having familiarized myself with some of these memoranda and specifically addressing the Judge's concern that we focus on what was going on; when we learned and what we did, I looked at that week. And that same week, we were advertising at least one of those buildings on the HDO designation list on the front page of the New York times. So we certainly lacked oversight and had lousy procedures, if not, you know, terribly flawed procedures in place. But there was absolutely no intent to hide what we were doing. In fact, we advertised what we were doing.[193]

78. As Mr. Price testified, Liberty's conduct is inconsistent with any finding that Liberty's principals wanted to encourage or approve a violation of the Commission's rules and regulations; if Liberty's intent was to commence unauthorized service knowing that it was breaking the law, Liberty would have hidden, not broadcast, the fact that it was commencing service at a given building. There is no evidence that Liberty's principals were so brazen. In fact, all the evidence points to the contrary, as Liberty's witnesses testified to their awareness

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[192] Tr. 538:23-540:3, 591:11-12 [H. Milstein].

[193] Tr. 1398:13-1399:2.

of legal requirements and the need to operate in accordance with them.

C. The fact of premature activation became known among Liberty's principals and outside counsel no earlier than April 27, 1995.

79. The evidence at the hearing established that Peter Price, Howard and Edward Milstein learned about the premature activations no earlier than April 27, 1995. This revelation was triggered by the April 26 Nourain Memorandum, which appears to have been a focus of conversation during the April 27 conference call with counsel at Ginsburg, Feldman and Bress to discuss the issue of Time Warner's petitions to deny.

80. The April 26. Nourain Memorandum, even though it did not address the question of premature activations, refreshed the witnesses' recollections regarding when they discovered the premature activations. Although Mr. Lehmkuhl's February 24 Inventory provided a prior sign which -- with some additional examination that was apparently not undertaken -- could have revealed the unauthorized operation of microwave paths sooner than late April 1995, the warnings unfortunately went unheeded. Liberty's disregard of significant information which could have prevented or minimized the violation of licensing requirements is a further reflection of the negative effects flowing from the disjointed licensing process that prevailed before mid-1995.

D. Liberty had always intended to disclose the facts and circumstances of the premature activations as soon as it had all the facts to present to the Commission.

81. The initial reaction at Liberty upon discovery of the premature activations was shock and disbelief. However, there was not certainty at first that buildings actually were receiving service prematurely nor was there certainty as to the extent of the problem.

Therefore, Liberty determined to investigate the matter and to disclose fully to the Commission once all the facts had been gathered and verified.

82. Mr. Lehmkuhl prepared the May 4, 1995 request for STA which did not disclose that Liberty prematurely activated microwave paths. Evidence was developed at the hearing that Mr. Lehmkuhl's supervisor, Mr. Barr, knew about the premature activations prior to the May 4 STAs being filed[194] and had intended to disclose the fact and extent of the premature activations in subsequent filings with the Commission.[195]

83. On May 5, 1995, Time Warner disclosed in a reply pleading that Liberty appeared to be engaging in the unauthorized operation of two microwave paths. Within two weeks of that disclosure, Liberty concluded its investigation and disclosed forthrightly an additional thirteen sites that were unlawfully receiving service without Commission authorization.[196] Toward the end of June, Liberty discovered four more instances of premature activation and disclosed this fact to the Commission a few weeks later in the requests for STA that were filed.[197] Furthermore, Liberty cooperated fully and openly with the Commission's requests for more information pursuant to 47 U.S.C. § 308(b).[198] Based on these facts, Liberty displayed candor and forthrightness in dealing with the Commission to

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[194] Tr. 1796:8-1797:7 [Barr].

[195] Tr. 1799:15-20, 1801:20-25, 1802:13-19, 1863:2-1864:2, 1895:25-1896:2, 1960:4-9 [Barr].

[196] TW/CV 18.

[197] TW/CV 27, 50.

[198] L/B 3; TW/CV 21.

reveal the full circumstances leading up to the premature activations. No finding of a failure to disclose or an intent to deceive can be found from these facts.

E. Liberty can be relied upon to remain compliant with FCC laws and regulations in the future.

84. As shown by the record evidence, Liberty took immediate action to remedy its unlawful actions: Liberty stopped activating paths and also suspended billing to customers at the affected sites so that the company would not profit from its violation of the law. Mr. Price began a process of auditing and monitoring the status of Liberty's licenses. Liberty's Chairman, after being fully apprised of the facts, took appropriate action against responsible personnel. Finally, Liberty has implemented an effective compliance program and has not commenced service without Commission authorization since April 1995.

85. In addition, the law has been changed so that no violation could occur prospectively. As noted in the HDO, ¶ 14 n.9, the Commission's rules applicable to Liberty's filing for microwave licenses was amended effective August 1, 1996 so that an applicant can commence service upon the filing of an application.

F. The witnesses presented credible and candid testimony regarding the disjointed license process that prevailed at Liberty prior to April 1995.

86. The deposition testimony of Mr. Price, Mr. Nourain, Mr. Ontiveros and Mr. Lehmkuhl showed that Liberty operated under a disjointed licensing process before April 1995. The following uncontroverted facts were established from the deposition testimony and each of these facts was confirmed at the mini-hearing:

- Mr. Nourain was hired upon Stern's recommendation.[199]

- Mr. Nourain performed his function without adequate supervision or oversight from Mr. Price and Mr. Ontiveros.[200]

- Mr. Nourain did not attend the weekly Thursday meetings at which Liberty's principals was present and his contact with Liberty's principals was infrequent.[201]

- Mr. Nourain, based on his prior job experience, viewed his role at Liberty as limited primarily to engineering and deferred the licensing function to Pepper & Corazzini.[202]

- Mr. Nourain activated buildings without waiting for an actual Commission grant before transmitting signals over a new path.[203]

- Mr. Nourain pre-signed license applications and STA requests in blank.[204]

- Mr. Nourain did not inform Pepper & Corazzini when he would activate a building for service; consequently, Pepper & Corazzini did not and could not

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[199] Tr. 515:19-21 [H. Milstein], 611:18-612:1 [Nourain], 1351:9-11 [Price], 1692:17-20 [Ontiveros]; H. Milstein Dep. 39:20-40:1 [L/B 4]; Price Dep. 265:8-13 [L/B 9].

[200] Tr. 947:6-9, 978:5-979:9 [Nourain], 1396:16-22, 1413:2-5, 1575:18-24 [Price], 1691:23, 1692:3, 1693:12-1694:3, [Ontiveros]; H. Milstein Dep. 40:17-21 [L/B 4]; Nourain Dep. 40:18-41:7 [L/B 7]; Ontiveros Dep. 26:13-18 [TW/CV 1]; Price Dep. 234:2-235:16 [L/B 9].

[201] Tr. 563:5-8 [Nourain], 1716:15-17 [Ontiveros]; E. Milstein Dep. 29:18-30:3 [TW/CV 46]; H. Milstein Dep. 40:3-4 [L/B 4]; Nourain Dep. 54:25-55:1 [L/B 8]; Ontiveros Dep. 70:11-13 [TW/CV 1]; Price Dep. 262:18-22, 266:21-267:11 [L/B 9].)

[202] Tr. 675:21-676:6, 710:4-9, 940:7-10, 943:6-944:2 [Nourain]; 1696:18-1697:10 [Ontiveros]; Nourain Dep. 13:18-14:11, 25:1-13, 41:2-3, 51:9-54:3 [L/B 7].

[203] Tr. 641:15-643:11 [Nourain]; Nourain Dep. 207:5-211:6 [L/B 7].

[204] Tr. 629:8-632:8, 848:22-849:1, 940:14-16 [Nourain], 1033:6-24, 1080:20-21, 1099:8-12 [Lehmkuhl], 1821:5-11 [Barr]; Lehmkuhl Dep. 72:4-8 [L/B 5]; Nourain Dep. 43:9-44:22, 89:22-90:3 [L/B 7], 44:5-10 [L/B 8].

verify with Mr. Nourain or anyone else at Liberty that buildings were not activated before the Commission granted authorization.[205]

- Mr. Nourain received grants of authority directly from the Commission, and he did not have a regular practice of sending copies of these grants to Pepper & Corazzini.[206]

87. At the mini-hearing, Mr. Nourain candidly admitted that he did not have an orderly filing system. This fact further lent credence to the reasons for Liberty's unlawful commencement of service at numerous sites. The testimony of the other witnesses at the mini-hearing corroborated Mr. Nourain's testimony regarding Liberty's licensing process before April 1995. In addition, they all testified openly and forthrightly about an embarrassing and devastating episode in the company's history and acknowledged the seriousness of the error.

G. The witnesses presented credible and candid testimony that the premature activations did not result from any intent by Liberty's principals to violate the Commission's rules and regulations.

88. Both at the depositions and during the mini-hearing, the witnesses testified to their awareness that a license was required from the Commission before any building could be activated.[207] Furthermore, the testimony from the mini-hearing revealed that no one at Liberty encouraged or directed anyone else at Liberty to provide service to a building without

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[205] Tr. 654:4-8, 716:3-25 [Nourain], 1039:14-23 [Lehmkuhl], 1805:11-15 [Barr]; Lehmkuhl Dep. 164:14-17 [L/B 6]; Nourain Dep. 208:5-211:6 [L/B 7].

[206] Tr. 652:25-653:20, 704:16-24 [Nourain], 1036:17-25 [Lehmkuhl]; Lehmkuhl Dep. 14:6-13 [L/B 5].

[207] Tr. 515:13-16, 517:22-24, 519:16-19 [H. Milstein], 1351:16-1352:22 [Price]; McKinnon Dep. 8:17-9:3 [TW/CV 41]; Price Dep. 17:18-18:3 [L/B 9].

Commission authorization.[208]

89. As established by testimony from the mini-hearing and the depositions, the witnesses uniformly reacted with surprise upon discovering that certain microwave paths were prematurely activated.[209] This uncontroverted fact further demonstrates lack of knowledge of the violations, especially among Liberty's principals.

90. Therefore, the consistent and forthright testimony by the witnesses demonstrated that Liberty's principals did not intentionally engage in the premature activation of microwave paths nor did they approve or encourage such unlawful operation.

H. The witnesses presented credible and candid testimony regarding the discovery of premature activations in late April 1995 and not earlier.[210]

91. The witnesses at the mini-hearing, assisted in their recollections by the late-produced April 26 Nourain Memorandum, confirmed that Liberty realized its unlawful operation of microwave paths during a conference call with counsel on April 27, 1995. Prior to the mini-hearing, the witnesses' best recollection on this issue was that they either learned in late April 1995[211] or from Time Warner's pleadings, presumably the petitions to deny and

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

[209] Tr. 519:25-520:22 [H. Milstein], 646:10 [Nourain], 1184:7-9 [Lehmkuhl], 1702:11-12 [Ontiveros], 1798:9-17 [Barr]; E. Milstein Dep. 49:2 [TW/CV 46]; H. Milstein Dep. 39:9-11 [L/B 4].

[210] Liberty does not rely on Nourain's testimony to support this finding, Letter from Robert Begleiter and Eliot Spitzer to Judge Sippel (Feb. 6, 1997) ("February 6, Letter").

[211] Nourain Dep. 76:17-77:1 [L/B 7].