

FCC MAIL SECTION

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

FCC 97M-37

70877

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

MEMORANDUM OPINION AND ORDER

Issued: March 5, 1997

Released: March 7, 1997

Background

1. This is a ruling on Motion Of Time Warner Cable Of New York City And Paragon Cable Manhattan and Cablevision Of New York - Phase I For An Inquiry Into The Adequacy Of Compliance By Liberty Cable Co., Inc. With Requests For Production of Documents In This Proceeding ("Motion For Inquiry") that was filed on January 9, 1997, by Time Warner of New York City and Paragon Cable Manhattan (collectively "Time Warner") and Cablevision of New York - Phase I ("Cablevision"). An Opposition was filed on February 14, 1997, by Bartholdi Cable Company, Inc. (formerly Liberty Cable Company, Inc. and referred to in this proceeding as "Liberty"). On February 21, 1997, Time Warner and Cablevision filed a Reply. The Wireless Telecommunications Bureau ("Bureau") filed Comments on February 21, 1997. Time Warner and Cablevision and the Bureau represent their intentions to further address in their Proposed Findings of Fact and Conclusions of Law the failures of Liberty to meet its discovery obligations fully and timely.

Facts

2. Discovery commenced in this case in April 3, 1996. Three key documents were neither produced nor identified by Liberty in the initial phase of document discovery. First, a Memorandum prepared by Liberty's outside licensing counsel, Michael Lehmkuhl, was not produced until specifically ordered to do so by Order FCC 96M-164, released June 27, 1996. The Lehmkuhl Memorandum dated February 24, 1995, contained highly relevant information on the status of Liberty's OFS microwave licensing. It was wrongfully withheld under a claim of privilege even though the document contained no legal opinion

and/or analysis and had been disclosed to Comsearch, a third party. Second, just before the hearing was commenced on Liberty's candor and credibility, Liberty's counsel disclosed a Memorandum from Mr. Lehmkuhl dated April 28, 1995, which demonstrated to Liberty officials that there were unauthorized microwave paths in operation. The document could have been found in two locations: the files of Pepper & Corazzini and the files of Liberty Broadcasting. Yet it was not made available for the depositions in the Spring and Summer of 1996. Third, after an additional search for relevant documents while the hearing was underway, a Memorandum dated April 26, 1995, to Peter Price and Anthony Ontiveros was turned over by Liberty's counsel. The Nourain Memorandum was another crucial piece of evidence in the chain and it was the earliest written record discovered of an awareness that there were unauthorized path openings. There have been admissions of unexcused oversight in meeting discovery but no justification was made for failures to produce the two April 1995 memoranda.¹

3. The Proposed Findings of Fact and Conclusions of Law of the parties were filed on February 28, 1997. There is opportunity in those pleadings and in the Reply pleadings that are due on March 10, 1997, for the parties to address Liberty's tardy disclosures of highly relevant evidence in the context of other hearing evidence. Therefore, there is not sufficient cause shown to conduct an additional inquiry into the facts and circumstances of Liberty's late document discovery. Time Warner and Cablevision also concur in their Reply pleadings that the issues raised in their Motion For Inquiry can be addressed in the pleadings and in findings.

4. In addition, on March 3, 1997, Time Warner filed a Motion For Limited Discovery And The Taking Of Additional Testimony, Or In The Alternative, To Enlarge Issues. There will be a round of pleadings under the Commission's rules and the question of further discovery will be considered in the context of post-hearing evidence. Therefore, there is no need to separately consider the concerns raised by the Motion For Inquiry which is under consideration here.

Ruling

Accordingly, IT IS ORDERED that the Motion For Inquiry filed on January 9, 1997, by Time Warner and Cablevision IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel
Administrative Law Judge

¹ The Lehmkuhl Memorandum of February 24, 1995, was identified by Liberty hearing counsel in a listing of documents that were claimed to be privileged. The other two documents of April 1995 had never been identified on the log and they were produced on the spot when discovered by Liberty's counsel.