

33. On June 13, June 22, and July 12, 1995, Liberty once again amended its modification application for 2727 Palisades Avenue to add paths from the Century transmitter site to OFS receive sites located at 3215 Arlington Parkway, 3001 Henry Hudson Parkway, 3875 Waldo Avenue, and 2500 Johnson Avenue. TWCV Ex. 40, at 2, 6; TWCV Ex. 43, at 1; Lehmkuhl, Tr. 1273-76.⁷ Again, Liberty did not disclose in those applications that it had already commenced service to 2727 Palisades Avenue without FCC authority.

34. On July 12 and again on July 24, 1995, Liberty amended its original STA request for 2727 Palisades Avenue to include additional receive sites located at 3001 Henry Hudson Parkway, 3875 Waldo Avenue and 2500 Johnson Avenue. TWCV Ex. 40. In both of those STA amendments, Liberty observed that its original application for 2727 Palisades Avenue was still pending, and that special temporary authority was required in order to operate the requested facilities until grant of the underlying application. TWCV Exs. 40, 43. Yet no mention was made of the fact that Liberty was already operating 2727 Palisades Avenue, without FCC authority.

35. On June 9, 1995, pursuant to 47 U.S.C. § 308(b), the Commission directed Liberty to provide more detailed information about Liberty's unauthorized activation of service at microwave facilities. TWCV Ex. 20. Specifically, Liberty was "directed to provide the date each unauthorized path was placed in operation, as well as the number of subscribers currently being served by each new path." *Id.* Liberty, by its counsel, Mr.

⁷Each of these receive sites is located within the territory currently served by Cablevision. The locations specified in TWCV Ex. 40, at 9 use abbreviated names for the streets where the receive sites are located. *See, e.g.*, TWCV Ex. 43. Again, these locations were incorporated under the FCC file number for 2727 Palisades Avenue (713295). TWCV Exs. 40, 43.

Barr, submitted a response to the Section 308(b) inquiry on June 16, 1995. TWCV Ex. 21. A cover letter drafted by Mr. Price accompanied Liberty's response. L/B Ex. 3. The response did not list any unlicensed facility not previously identified in the May 17, 1995 Surreply.

36. Liberty filed applications for microwave facilities to serve four additional locations on July 17, 1995:

- (1) 1295 Madison Ave.
- (2) 38 E. 85th St.
- (3) 430/440 E. 56th St.
- (4) 380 Rector Pl.

See, e.g., TWCV Ex. 25. These facilities are listed in Appendix A of the HDO. Although these facilities were already operating when the applications were filed, the applications failed to state that fact. TWCV Ex. 30. On July 24, 1995, Liberty filed STA requests for these four microwave facilities, which did reveal that they were already in operation. TWCV Exs. 27, 30. At no time did Liberty ever supplement its June 16, 1995 response to the Commission's June 9, 1995 Section 308(b) request to reveal the existence of four more unauthorized, activated facilities.

II. Liberty's Activation Of Unlicensed Microwave Paths.

37. Liberty activated a total of nineteen unlicensed microwave facilities during the period from July 11, 1994 through April 24, 1995. TWCV Ex. 30. These facilities fall into two groups: a group of six facilities activated before any license application had been filed and a group of thirteen facilities activated while license applications were pending. Id. Although requests for STA eventually were filed for all of these facilities, all of the STA requests were filed after the facilities had been activated. Id.

38. Testimony at the hearing concerned the thirteen unlicensed facilities that were activated after a license application had been filed. A number of Liberty's microwave license applications were the subjects of petitions to deny filed by TWCNYC on January 9, 1995. Mr. Price, Liberty's President, received copies of these petitions from Pepper & Corazzini, after they had been filed. Barr, Tr. 1815-16; Price, Tr. 1435-36. On January 11, 1995, Mr. Price and Mr. Barr spoke by telephone regarding these petitions. Barr, Tr. 1814-15; TWCV Ex. 44. Mr. Barr told Mr. Price that, regardless of their merit, the effect of the petitions was to delay the processing of Liberty's pending license applications. Barr, Tr. 1795-96; Price, Tr. 1514-15.

39. Mr. Lehmkuhl also discussed the petitions to deny with Mr. Nourain during the same time period. Lehmkuhl, Tr. 1189-90. Likewise, Mr. Nourain understood that the effect of the petitions was to delay the Commission's processing of Liberty's applications. Id. at 1096-97, 1188-89.

40. Mr. Nourain claims to have understood that the petitions had been filed only against applications that were for microwave facilities to replace existing coaxial connections to buildings presently being served by Liberty. Nourain, Tr. 986, 996-97. However, copies of the petitions, which were not so limited, were delivered to Liberty by its FCC counsel. Barr, Tr. 1815-16; Price, Tr. 1435-36; Lehmkuhl, Tr. 1083. Moreover, Mr. Nourain understood that the petitions applied to all of Liberty's pending applications for microwave facilities to serve addresses in Manhattan and the Bronx, where TWCNYC was a franchised cable operator. Lehmkuhl, Tr. 1096-97, 1189-90. Similarly, in his discussions of the petitions, Mr. Lehmkuhl never suggested that they were limited to only some of Liberty's

applications to serve new customers in Manhattan and the Bronx; and Mr. Nourain never gave him any indication that he believed otherwise. Id.

41. Meanwhile, in January, 1995, Liberty activated unlicensed facilities to serve 35 W. End Avenue, 441 E. 92nd Street, 564 First Avenue, 545 First Avenue and 114 E. 72nd Street. TWCV Ex. 30. Except for 441 E. 92nd Street, which was not the subject of a pending application, the other unlicensed facilities were the subject of pending applications. Id.

42. Liberty has given no explanation of why it activated 441 E. 92nd Street before it had even filed an application. The application was filed on February 21, 1995. Id.

43. In February 1995, Liberty activated unlicensed facilities to serve two more addresses: 639 W. End Avenue and 25 W. 54th Street. Id.

44. On February 24, 1995, Mr. Lehmkuhl sent both Messrs. Price and Nourain an "Inventory" of all of Liberty's microwave licenses and pending applications. L/B Ex. 1. The February 24, 1995 "Inventory" identified all of the addresses to which Liberty had commenced service by means of unlicensed facilities to date in 1995 as the subject of "pending" applications. Id. Similarly, Liberty had commenced service in late 1994 to two addresses that also were identified in the February 24, 1995 "Inventory" as the subject of "pending" applications: 433 E. 56th Street and 524 E. 72nd Street. Id.; TWCV Ex. 30.

45. As a regular part of its business, Liberty compiled a weekly operations report that reflected the status of its construction of new facilities and installation of customers. Ontiveros, Tr. 1699; TWCV Ex. 14. This report was prepared by Mr. Ontiveros, and Mr. Nourain supplied information regarding microwave facilities. Ontiveros, Tr. 1699, 1719,

1724; L/B Ex. 8 (Nourain Deposition, 8/1/96), at 54. Where the report indicates that customers are being "installed" in a particular building, microwave service to that building has been established and individual customers are being connected to the distribution system in the building. Ontiveros, Tr. 1723; TWCV Ex. 1 (Ontiveros Deposition, 5/21/96), at 90-91. This report was seen and discussed by Edward and Howard Milstein, Peter Price, Anthony Ontiveros and others at a weekly senior management meeting held every Thursday. Ontiveros, Tr. 1714-16, 1719. Thus, within a week, Messrs. Price, E. Milstein and H. Milstein were aware of when a microwave facility to a particular building had been activated.

46. Mr. H. Milstein testified that he would have expected the persons receiving the February 24, 1995 Inventory to use that document to compare the lawyers' report of licensing status with Liberty's operational records. H. Milstein, Tr. 559. However, both Messrs. Price and Nourain say they have no recollection of having seen the "Inventory" and performed no such comparison. Nourain, Tr. 652; Price, Tr. 1434. Mr. Price admitted that such a comparison would have revealed the existence of Liberty's unlicensed operational microwave facilities. L/B Ex. 11 (Price Deposition, 8/1/96), at 174-78.

47. In March 1995, Liberty continued to activate unlicensed facilities to serve additional addresses: 30 Waterside, 200 E. 32nd Street, and 16 W. 16th Street. TWCV Ex. 30. All of these facilities were listed as the subject of "pending" applications on the February 24, 1995 Inventory. L/B Ex. 1.

48. In April 1995, Liberty activated unlicensed facilities to serve three more addresses: 767 Fifth Avenue, 6 E. 44th Street, and 2727 Palisades Avenue. Only the application for the facility to serve 2727 Palisades Avenue was not listed on the February 24,

1995 Inventory. That application had been filed in March, after the Inventory had been prepared. TWCV Ex. 30.

III. Liberty Recklessly Disregarded The Commission's Rules Requiring Authorization Prior To Activating A Microwave Facility.

A. Liberty knew that FCC authorization was necessary prior to activating a microwave facility.

49. Liberty's management knew that FCC authorization was necessary to operate microwave facilities utilizing the 18 GHz frequency. Price, Tr. 1352; Nourain, Tr. 613-15; E. Milstein, Tr. 1615-16; Ontiveros, Tr. 1687.

50. Bruce McKinnon was Vice President of Operations and Chief Operations Officer from the summer of 1991 through May 1993. Price, Tr. 1440-41. Mr. McKinnon reported to Mr. Price. Ontiveros, Tr. 1697-98. Mr. McKinnon oversaw the operations department and ensured that Messrs. Ontiveros and Nourain coordinated their activities with regulatory counsel. Price, Tr., 1443-44. While Mr. McKinnon was at Liberty, the operations department waited until it actually received a license from the FCC before activating a microwave facility. TWCV Ex. 41 (McKinnon Deposition, 6/5/96), at 8-9, 12.

51. Mr. Nourain understood that FCC authorization was necessary prior to activation. TWCV Ex. 41 (McKinnon Deposition, 6/5/96), at 12.

52. When Mr. Nourain was hired, he told Mr. Joseph Stern, Liberty's consultant, that he understood the licensing process.

Q: Did Mr. Nourain indicate to you any kind of confusion or uncertainty about how the [licensing] process worked?

A: No. He said he understood the process completely; there was no need to go into detail.

Nourain, Tr. 663 (quoting from Stern Deposition, 6/5/96).

53. In April 1993, Mr. Nourain reviewed a letter that outlined the requirements for FCC compliance. Jennifer Richter, an attorney at Pepper & Corazzini, sent the letter, dated April 20, 1993, to Bruce McKinnon. Handwritten notations on the letter indicate that Mr. Nourain reviewed the letter and forwarded it to Mr. Price. TWCV Ex. 51. In the letter, Ms. Richter stressed that new microwave paths cannot be activated until the FCC grants authorization. She also advised Liberty of the number of days it usually takes for the FCC to process an application. Id.

B. Liberty's method of activating microwave facilities was based on groundless assumptions and ignored the Commission's Rules.

54. As part of his responsibilities, Mr. Nourain conducted line of sight surveys of proposed microwave paths to new receiver locations and performed coordination technical studies to ascertain geographic information about the transmitter and receiver. Nourain, Tr. 617-19. Upon completion of these technical tasks, Mr. Nourain sent technical data to Comsearch, a firm that performed a coordination interference study to ensure that there would be no interference with other users. Id. at 619-20, 692-93; Lehmkuhl, Tr. 1029.

55. When Comsearch completed its coordination study, it sent the results directly to Pepper & Corazzini, the law firm that prepared Liberty's license applications. Nourain, Tr. 620-21; Lehmkuhl, Tr. 1028. Comsearch later sent a supplemental showing to Pepper & Corazzini, which listed other potentially affected users within the geographic area and the emission designators for the equipment. Nourain, Tr. 621-23. See TWCV Ex. 25, at 15-22.

56. According to Mr. Lehmkuhl, it takes approximately 30 days for Comsearch to complete a supplemental showing after the prior coordination notice is sent to potentially

affected users of the spectrum. Lehmkuhl, Tr. 1031. Mr. Lehmkuhl stated that he generally receives the supplemental showing within 45 days from the date the prior coordination notice is sent out. Id. at 1032.

57. Pepper & Corazzini prepared the application when it received the results of the coordination interference study from Comsearch. Nourain, Tr. 630; Lehmkuhl, Tr. 1066. Mr. Lehmkuhl conferred with Mr. Nourain when he prepared applications for Liberty. Lehmkuhl, Tr. 1031, 1074-75. After receiving the supplemental showing, Pepper & Corazzini was to file the application as soon as possible. Nourain, Tr. 630. Mr. Lehmkuhl filed the application not more than two weeks after he received the supplemental showing. Lehmkuhl, Tr. 1067. Although the completed application bore Mr. Nourain's signature, he did not actually sign the completed application. Rather, he signed a large number of blank application forms, which were left in the Pepper & Corazzini offices. Mr. Lehmkuhl filled in the appropriate date next to Mr. Nourain's signature. Pepper & Corazzini sent copies of filed applications to Mr. Nourain. Nourain, Tr. 694-95; Lehmkuhl, Tr. 1077.

58. Mr. Nourain relied on Pepper & Corazzini filing an application immediately after they received a supplemental showing from Comsearch.

[T]hey were instructed to [file the application] as soon as they got the supplemental showing . . . They were supposed to have the application completely filled out and ready. As soon as the supplemental showing will go to them, they should file them. And we all know the supplemental showing -- at the time I knew that it will take, again, somewhere between 15 and 20 days to -- after the Comsearch will send their data out to come back to them and they will send it to Pepper & Corazzini. Therefore, my assumption was roughly about 20 days -- 15 to 20 days. After I saw the date of the Comsearch's data sheet, that application should have been filed with an STA.

Nourain, Tr. 696-97.

59. Mr. Nourain testified that Pepper & Corazzini, specifically Mr. Lehmkuhl, was told to apply for STA automatically with the filing of a license application. Id. at 645, 714-15, 936-37. However, both Mr. Barr and Mr. Lehmkuhl contradict that statement. Lehmkuhl, Tr. 1038; Barr, Tr. 1821. Moreover, Ms. Richter's 1993 letter does not suggest that routine filing of STA requests was part of the course of dealing between Liberty and Pepper & Corazzini. TWCV Ex. 51. Similarly, Mr. Lehmkuhl's February 24, 1995 "Inventory" of Liberty's microwave licenses and applications states that Liberty is not operating under any STAs and reflects a number of pending license applications, but no pending STA requests. L/B Ex. 1.

60. Mr. Nourain paid no attention to whether an STA had actually been granted for a path prior to activating it. He assumed that an STA would be granted within a few days after a license application was filed.

Witness: "I did not -- I did not pay attention to those STAs. I was looking for the time that I was -- I was completing the technical information.

Judge Sippel: You just looked at the date that you completed your job and then you looked at the calendar and then you made your decision.

A: Based on what I was told, that it's going to take a certain time to get the process of -- Comsearch is going to take time for filing. And the STA which would be filed -- my assumption was the STA would be filed with the application. And a few days after that, you will get authority to turn the path on.

Nourain, Tr. 642-43; see id. at 703.

61. During 1994 and 1995, Mr. Nourain assumed that it would take about a month to 40 days to get an STA after he received Comsearch's coordination study for a path.

It could have been as -- as my understanding was if I do anything expedited, it could have been as quick as three weeks to, if nothing was expedited, would

be within about a month to 40 days. That's after I got the Comsearch -- from the date that I got that Comsearch technical information and I reviewed would be between two weeks to at some cases the month.

Nourain, Tr. 846-47.

62. Mr. Nourain received STAs at his office, but made no effort to keep track of the authorizations that would allow him to transmit for each path, or to ascertain the microwave path location to which they applied. Id. at 634, 707.

63. Solely because Mr. Nourain had been receiving some STAs in the past, he assumed he had authority to activate microwave paths, without regard to whether the STAs he had received in fact applied to the activated paths. Id. at 639.

64. In actuality, Mr. Nourain was not receiving STAs for new paths in 1995. During the period of January and February 1995, Liberty received less than five STAs. These STAs were renewals of expiring STAs and not STAs for new paths. Lehmkuhl, Tr. 1104-05, 1258. Furthermore, in February 1995, Mr. Nourain received a memorandum from Mr. Lehmkuhl which stated that Liberty was not operating under any STAs. Id. at 1039; L/B Ex. 1.

65. If Mr. Nourain were unaware of the true nature of the workings of the FCC's application process, as he claims to have been in the late 1994 - early 1995 period, this lack of awareness was the product of a willful refusal to check the validity of his "assumptions" with legal counsel, even though he conversed "fairly regularly" with them. Barr, Tr. 1807, 1809. Those conversations do not support the "assumption" Mr. Nourain claims to have had.

Q: Let's just clarify. No lawyer ever told you, Mr. Nourain, that you could wait a certain number of days after you did a coordination and confidently be sure that you could turn on a new microwave facility legally.

A: I was -- I was also getting --

Q: Isn't that correct?

A: That's correct.

....

Q: No lawyer ever told you, Mr. Nourain, did he or she, that with respect to any of the addresses listed here, that you had a license or special temporary authority prior to the date that you actually turned these facilities on --

A: No.

Nourain, Tr. 725-26.

66. Mr. Nourain's actual activation practices did not even conform to his assumptions. Mr. Nourain assumed that Liberty would receive an STA to operate a microwave facility within 30 to 40 days after Comsearch completed its frequency coordination study. Nourain, Tr. 846-47. However, regarding the microwave facilities that were prematurely activated, Mr. Nourain inconsistently waited between four and 203 days before turning on a facility. Findings, ¶ 18. Moreover, he activated six facilities before filing an application for them.

67. Finally, even if Mr. Nourain truly had a basis for assuming he would be authorized to activate new microwave facilities 40 days after the completion of the frequency coordination study, in the first quarter of 1995, a new factor existed -- TWCNYC's petitions to deny Liberty's applications. The fact of these petitions and the likelihood that they would delay Commission action on Liberty's pending applications was a matter that was known to

both Mr. Price and Mr. Nourain. Barr, Tr. 1795-96, 1814-15; Lehmkuhl, Tr. 1096-97, 1188-90; Price, Tr. 1506, 1514-16.

C. Liberty's senior management insulated itself from the microwave licensing and activation process.

68. Mr. Nourain had sole decision-making authority regarding when to activate a microwave path.

Judge Sippel: I'm saying that after -- you now have reached the decision where you're going to activate. You make that -- you were making that decision alone, right, back in 1995 or --

A: That's correct.

Nourain, Tr. 676.

69. Mr. Price testified that until mid-1995 he relied on engineering and operations to interact with counsel to coordinate the licensing of the buildings. Price, Tr. 1355, 1361, 1396. He admitted that there was no executive oversight of the licensing and microwave activation process. Price, Tr. 1396; see id. at 1355.

70. After Mr. McKinnon left Liberty, Mr. Ontiveros took over some of his functions, but he did not supervise Mr. Nourain in his engineering microwave functions except as it related to construction of the microwave system at a building. Ontiveros, Tr. 1692, 1698. Mr. Ontiveros did not track Mr. Nourain's licensing activities and was unaware of Mr. Nourain's practice of activating paths based on assumptions as to when the FCC would act on a request for authorization. Id. at 1694, 1735.

71. Mr. Ontiveros admitted that he should have been more involved with Mr. Nourain's activities. Id. at 1702.

72. No one ever told Mr. Ontiveros to ensure that activations did not occur without a license. Id. at 1780. He did not receive a reprimand for not supervising Mr. Nourain. Id. at 1774.

73. No one at Liberty was aware of Mr. Nourain's use of assumptions to decide when to activate a microwave facility.

Judge Sippel: So you were the only one at Liberty that knew that that's the way you were operating? Is that your testimony?

Witness: I was the only one that knew and that was -- yes, after I was discussing that with -- I would get all my information from discussing it with Pepper & Corazzini.

....

Judge Sippel: ... My question is is there anybody in Liberty management that knew what you were doing. Anybody.

A: No, I don't think so as far as the timing is concerned.

Nourain, Tr. 975-76; Price, Tr. 1574-77. Liberty's counsel was also ignorant of Mr. Nourain's assumptions. Lehmkuhl, Tr. 1331-32.

74. Licensing was not a routine topic at meetings attended by Mr. Nourain. When licensing was discussed, it was usually done in a general way. Mr. Nourain recalled that:

[i]f it was -- if it was -- if it was the problem with activating and it wasn't on my -- on my formula so to speak to activate that, then I would tell them that we need more time to activate the path or to turn the system on. And that would be the extent of it.

Nourain, Tr. 976-77. He remarked that the marketing meetings mostly concerned signing up buildings and construction. Id. at 977. At such meetings, Mr. Nourain would be asked "are we okay with the STAs. And I would tell them yes." Id. at 978.

75. Mr. Nourain was never asked whether a particular license or STA had been received.

Judge Sippel: ... But nobody ever asked have we got the license or have we got the STA?

...

Witness: No, nobody ever asked me that question.

....

Judge Sippel: Or nobody said that when the STA comes in, give me a call and tell me. Nobody ever said that?

Witness: That's correct.

Id. at 978-79.

76. In fact, Liberty's senior management rarely had any contact with Mr. Nourain. Mr. Price testified that "the root of the problem here is today a lack [of] oversight on our part in managing our license process." Price, Tr. 1413. Mr. H. Milstein had virtually no contact with Mr. Nourain prior to the unauthorized activation issue. H. Milstein, Tr. 563.

77. Mr. Price did not have regular meetings with Mr. Nourain, who was responsible for all aspects of the microwave system. Price, Tr. 1437-38.

78. Mr. Price said he did not know whether Mr. Nourain was receiving copies of applications and STA requests filed by Pepper & Corazzini. Id. at 1439.

79. In fact, Mr. Price said he was totally ignorant of Mr. Nourain's practices regarding the activation of microwave paths.

Judge Sippel: Well, this talk about having a procedure in place, did you have any idea what Mr. Nourain was doing in terms of when he had authorization to activate these paths?

Witness: No, I presumed that he knew -- he was recommended by someone I respected. He was supervised by someone I had worked with for a period of

several years, Tony Ontiveros. And he was I believe audited I thought by regulatory counsel I talked to once a week. And no one told me that I should be concerned that he wasn't doing what he was supposed to do.

Id. at 1439-40. Mr. Price testified that he never had a conversation with Mr. Nourain regarding his mode of operation. Id. at 1572. In fact, Mr. Price has never even attempted to learn the reason for unauthorized activations. At the hearing, he claimed that he still has no knowledge about Mr. Nourain's practices. Id. at 1573-77.

80. Mr. Nourain sensed that Mr. Price was not open to frequent communication. Mr. Nourain testified: "I did not just routinely go see Mr. Edward Milstein or Mr. Price, it's not something I just say I want to come and talk to you; they come down there and talk to them." Nourain, Tr. 747.

81. Mr. H. Milstein testified that: "Peter [Price] set up and provided that interface [between counsel and operations] to be sure we were complying with the regulatory requirements to operate in the 18 gigahertz spectrum." H. Milstein, Tr. 515-16. However, Mr. Price failed to establish a compliance system and his assumptions regarding compliance were groundless.

82. Mr. Price testified that he established a compliance procedure in a 1992 memorandum addressed to Mr. McKinnon. Price, Tr. 1396-97; L/B Ex. 2.

Judge Sippel: Is the only -- is the only written document that memorialized the compliance, the first compliance procedure that was initiated under you? Is that all contained in Liberty Exhibit Number 2?

Witness: Yes, sir. It is.

Price, Tr. 1396-97.

83. Mr. McKinnon, the recipient of the memorandum, did not view it as the establishment of a compliance procedure. He thought that Mr. Price was merely directing him to spend less time monitoring the FCC licensing procedure and more time on installing facilities. TWCV Ex. 41 (McKinnon Deposition, 6/5/96), at 19-20.

84. Mr. H. Milstein testified that Mr. Price instructed Pepper & Corazzini "to put in place a monitoring system and to audit it from time-to-time to be sure we'd be in compliance." H. Milstein, Tr. 554.

85. However, Pepper & Corazzini was not aware of any instructions to audit Liberty's procedures.

Q: Mr. Lehmkuhl, during the period June 1994 through July 1995, was -- to your knowledge, was Pepper & Corazzini ever instructed by Liberty to audit its procedures for ensuring that it did not commence operation [without] authorization?

A: No.

Q: Was -- to your knowledge, was Pepper & Corazzini ever asked to audit Liberty's procedures for turning on facilities -- turning on OFS paths for which it desired to provide services?

A: No.

Q: So I take it that it was not up to Pepper & Corazzini during that time period to devise a means for monitoring Liberty's activations of OFS paths.

A: That's correct.

Lehmkuhl, Tr. 1287-88.

86. Pepper & Corazzini did not have a compliance program for Liberty to ensure that Liberty was not operating without licenses, although it was customary to send

inventories, such as the February 24, 1995 Inventory, to Messrs. Nourain and Price. Barr, Tr. 1822-24; L/B Ex. 1.

87. Even though Liberty had weekly installation progress reports that tracked the progress of construction and installation at all the buildings it served or contracted to serve, according to its co-chairman, no one at Liberty tracked license applications or STA requests or reconciled FCC authorizations with activated facilities. E. Milstein, Tr. 1618; TWCV Ex. 14.

88. Until late April 1995, no one at Liberty reviewed applications prior to filing. Mr. Nourain signed license applications in blank and sent them to Pepper & Corazzini. Nourain, Tr. 629-31; Lehmkuhl, Tr. 1071. According to Mr. Nourain, signing STA applications in blank was prompted by Pepper & Corazzini. According to Mr. Lehmkuhl the practice of signing applications in blank was in place when he arrived at Pepper & Corazzini. He understood that it was Mr. Nourain's idea. Lehmkuhl, Tr. 1033-34, 1080, 1099-100.

IV. Testimony Regarding The Actual Date That Liberty First Obtained Knowledge Of Unauthorized Activation Of Microwave Paths Lacks Credibility.

89. The original purpose of the hearing was to shed some light on an important matter left unclear in the Joint Motion for summary decision -- when and how Liberty became aware that it was operating unlicensed microwave facilities. The hearing testimony, unfortunately, did not provide that resolution. As is discussed in more detail, *infra*, in their depositions, Liberty's principals all testified that it was TWCNYC's May 5, 1995 pleading filed with the Commission that first brought this matter to their attention. If that were the case, Liberty's failure to have revealed its unlicensed operations in its May 4, 1995 STA requests for facilities that already had been activated would have been excusable. See

TWCV Ex. 17. However, subsequent to the principals' depositions, documents came to light that impeached this version of events. See TWCV Exs. 34, 35.

90. At trial, these principal witnesses departed from their deposition testimony by acknowledging that they knew that Liberty was operating unlicensed facilities sometime during the week of April 24, 1995, before TWCNYC brought the matter to the Commission's attention. Each witness's testimony will be discussed in turn.

A. Howard Milstein.

91. At the hearing, Mr. H. Milstein testified that he first became aware of the possibility of Liberty's unauthorized activation of microwave facilities in "late April 1995."

Q: So when did you first become aware that there was an issue with respect to Liberty Cable's transmitting signal on paths that had not been properly licensed by the FCC?

A: Well, I became aware that there was a concern that it might not be properly licensed sometime in late April of '95. I didn't actually get concerned that we had been operating illegally. I was concerned that we had to find out in late April. But until Lloyd Constantine [Liberty's outside counsel] reported back to me that there in fact was a real problem here which would have been some number of days later, perhaps in early May sometime, I didn't have any - let's say I was surprised to learn that we had been operating out of compliance in some cases.

H. Milstein, Tr. 517.

92. Mr. H. Milstein said he was in his office when he received the information regarding Liberty's premature activation of microwave facilities. Id. at 576. He asserted that he was told "[t]hat we may have a problem with operating -- beaming signal without the proper licenses." Id. (emphasis added). Upon learning this news, he immediately called Mr. Constantine. Id. at 548.

93. Mr. H. Milstein considered learning of a concern about unauthorized operations to be very significant to Liberty's continued health and operation. Id. at 574-76. Despite the significance Mr. H. Milstein attached to the event, he had no specific recollection of who informed him of Liberty's illegal actions. He testified that: "In any event, some combination of Peter and Lloyd was immediately present. And immediately, Lloyd was authorized to undertake a full investigation of what had occurred as -- the minute I heard about it." Id. at 549-50, see id. at 520.

94. Contrary to Mr. H. Milstein's hearing testimony that he was told Liberty may have a problem with operating without the proper licenses, Mr. Constantine, in his affidavit, states: "In late April 1995, Liberty's Chairman, Howard Milstein, became aware that Liberty was providing service to customers in two buildings in New York City utilizing microwave paths that had pending, but not yet granted, applications before the FCC." TWCV Ex. 29 (emphasis added).

95. Similarly, Mr. H. Milstein had "no independent recollection of the precise date" when he first learned of Liberty's unauthorized activation of microwave facilities. H. Milstein, Tr. 544. He adopted the late April 1995 date solely based on Lloyd Constantine's affidavit. Id. at 544-45, 548; TWCV Ex. 29.

96. Mr. H. Milstein claims that he knew there was a problem at least a few days after his discussion with Mr. Constantine in late April 1995, when Mr. Constantine reported back to him that there was a problem. H. Milstein, Tr. 520, 551, 578.

Q: Okay. But you found -- you found out in late April, did you not, that there was a problem? Not might-be problem, but --

A: No.

Q: -- a real problem.

A: No the first time I found out there was a might-be, I don't think I found out probably for another three, four, five days, a few days later. There could have been a weekend in the middle. I don't know what -- that there was a problem. By the time I found out there was a problem, the -- Time Warner had sent its letter about the problem, although I don't think the Time Warner letter -- the last letter about the licenses triggered our look into the problem. I think that's the way it occurred.

Id. at 551, 578.

97. Mr. H. Milstein was not confident that discovery of the problem with microwave licenses actually occurred before Time Warner filed its Reply to Opposition on May 5, 1995, in which Time Warner alleged that Liberty was operating microwave facilities without licenses. Id. at 553-54.

98. While Messrs. Price and Nourain were talking with the company's lawyers on April 27, 1995, Mr. H. Milstein was not involved. Price, Tr. 1370; Nourain, Tr. 954-55. The totality of the evidence suggests that, despite the apparent seriousness of the situation, H. Milstein was not involved until perhaps at least the first week in May, 1995.

99. In his deposition, Mr. H. Milstein testified that he had no specific recollection of the precise date he learned about Liberty's unauthorized activation of microwave facilities, but he clearly recalled that a TWCNYC complaint triggered his knowledge, not a conversation with his lawyer or anyone at Liberty.

Q: I want to . . . ask you when it first came to your attention that Liberty was or might be operating microwave paths without FCC licenses. Do you remember when that was that you first learned that might be the case or was the case?

A: . . . I don't have a specific date in mind if that's what your question is.

Q: Sure. Do you remember who brought this to your attention or how it was brought to your attention the first time?

A: I think it was brought to our attention because Time Warner made a complaint to some regulatory agency.

Q: And you were informed about that complaint I take it.

A: Yes.

Id. at 543-44; L/B Ex. 4, at 28. TWCNYC's Reply to Opposition, which alleged that Liberty was operating two microwave facilities without authorization, was filed on May 5, 1995.

B. Peter Price.

100. Mr. Price testified that he first learned of Liberty's unauthorized activation of microwave paths in late April 1995.

Q: When did you first learn that there was such unauthorized service?

A: I learned -- at least it became apparent that there was very probably unauthorized service at the end of April 1995. I believe it was --

Price, Tr. 1362.

101. Mr. Price learned of Liberty's unauthorized operations upon receipt of a memorandum drafted by Mr. Nourain and dated April 26, 1995. Id. at 1362-64. He believed he saw the document on April 27, 1995. Price, Tr. 1362-63; TWCV Ex. 35. The document states in part: "However, in order to be able to turn on current customers, the Special Temporary Authority (STA) is being filed." Upon reading that sentence, "it struck [Mr. Price] there was a -- there was a gap there between the turning on of service and the obtaining of authority." Price, Tr. 1363-64. Mr. Price was familiar with some sites listed in the memorandum and therefore knew that some were already operating. Id. at 1364.

102. The April 26, 1995 memorandum provided Mr. Price with knowledge of Liberty's unauthorized operations. Mr. Price testified: "I took it from the face of reading this that our own people -- that anyone reading this would be aware we had a problem. So I presume while this didn't say specifically that we were providing unauthorized service, it didn't take a great genius to figure that out just from the face of the document." Id. at 1373.

103. Mr. Price's testimony regarding when he first learned of Liberty's unauthorized activation of microwave paths was different at his deposition. At his deposition, Price testified that it first came to his attention in early January 1995 that Liberty was operating microwave paths without an FCC license.

Q: Now, did there come a time in 1995 when you became aware that Liberty was operating some microwave paths for which it had not yet received an FCC license?

A: That's correct.

Q: Approximately when did that come to your attention, if you remember?

A: I believe it was in January '95, in that early January -- early 1995. I'm not clear when. Somewhere in that area.

Id. at 1411; L/B Ex. 9 (Price Deposition, 5/28/96), at 93-94. Mr. Price then stated: "Just to clarify, it was early '95. When in '95? Sometime in the first quarter, I believe, of '95." Price, Tr. 1414-15; L/B Ex. 9 (Price Deposition, 5/28/96), at 94. He later testified at his deposition that it could have been as late as April 1995. Price, Tr. 1414-15; L/B Ex. 9 (Price Deposition, 5/28/96), at 94-95.

104. Mr. Price testified at his deposition that he first learned of the possibility of unlicensed operations in a conversation with counsel.

Q: What was the source of the first information you received about the possibility that you might have some unlicensed operating microwave paths?

A: I believe it was from counsel.

Q: Was counsel reporting to you an allegation that had been made in a pleading filed by Time Warner?

A: I believe that's where they got their information. I can't say, but I believe that's what it is.

L/B Ex. 9 (Price Deposition, 5/28/96), at 95-96. Mr. Price explained that counsel communicated the information through a conversation. Price, Tr. 1416; L/B Ex. 9 (Price Deposition, 5/28/96), at 96.

105. By contrast, at the hearing, Mr. Price testified that an April 26, 1995 memorandum from Mr. Nourain was the first indication that Liberty might be running unlicensed. Price, Tr. 1416-19.

Q: Okay. So to use a metaphor, this memo and the time that you got this memo was the very first time that this issue of unlicensed operation by Liberty came on your radar screen.

A: It was the first time that I recognized that there was a possibility of unauthorized operation.

Id. at 1418-19.

C. Edward Milstein

106. Mr. E. Milstein testified at the hearing that he learned that Liberty's license applications were delayed due to an incorrect emission designator contained in some applications during the course of a weekly management meeting. E. Milstein, Tr. 1619. Mr. E. Milstein understood that due to the emission designator error, license applications had to be refiled, thereby delaying the grant of those licenses. Id. at 1636. Mr. E. Milstein

asked for more information on this issue to discover the extent of the problem, and a couple of days later received the April 26, 1995 memorandum from Mr. Nourain. Id. at 1619-20, 1647-48; TWCV Ex. 35. He did not recall Mr. Nourain or Mr. Ontiveros having any unusual concern about the emission designator situation. Id. at 1633. April 26, 1995 was a Wednesday, and the Liberty senior management meetings were held on Thursdays. See Begleiter, Tr. 777; H. Milstein, Tr. 522-23.

107. After reading the April 26, 1995 memorandum, Mr. E. Milstein understood that some applications had to be refiled, but he did not form the impression that Liberty was operating without authorization. E. Milstein, Tr. 1620, 1632. Mr. E. Milstein did not thoroughly review the memorandum, but forwarded it Mr. Price. Id. at 1632, 1647-48.

108. Mr. E. Milstein said he learned about unauthorized paths from Mr. Price in "late April 1995." Id. at 1624, 1656.

... Peter told me that he thought we had unauthorized paths and I found out -- we were able to confirm it through the internal investigation.

Id. at 1623; see id. at 1624, 1639. He did not specifically recall the circumstances of Mr. Price's informing him about service to unauthorized microwave paths. E. Milstein, Tr. 1657. "I don't remember the specific encounter. I don't know whether he called me on the phone or he walked into the room." Id. at 1656-57. Mr. E. Milstein testified that he learned about Liberty's unauthorized operations a couple of days after he first heard of the emission designator error. Id. at 1623-24.

109. Like Mr. H. Milstein, Mr. E. Milstein did not believe that it was true. He testified: "And so that there -- there is a time frame in between when we were told that we

may have paths that are illegal and the time when I really believed that we had done something that stupid." Id. at 1623-24, 1659.

110. Mr. E. Milstein testified that Lloyd Constantine's firm conducted an internal investigation at the request of Mr. H. Milstein. The purpose of the investigation was to "find out whether or not it was true that we had turned things on. And in the even[t] that we had turned things on without authorization, we had to immediately disclose it to the FCC." Id. at 1625.

111. Within a week of Mr. Price informing Mr. E. Milstein about the possibility of unlicensed operation, the investigation confirmed that Liberty was indeed operating microwave facilities without licenses. Id. at 1640.

112. By contrast, Mr. E. Milstein testified at his deposition that he first learned that Liberty was operating microwave paths without FCC authorization when TWCNYC filed a pleading with the Commission. In the pleading, TWCNYC claimed that Liberty had activated unlicensed microwave paths.

Q: Now did there come a time when you became aware of the fact that Liberty had some microwave paths in operation for which it would not have FCC licenses or other grants of authority?

A: Yes.

Q: When did you have that awareness?

....

Witness: When Time Warner made the filing with the FCC.

Q: Did someone bring this filing to your attention?

A: I became aware of it in some conversation either I was part of or I overheard.