

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

FCC 97M-63
 71112

APR 25 12 48 PM '97

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	WNIM210
	)	708779	WNIM385
New York, New York	)	708780	WNTT555
	)	708781, 709426, 711937	WNIM212
	)	709332	(NEW)
	)	712203	WNTW782
	)	712218	WNTY584
	)	712219	WNTY605
	)	713295	WNTX889
	)	713300	(NEW)
	)	717325	(NEW)

MEMORANDUM OPINION AND ORDER

Issued: April 18, 1997 ; Released: April 21, 1997

Background

1. This is a ruling on a Motion By Time Warner Cable Of New York City And Paragon Cable Manhattan For Limited Discovery And the Taking Of Additional Hearing Testimony, Or, In The Alternative, To Enlarge Issues (the "Motion"). The Motion was filed by Time Warner of New York City and Paragon Cable Manhattan (collectively "Time Warner") on March 3, 1997. The Wireless Telecommunications Bureau ("Bureau") filed Comments in support of the Motion on March 21, 1997. The licensee, Bartholdi Cable Co., Inc. (formerly and herein Liberty Cable Co. or "Liberty") filed its Opposition on March 21, 1997.¹ Time Warner filed a Reply on March 28, 1997. See Order FCC 97M-40, released March 14, 1997.

2. Time Warner seeks to add the following issue:

To determine whether or not Liberty operated unlicensed paths in 1993 and was warned by legal counsel about the requirements of the Communications Act and the Commission's Rules is a matter of decisional significance and implicates the public interest.

¹ The Bureau's Comment and Liberty's Opposition were due on March 14, 1997. At the request of Liberty, the time was extended to March 21, 1997. See Order FCC 97M-40, released March 14, 1997.

3. The issue and related discovery are sought by Time Warner based on a document that was first identified in testimony on January 28, 1997, concerning contemporaneous notes of a telephone conversation between Mr. Howard Barr and Mr. Lloyd Constantine, two of Liberty's counsel, and a related hearing transcript correction that was sought by Mr. Barr on February 9, 1997. The document that was uncovered is a letter dated April 20, 1993, from Ms. Jennifer L. Richter, a former associate of Mr. Barr at the law firm of Pepper & Corazzini, to Mr. Bruce McKinnon who was formerly an employee at Liberty (the "Richter Letter"). A copy of the Richter Letter had been sent to Mr. Behrooz Nourain. After the letter arrived at Liberty, a copy was directed to Mr. Peter Price, the most senior officer at Liberty with immediate responsibility for FCC compliance. The Bureau supports only the request by Time Warner for additional discovery and for reopening the record to permit further testimony.

Facts

4. The Motion To Enlarge Issues was filed by Time Warner later than 15 days of Time Warner's discovery of the operative facts. Therefore, as an alternative to adding an issue, Time Warner asks to take discovery and question Liberty on the truthfulness of its representations that the premature activations were first discovered by Liberty in late April 1995. Time Warner and the Bureau seek discovery based on the Richter Letter which raises a question of whether there may have been a premature activation that prompted the letter.² They also argue that the effort by Mr. Barr to clarify his testimony after the Richter Letter was produced shows an intent to limit his testimony so that it would not apply to Liberty's licensing activities in 1993, thereby implying that there may have been a premature activation in 1993. Time Warner and the Bureau also submit as a corroborating event a premature activation of microwave facilities that were serving 33 W. 67th Street. Such activation allegedly took place in June 1993, around the time of Liberty's receipt of the Richter Letter.

5. Disclosure of relevant evidence was uncovered at the end of a hearing on Liberty's candor. The hearing was held to address inconsistencies on the date that Liberty first learned of the illegal OFS activations. The last witness to testify for Liberty was Mr. Barr. Mr. Barr was one of several attorneys for Liberty who were made aware of unlawful activations in a conference call on April 27, 1995, that was initiated by Mr. Price. It was during a later telephone conversation on June 22, 1995, that Mr. Barr made reference to the Richter Letter. Ms. Richter had given notice to Liberty (and to anyone who read her letter) of the sequence of licensing compliance before microwave activation. It is evident from the letter that on April 20, 1993, Liberty had learned (or was reminded) that Commission licenses or temporary authorizations had to be in hand before there could be any lawful activations.

² An equally plausible scenario is that Liberty may have been contemplating a premature activation that Ms. Richter nipped in the bud. But it is unanimously believed by the Bureau and Time Warner that something was amiss.

6. In its response to the Motion, Liberty submitted declarations under penalty of perjury of Messrs. Howard and Edward Milstein³, Mr. Price, and Ms. Richter. The copy of the Richter Letter which had been furnished to Mr. Price bears a handwritten notation:

"Peter: Pls. Review and advise. B.N. [Behrooz Nourain]
4/28/93."

Mr. Price concluded in his declaration that he has no recollection of having seen or of having reviewed the Richter Letter. He further declares that he was not informed of any premature activations in 1993 from the Richter Letter. Liberty also submitted a declaration of Ms. Richter. She states her belief that she never had learned of an unlawful activation by Liberty and that she would have advised Liberty to terminate any illegal operation. There are no declarations submitted by Liberty for Mr. Barr, Mr. McKinnon or Mr. Nourain, the three persons who were closest to the operative facts.

Discussion

7. The Commission Rules require that motions to enlarge issues be filed no later than 15 days from the publication of the designation order. 47 C.F.R. §1.229(a). Time Warner could not meet that threshold time requirement when the evidence, which should have been at least identified more than a year ago, first became available after the hearing on candor was concluded. Now Time Warner must comply with an additional requirement:

Motions for modifications of issues which are based on new facts or newly discovered facts shall be filed within 15 days after such facts are discovered by the moving party.

47 C.F.R. §1.229(b)(4). Time Warner has stated good reasons for filing beyond 15 days of the designation order. But the motion still was filed late because it exceeded 15 days from discovery of the facts. The Richter Letter was produced on February 4, 1997, and the written proposed change to Mr. Barr's testimony was submitted on February 10, 1997. The Motion should have been filed no later than February 25, 1997. Time Warner filed six days later on March 3, 1997. Therefore, the issue could only be added if other conditions are met:

In the absence of good cause for late filing of a motion to modify the issues, the motion to enlarge will be considered fully on its merits if (and only if) initial examination of the motion demonstrates that it raises a question of probable decisional significance and such substantial public interest importance as to warrant consideration in spite of its untimely filing.

³ The Milsteins have denied having any knowledge of the Richter Letter. There is no evidence that the letter was ever directed to either of the Milsteins.

47 C.F.R. §1.229(c). The Commission has limited the scope of this hearing to nineteen instances of unlicensed activations that occurred in 1994 and 1995. In view of that limited time period for a factual inquiry, there has not been an adequate showing of the decisional significance of a 1993 activation. Therefore, the issue will not be added.

Discovery And Testimony

8. However, the newly discovered information is relevant to Liberty's candor and credibility which are in issue in this proceeding. The Richter Letter relates directly to Liberty's knowledge of the law as well as the question of when Liberty first knew of any illegal premature activation and whether Liberty had been without knowledge of such activations before late April 1995. Conversely, if Liberty knew in 1993 that it had illegally activated a microwave path, then it would not have been forthright in advising the Commission that prior to late April 1995, it had no knowledge of such activations. The Richter Letter was dated April 20, 1993, which is approximately one and one half years after liberty commenced operations as an OFS provider. Ms. Richter was an associate at the law firm that was providing legal services for Liberty in the licensing of OFS transmitters and microwave paths. Ms. Richter's letter explains "when it is permissible for Liberty to construct and operate new microwave paths and stations, and when it is not." Ms. Richter represented in her declaration that it was now "difficult to recall all details of the specific conversations four years ago that precipitated the letter." But Ms. Richter has not categorically ruled out the possibility that there may have been a specific problem concerning an unlicensed activation. Now she can only declare with "some certainty" that no one from Liberty informed her of a premature activation and that if she had been so informed she would have advised Liberty to cease operations. But that rationalization does not adequately answer the question of what event prompted her to write such an emphatic letter on licensure compliance.

9. The discovery of a knowing premature activation in 1993, would be a significant factual change in Liberty's account that would adversely impact summary decision. Mr. Barr was asked if before April 27, 1995, he had "heard anybody suggest that there was premature service?" Mr. Barr answered the question with an unqualified "No." (Tr. 1796.) Time Warner argues that the only reason for the limitation is Mr. Barr's realization after the close of the record that his answer could have extended back to 1993 which would have caused his answer to be untruthful. Liberty counters in its Opposition that Time Warner had limited its questions to the relevant time period which was January to April 1995, and that Time Warner could have followed up with a question about activations before that time. However, if Mr. Barr learned (or was reminded) after testifying that there were premature activations in 1993, Mr. Barr would have a reasonable motive for a clarification that would allow for pre-1994-95 activations. And by making the clarification after leaving

the witness stand, the logical follow-up questions that such a clarification would engender could not be asked of Mr. Barr.⁴

10. The Bureau finds inconceivable how one could conclude that neither Ms. Richter nor Mr. Barr ever spoke with anyone from Liberty about the subject of unlawful microwave activations at the time of the 1993 Richter Letter. While the Bureau's suspicions may be well founded, the Presiding Judge is not prepared to make that assumption without more evidence. The Bureau also is legitimately concerned about Mr. Barr's clarification in light of the proximate circumstance of the discovery of the Richter Letter and the occurrence of one other additional event which was somewhat out of the ordinary. On February 6, 1997, Liberty's courtroom litigation team sent a letter to the Presiding Judge stating that "Liberty does not rely on the testimony of Behrooz Nourain with respect to when he initially became aware of the unauthorized service." The Bureau cites the direct testimony of Mr. Nourain which, if credible, would support a finding that he and Liberty did not learn of the premature activations before late April 1995. The Bureau believes that Liberty's litigation counsel disassociated themselves from that testimony when the Richter Letter was disclosed.⁵ Without further speculation, it is only concluded here that there are substantial questions of fact raised by the cumulative effect of the three events (Richter Letter-Barr testimony clarification-Trial Counsel's letter of disassociation) to require further testimony.

11. Liberty's Installation Progress Reports show that installation was completed at 33 West 67th Street sometime in June 1993.⁶ That address was served by a microwave path originating at One Lincoln Plaza. Liberty did not apply for an authorization to transmit the signal until June 16, 1993. Installation of customers would only begin once the signal was present in the building from the microwave coaxial cable link. (Tr. 1723.) It was unlikely that the Commission would have had time to process and grant an application by the end of June 1993. These are circumstances which raise an inference that an OFS facility was prematurely activated by Liberty in 1993. Liberty has not denied that there was an unauthorized activation at 33 West 67th Street's transmission service. Thus, the occurrence of unlawful activation that was related in time to the Richter Letter is not an unreasonable supposition. To

⁴ Liberty argues that Time Warner and the Bureau simply failed to ask the right questions and that therefore the subject of pre-January 1995 microwave activations was waived. But that turns the hearing into a game. There is either a substantial question to pursue or there is nothing significant to consider. Liberty states that the clarification was not necessary but offers no explanation from Mr. Barr. The only person who can answer the question is Mr. Barr.

⁵ There also was testimony by Mr. Nourain about having received a fax from Liberty's headquarters at or before the disclosures of April 27, 1995. (Tr. 760-762.) A copy of the fax, if it exists, was never produced.

⁶ In the first round of discovery, Liberty redacted addresses of activated OFS facilities that were not cited in the designation order. After the Lehmkuhl Memorandum was ordered to be produced, Liberty was required to identify other addresses such as 33 W. 67th Street.

the contrary, it is impossible that the Richter Letter dated April 20, 1993, could be referring to any of the illegal activations of 1994-1995 that were designated in this proceeding.

12. The Bureau has been a joint proponent with Liberty in urging that the issues in this case be disposed of by summary decision. However, in light of these developments, if the evidence should show that Liberty had been aware of OFS microwave activation violations in April 1993, and that Liberty continued to ignore the fact of such violations, the Bureau would "seriously rethink its position on the Joint Motion."⁷ While it has no information at this time as to whether Liberty was aware of any 1993 unlawful activations, the Bureau confirms that there were no disclosures made to the Commission regarding any unauthorized service provisions by Liberty in 1993.⁸ It is evident that if there had been violations in 1993, there was no resulting compliance program installed at Liberty because there were multiple violations in 1994 and in 1995 until late April.

13. It is highly significant that the Bureau should question its ability to proceed further as a joint movant with Liberty, depending on the outcome of further testimony from Ms. Richter and Mr. Barr. Testimony will be taken as soon as possible after discovery is completed.⁹

Order

IT IS ORDERED that the Motion By Time Warner Cable Of New York City And Paragon Cable Manhattan For Limited Discovery And the Taking Of Additional Hearing Testimony, Or, In The Alternative, To Enlarge Issues filed by Time Warner on March 3, 1997, IS DENIED in part and IS GRANTED in part.

⁷ The Commission considers summary decision to be an "extraordinary procedure" to be used only if the parties are in agreement regarding material factual inferences that may be properly drawn from the record. Big Country Rocker, Inc., 50 F.C.C. 2d 967, 968 (Review Bd 1975). Developments that have occurred after the Joint Motion For Summary Decision was filed, including significant inconsistencies on deposition testimony followed by the recently produced Richter Letter, the Barr correction, and Counsel's letter rejecting Nourain's testimony, place summary decision in serious doubt.

⁸ This development raises once more the frustration at not having access to the Internal Audit Report. The disclosure in Mr. Barr's note of his conversation with Mr. Constantine in June 1995, shows that the Richter letter was available to those who were responsible for preparing the Report. Certainly, if the Richter Letter was a reaction to learning of an unlawful activation that had occurred in 1993, that would be a significant fact that should have been disclosed to the Commission when it was being asked to consider whether or not to grant Liberty temporary authorization to operate OFS facilities.

⁹ In addition to document discovery, depositions are authorized to be taken of Ms. Richter and Messrs. Price, Nourain, McKinnon, Barr and Lehmkuhl.

IT IS FURTHER ORDERED that the parties SHALL SUBMIT an expedited discovery schedule to the Presiding Judge by **April 24, 1997**.

IT IS FURTHER ORDERED that the hearing SHALL REOPEN on **May 13, 1997**, at 10:00 a.m. in a Commission courtroom in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION¹⁰



Richard L. Sippel
Administrative Law Judge

¹⁰ Copies of this MO&O were faxed or e-mailed to counsel on the date of issuance solely as a courtesy to counsel and the parties. An Order of the Presiding Judge can only be officially released when a copy is made available to the public. See 47 C.F.R. §1.4(b)(2).