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

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JUN 11 1997

Federal Communications Commission  
Office of Secretary

In Re Applications Of	)	WT DOCKET NO. 96-41	
	)		
	)	File Nos.:	
LIBERTY CABLE CO., INC.	)	708777	WNTT370
	)	708778, 713296	WNTM210
For Private Operational Fixed	)	708779	WNTM385
Microwave Service Authorization	)	708780	WNTM555
and Modifications	)	708781, 709426, 711937	WNTM212
	)	709332	NEW
New York, New York	)	712203	WNTW782
	)	712218	WNTY584
	)	712219	WNTY605
	)	713295	WNTX889
	)	713300	NEW
	)	717325	NEW

To: Administrative Law Judge Richard L. Sippel

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

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## SUMMARY

Throughout this proceeding, Bartholdi Cable Company, Inc., formerly known as Liberty Cable Company, Inc. (“Liberty”), has consistently maintained that its principals did not learn about any premature activations before April 27, 1995. The extensive record developed in this case, as supplemented by the recent additional round of discovery and hearings, has done nothing to alter this basic fact on a central issue in this proceeding. Therefore, Liberty’s Proposed Findings of Fact and Conclusions of Law should be adopted in full, and the Joint Motion for Summary Decision filed by Liberty with the Wireless Telecommunication Bureau (the “Bureau”) should be granted.

The most recent round of discovery and hearings centered around the April 20, 1993 letter from Jennifer Richter, Esq. of Pepper & Corazzini to Mr. Bruce McKinnon at Liberty (the “Richter Letter”). Time Warner Cable of New York City and Paragon Cable Manhattan (together, “Time Warner”) claimed that this letter, along with other “newly-discovered” evidence, revealed the possibility that Liberty might have engaged in premature activation of microwave facilities in 1993, thus suggesting that Liberty knew about premature activations before the end of April 1995.

On its face, the Richter Letter did not alert Liberty to any instance of premature activation. It instructed Liberty about when the company could construct and activate its microwave facilities. It also set forth relevant licensing application time lines and reminded Liberty of the option to file for requests for Special Temporary Authority (STA) in order to provide service lawfully while a license was pending.

At the continued hearing, all the witnesses were called by Time Warner, and Ms. Richter’s testimony was sponsored by Time Warner. The testimony adduced at the continued hearing, including that of the letter’s author, revealed nothing contrary to the plain statements contained in the Richter Letter. The uncontroverted evidence established that Ms. Richter did not write the letter to inform anyone at Liberty about any premature activation that had occurred. Instead, she was disturbed by what she perceived to be

confusion about the rules on the part of Liberty's microwave engineer, Mr. Behrooz Nourain, and Ms. Richter wanted to clarify these rules and procedures in writing in order to allay any confusion and to ward off a potential violation of the Federal Communication Commission's rules.

Liberty's reaction to the Richter Letter was to file for STAs, a practice which had already been followed at Liberty since inception. The testimony at the continued hearing revealed that the Richter Letter was not to be perceived to be either an extraordinary document or an especially significant event in Liberty's history. The Richter Letter was not an alarm warning Liberty about any actual violation of Commission rules; at most, it was a reminder to Liberty to file for STAs given the lengthy time that it took the Commission to process Liberty's license applications. The Richter Letter, therefore, did not lead to discovery of premature activations at Liberty. Indeed, at the continued hearing, Mr. Howard Barr and Mr. Peter Price re-affirmed their prior testimony that they did not know about any premature activations before April 27, 1995.

At the continued hearing, questions were asked about the license inventories Ms. Richter prepared in 1993. The testimony revealed that these license inventories were done by Ms. Richter for her own organizational purposes, and Mr. Nourain did not rely on them to perform his licensing function for Liberty. Thus, Ms. Richter's licensing inventories had no bearing on discovery of premature activations before late April 1995.

Finally, Mr. Nourain was again questioned about the allegedly inconsistent statements contained in his February 21, 1995 affidavit filed in New York Federal Court and his May 17, 1995 declaration in support of Liberty's Surreply of the same date. The statements appeared to be inconsistent because Mr. Nourain said on May 17 that he was not aware of Time Warner's petition against Liberty's license applications until April 1995, while a few months before, in February, Mr. Nourain stated that he was informed of Time Warner's opposition to Liberty's various 18 GHz license applications. Mr. Nourain testified again, consistent with his prior testimony on this topic, that his February

affidavit related to Liberty's license applications for hardwire or "I-Block" buildings, while his May declaration reflected his realization in April 1995 that Time Warner had petitioned against more than Liberty's hardwire sites. Therefore, in context, the two statements are not in fact inconsistent.

The extensive record in this proceeding demonstrates that Liberty has at all times been candid, forthright and truthful with the Commission. In particular, Liberty did not lack candor and did not misrepresent facts regarding when Liberty's principals first learned about premature activation of microwave facilities. There has been no evidence whatsoever that Liberty acted with any intent to deceive the Commission, an essential element of a finding that Liberty engaged in misrepresentation or lack of candor before the Commission.

Accordingly, as set forth more fully in the Supplemental Proposed Findings of Fact and Conclusions of Law, Liberty respectfully submits that its Proposed Findings of Fact and Conclusions of Law, as supplemented, should be adopted in full, and the Joint Motion for Summary Decision should be granted in its entirety.

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To: Administrative Law Judge Richard L. Sippel

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

Pursuant to 47 C.F.R. § 1.263 and Order, FCC 97M-74 (rel. May 1, 1997), Bartholdi Cable Company, Inc., formerly known as Liberty Cable Company, Inc. ("Liberty"), hereby submits its supplemental proposed findings of fact and conclusions of law in the above-referenced proceeding. Based on the extensive record developed in this proceeding, as supplemented by the additional discovery and hearings permitted by the Presiding Judge, Liberty has shown that it was at all times candid, forthright and truthful with the Commission regarding the first discovery of premature activations. Accordingly, Liberty respectfully requests that Liberty's Proposed Findings of Fact and Conclusions of Law be adopted in full ("Liberty's Proposed Findings"), and the pending

Joint Motion for Summary Decision (“Joint Motion”) by Liberty and the Wireless Telecommunications Bureau (the “Bureau”) be granted in its entirety.

## I. PROCEDURAL BACKGROUND

1. From January 13 through 28, 1997, pursuant to *Memorandum Opinion and Order* FCC 96M-265 (rel. December 10, 1996), a mini-hearing was held to determine the candor of Liberty’s witnesses regarding when Liberty’s principals first learned that premature activation of microwave paths had occurred.

2. The following eight witnesses testified: Howard Milstein, Liberty’s Chairman (January 13); Behrooz Nourain, formerly Liberty’s Director of Engineering (January 13-14); Michael Lehmkuhl, an associate at Pepper & Corazzini, Liberty’s licensing counsel (January 15-16); Peter Price, Liberty’s President (January 16 and 21); Anthony Ontiveros, Liberty’s former General Manager of Operations (January 27); Edward Milstein, Liberty’s Co-Chairman (January 27); and Howard Barr, a partner at Pepper & Corazzini (January 28).

3. On the issue of when Liberty’s principals first learned about premature activations, the uncontroverted testimony confirmed the late April-early May 1995 time frame of discovery that was established in depositions taken in May 1996 and as articulated in the Joint Motion filed on July 15, 1996. Testimony at the mini-hearing, with aid of late-discovered documents, confirmed that April 27, 1995 was the earliest date that Liberty’s principals learned about the possibility of premature activations.

4. After the testimonial phase concluded, the Presiding Judge, in Order FCC 97M-14 (rel. February 5, 1997), ordered the production of a letter dated April 20, 1993 from Jennifer L. Richter, Esq., then an associate at Pepper & Corazzini, to Mr. Bruce

McKinnon, then Liberty's Chief Operating Officer (the "Richter Letter").<sup>1</sup> The Richter Letter recounted to Mr. McKinnon a conversation between Ms. Richter and Mr. Nourain which "gave [them] pause." In the letter, Ms. Richter then proceeded to inform Mr. McKinnon about Commission procedures and timetables for obtaining licenses and STAs. The letter was copied to Mr. Nourain, who in turn hand wrote on it a note dated April 28, 1993 asking Mr. Price to "review and advise."

5. As proposed findings of fact and conclusions of law were being filed by the parties, Time Warner Cable of New York City and Paragon Cable Manhattan (together, "Time Warner"), on March 3, 1997, made a Motion for Limited Discovery and the Taking of Additional Hearing Testimony or, in the Alternative, to Enlarge Issues (the "Motion"). Time Warner argued that "newly-discovered evidence" prompted this latest Motion. In particular, Time Warner pointed to the Richter Letter, Mr. Barr's correction of his hearing transcript<sup>2</sup> and an alleged instance of premature activation in June 1993 as evidence that Liberty may have known of premature activations before late April 1995.

6. After the pleading cycle closed on Time Warner's Motion, the Presiding Judge issued a *Memorandum Opinion and Order*, FCC 97M-63 (rel. April 21, 1997), in

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<sup>1</sup> The Richter Letter has been admitted into evidence as TW/CV 51. Numbers following "TW/CV" refer to exhibits introduced by Time Warner and Cablevision of New York City - Phase I ("Cablevision").

<sup>2</sup> On January 28, 1997, Mr. Barr was asked on direct examination regarding whether he knew or heard of any premature activation at Liberty before April 27, 1995, to which Mr. Barr replied, "No." Tr. 1796:8-20 [Barr]. Mr. Barr later corrected his testimony to clarify that he was focussing on the period between January and April 1995. Motion, Ex. B. Citations to the hearing transcript shall take the form "Tr." followed by the page and line numbers, separated by a colon, and in the case of witness' testimony, the last name of the witness will be included in brackets at the end. All citations are to the condensed versions of the hearing transcript.

which Time Warner's motion to enlarge issues was denied. In so ruling, the Presiding Judge expressly held: "The Commission has limited the scope this hearing to nineteen instances of unlicensed activation 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 decisional significance of a 1993 activation. Therefore, the issue will not be added."<sup>3</sup>

7. However, the Presiding Judge granted Time Warner's request to re-open discovery. The Presiding Judge cited to three events in support of this ruling: the emergence of the Richter Letter, Mr. Barr's clarification of his hearing testimony and the submission of a letter by Liberty's trial counsel on February 6, 1997, stating that Liberty does not rely on Mr. Nourain's testimony regarding his first discovery of premature activations at the end of April 1995. The Presiding Judge stated: "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."<sup>4</sup> Accordingly, the Presiding Judge authorized further document discovery as well as depositions of Ms. Richter and additional depositions of Mr. Price, Mr. Nourain, Mr. McKinnon, Mr. Barr and Mr. Lehmkuhl,<sup>5</sup> all of whom were previously deposed.

8. On April 18, the Presiding Judge issued another Order, FCC 97M-64 (rel. April 21, 1997), directing that "Mr. Behrooz Nourain (among others) will be returning to

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<sup>3</sup> *Memorandum Opinion and Order*, FCC 97M-63, ¶ 7.

<sup>4</sup> *Memorandum Opinion and Order*, FCC 97M-63, ¶ 10.

<sup>5</sup> *Id.*, n. 9.

the witness stand. In the interest of a complete record concerning his and Liberty's credibility, Mr. Nourain should be questioned fully on the two Nourain Affidavits which are cited in the designation order and which are the subject of a designated issue."<sup>6</sup>

9. Pursuant to Order FCC 97M-74 (rel. May 1, 1997), Liberty produced on May 9 copies of documents responsive to Time Warner's April 25, 1997 Additional Request for Production of Documents.<sup>7</sup> Pursuant to the same Order, the following additional depositions were taken by Time Warner and the Bureau: Jennifer L. Richter, Esq. (May 12, 1997); Bruce McKinnon (May 14, 1997); Howard Barr, Esq. (May 16, 1997); and Behrooz Nourain (May 19, 1997).<sup>8</sup> Although authorized to do so, Time Warner and the Bureau opted not to depose Mr. Price and Mr. Lehmkuhl again.

10. Pursuant to Order FCC 97M-92 (rel. May 27, 1997), Ms. Richter and Mr. Barr testified on May 28, and Mr. Price and Mr. Nourain testified on May 29.<sup>9</sup> All these witnesses were called by Time Warner. Although Time Warner was permitted to treat

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<sup>6</sup> Order FCC 97M-64, pp. 1-2 (citation omitted). The two documents are in evidence as TW/CV 13 and 18. In Order FCC 97M-79 (rel. May 6, 1997), the Presiding Judge confirmed that the additional hearing would include examination of Mr. Nourain on the alleged inconsistencies in his statements. In that same Order, the Presiding Judge further ruled that no additional evidence would be taken on the "hard wire/franchise issues" as the parties agreed that the record on summary decision was otherwise sufficient to support an initial decision.

<sup>7</sup> Neither the Bureau nor Cablevision joined in Time Warner's Additional Request for Production of Documents.

<sup>8</sup> Ms. Richter's deposition, subject to her corrections, has been entered into evidence as TW/CV 55. Mr. McKinnon's deposition has been admitted into evidence as TW/CV 53, Mr. Barr's deposition is in evidence as TW/CV 52, and Mr. Nourain's deposition is in evidence as TW/CV 54.

<sup>9</sup> Cablevision, through counsel, withdrew itself from the additional hearings (Tr. 1994:7-14, 1996:12).

these witnesses as hostile,<sup>10</sup> Time Warner expressly declined to do so with respect to Ms. Richter and called her as a Time Warner witness.<sup>11</sup> On the specific issues designated for this additional round of hearings, the four witnesses testified as follows:

## **II. TESTIMONY**

### **A. Jennifer Richter**

11. Ms. Richter is currently Vice President and General Counsel for Wireless Broadcasting Systems of America.<sup>12</sup> From about April 1992 until July 1994, she was an associate at Pepper & Corazzini.<sup>13</sup> Ms. Richter worked on the Liberty account from the beginning of her tenure at Pepper & Corazzini and most of her work for Liberty was related to licensing applications.<sup>14</sup> She initially reported to Mr. Todd Parriott who also worked on the Liberty account but after he left, Ms. Richter handled the account on her own, without day-to-day supervision.<sup>15</sup>

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<sup>10</sup> Order, FCC 97M-92 (rel. May 27, 1997), p.2.

<sup>11</sup> Tr. 1996:15-22. Time Warner's sponsorship of Ms. Richter's testimony was noted in Order, FCC 97M-103 (rel. June 9, 1997).

<sup>12</sup> Tr. 1997:19-20 [Richter].

<sup>13</sup> Tr. 2000:18-20 [Richter].

<sup>14</sup> Tr. 2001:4-10, 2002:18-23 [Richter].

<sup>15</sup> Tr. 2001:19-21, 2002:24 - 2003:12 [Richter].

12. Ms. Richter's primary contact with Liberty was through Mr. Nourain.<sup>16</sup> She had limited contact with Mr. Price and had sent correspondence to, but did not speak with, Mr. McKinnon.<sup>17</sup>

13. Early on in the working relationship between Ms. Richter and Mr. Nourain, she realized that Mr. Nourain did not have a clear grasp of the Commission's rules regarding 18 GHz microwave licensing procedures.<sup>18</sup> Mr. Nourain made this fact clear to Ms. Richter from the outset: "[H]e specifically told me he was coming from a different service and didn't know these rules and was relying on me to explain what they were."<sup>19</sup> Ms. Richter thus saw her task as an ongoing educational effort to instruct Mr. Nourain regarding the applicable rules and regulations relating to licensing facilities operating on the 18 GHz frequency.<sup>20</sup>

14. In April 1993, Ms. Richter's time entries showed that she had telephone conversations with Mr. Nourain about constructing and operating microwave paths prior to their being licensed.<sup>21</sup> These phone calls were apparently prompted by long delays that Liberty was then experiencing in obtaining the appropriate licenses. "Applications were pending for a very long period of time and Liberty needed to get going with its business.

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<sup>16</sup> Tr. 2004:1-3 [Richter].

<sup>17</sup> Tr. 2004:3-8 [Richter].

<sup>18</sup> Tr. 2035:8-16 [Richter].

<sup>19</sup> Tr. 2036:6-8 [Richter].

<sup>20</sup> Tr. 2035:14-16, 2039:8-10 [Richter].

<sup>21</sup> Tr. 2037:18-21 [Richter]; TW/CV 61.

And the question was how can we do that? How can we construct and operate a path that has not yet been licensed?”<sup>22</sup>

15. Ms. Richter then sent a letter dated April 20, 1993, addressed to Mr. McKinnon with a copy to Mr. Nourain, regarding the conversations she and Mr. Nourain had earlier in the month.<sup>23</sup> After stating that these discussion gave both her and Mr. Nourain pause, Ms. Richter went on “to detail the parameters within which construction and operation of new paths and new stations is permissible.”<sup>24</sup> Ms. Richter instructed that while construction of facilities prior to authorization was permissible, operation was not.<sup>25</sup> Ms. Richter then set forth the time frames for processing of licensing applications.<sup>26</sup> Ms. Richter further wrote, “If Liberty is desperate to begin operation of a station, either new or modified, and grant of the underlying application is pending, let me know and we can apply for an STA.”<sup>27</sup> Nowhere in the Richter Letter is there a reference to the occurrence of any premature activation.

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<sup>22</sup> Tr. 2037:23 - 2038:8 [Richter].

<sup>23</sup> Tr. 2040:2-7 [Richter]; TW/CV 51. Mr. McKinnon was leaving Liberty at that point and does not recall receiving the letter. McKinnon Dep. 21:16 - 22:3 (TW/CV 53). Citations to the depositions take the form “[Deponent] Dep.” followed by page and line numbers. All references to depositions, unless otherwise indicated, refer to the additional round of depositions taken between May 12 and May 19, 1997, as authorized by Order FCC 97M-74 (rel. May 1, 1997).

<sup>24</sup> TW/CV 51.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

16. Ms. Richter testified that, while she cannot state now what there was about her conversation with Mr. Nourain in April 1993 that gave both of them pause, she was concerned about a prospective violation of Commission rules due to the confusion Mr. Nourain had displayed about the rules: "I was concerned that some confusion about the rules could lead them [Liberty] to turn on facilities that had not yet been authorized."<sup>28</sup> As Ms. Richter's testimony makes clear, she did not have a concern about premature activations that had already occurred; her concern was purely prospective.

17. Ms. Richter directed these concerns only to Mr. Nourain, and no one else at Liberty:<sup>29</sup>

JUDGE SIPPEL: If you -- you've twice used the word that you were concerned that there might be an inadvertent activation. Did you express this concern to anybody else in the firm or in the company?

THE WITNESS: Other than this letter, I don't recall discussing it or writing about it. And let me clarify. My concern was not that there had been an inadvertent activation. My concern was that there could be.

JUDGE SIPPEL: I understand. I understand your answer very clearly. But what I'm trying to probe your recollection as to whether or not that concern reached a level where you might have gone in and said to Mr. Corazzini, Mr. Barr or somebody superior to Mr. Nourain, I've got a concern here. I want you folks to know about it.

THE WITNESS: Other than this letter?

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<sup>28</sup> Tr. 2042:23-25 [Richter].

<sup>29</sup> There is no evidence that either Mr. Howard Milstein or Mr. Edward Milstein received the Richter Letter before the premature activations were discovered and investigated in mid-1995, nor is there evidence that Ms. Richter's "concerns" were brought to the attention of either of the Milsteins. Tr. 2204:12 - 2206:7 [Price].

JUDGE SIPPEL: Yes, ma'am.

THE WITNESS: No, I don't recall doing that other than this letter. I guess I thought the letter spoke for itself.

JUDGE SIPPEL: No, that question didn't mean to be critical of the letter at all, but I'm trying to again see if you've twice used this word concerned and that just raises a question in my mind. You may be covering this as you go along, but I wanted since I'm asking these questions now, all of this letter is focused or it's couched in terms of the dear Bruce letter, meaning Mr. McKinnon. Yet, it seems to be clear to me from everything that you've testified to today that you were really communicating to Mr. Nourain, is that correct?

THE WITNESS: Yes. Most of my contacts, practically all of them were with Behrooz.<sup>30</sup>

18. Ms. Richter reiterated that the concern expressed in the Richter Letter was not with any inadvertent activation of microwave paths that had occurred as of the writing of the letter:

Q [BY MR. BECKNER]: Okay. After these conversations that you had with Mr. Nourain that precipitated the April 20th letter, did you do anything to try to determine whether or not Mr. Nourain had violated the FCC rules because of these misunderstandings that he had expressed to you?

A [BY MS. RICHTER]: That wasn't my concern. My concern was not that they had done anything illegal. My concern was that confusion could cause them to if I didn't clear it up and that was the reason for the letter. But I wasn't concerned that anything had been done that was in violation of the rules.

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<sup>30</sup> Tr. 2044:18 - 2045:23 [Richter].

Q: Can you tell us why you weren't concerned that Mr. Nourain's confusion might not have in the past led him to do something that violated the Commission's rules?

A: Apparently because nothing was said to me to lead me to that conclusion.

JUDGE SIPPEL: Well, you wouldn't necessarily have to reach a conclusion. You could have a suspicion. Did you have any suspicions that he might have inadvertently activated something at or about this time of April 20th, '93?

THE WITNESS: No, my concern was that that could happen, but not that it had happened. That it could happen and I was trying to prevent it with the letter.<sup>31</sup>

Ms. Richter thus did not even suspect that premature activations had occurred.

19. Ms. Richter's recollection was refreshed at her deposition, with the aid of Pepper & Corazzini time records, that she had a telephone conversation with Mr. Price at the end of April 1993 regarding filing requests for STA.<sup>32</sup> Ms. Richter believes that her April 20 letter prompted the discussion.<sup>33</sup> Following this conversation, Pepper & Corazzini proceeded to file requests for STA in order to enable Liberty to activate buildings for service while license applications made their way through the Commission's lengthy approval processes.<sup>34</sup>

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<sup>31</sup> Tr. 2060:5 - 2061:3 [Richter].

<sup>32</sup> Tr. 2061:20 - 2062:23 [Richter]; Richter Dep. 81:11 - 82:1, 89:22 - 90:4 [TW/CV 55]; TW/CV 61.

<sup>33</sup> Tr. 2062:10-14 [Richter].

<sup>34</sup> Tr. 2062:18 - 2063:2 [Richter].

20. Ms. Richter also testified about the license inventories she prepared while she was at Pepper & Corazzini. She created these inventories for organizational purposes: “Well, the file was fairly disorganized and it was difficult for me to keep track of all of the paths that we were applying for. There was a lot of paper and Liberty was doing a lot of licensing work. And so there really was a need to bring order to the process.”<sup>35</sup>

21. Ms. Richter was questioned specifically about certain paths appearing on her April 6, 1993 license inventory.<sup>36</sup> Ms. Richter was asked whether she knew from Mr. Nourain or otherwise, whether these paths were already activated while their applications were pending. In each instance, Ms. Richter answered, “No.”<sup>37</sup>

**B. Howard Barr**

22. Mr. Barr testified that he produced the Richter Letter to Mr. Lloyd Constantine in response to Mr. Constantine’s request made during a telephone conversation at the end of June 1995.<sup>38</sup> Mr. Barr does not recall when he first saw or read the Richter Letter.<sup>39</sup> He also does not recall discussing the contents of the Richter Letter

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<sup>35</sup> Tr. 2015:4-8 [Richter].

<sup>36</sup> TW/CV 3.

<sup>37</sup> Tr. 2072:16-22, 2074:23 - 2075:1, 2077:6-8 [Richter].

<sup>38</sup> Tr. 2111:22 - 2112:5 [Barr]; TW/CV 50.

<sup>39</sup> Tr. 2113:17-20, 2120:24 - 2121:3 [Barr].

with Ms. Richter.<sup>40</sup> Mr. Barr reaffirmed that until April 27, 1995, he did not learn of or even suspect that Liberty had engaged in premature activations.<sup>41</sup>

23. Mr. Barr was questioned about his post-hearing clarification of his testimony from January 28, 1997. Mr. Barr explained that upon his review of the transcript, the question appeared broader than the time frame that he had in mind and wanted to make that clear.<sup>42</sup> The change was purely for the sake of clarity.<sup>43</sup>

24. Mr. Barr also confirmed that around April 1993, Ms. Richter was primarily responsible for the Liberty account, and he was not doing much work for Liberty at the time, except for a brief period at the end of April 1993 when he drafted STA requests in Ms. Richter's absence.<sup>44</sup> Indeed, the Pepper & Corazzini bills entered into evidence for this round of hearings showed that Mr. Barr spent only three days at the end of April preparing STA requests and performed no other work for Liberty during the relevant time period.<sup>45</sup>

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<sup>40</sup> Tr. 2125:6-13 [Barr].

<sup>41</sup> Tr. 2119:21-23, 2120:6-9, 2128:10-21 [Barr].

<sup>42</sup> Tr. 2121:10-15 [Barr].

<sup>43</sup> Tr. 2121:15-19 [Barr].

<sup>44</sup> Tr. 2123:20-25, 2127:5-12 [Barr].

<sup>45</sup> Tr. 2144:8-13 [Barr]; TW/CV 61.

**C. Peter Price**

25. Mr. Price testified that in the first six months of 1993, he did not have any supervisory responsibility over Mr. Nourain.<sup>46</sup> At that time, Mr. Nourain reported to Mr. Ontiveros and Mr. McKinnon.<sup>47</sup> Mr. Price recalled that Mr. McKinnon left Liberty's employ in the middle of May 1993.<sup>48</sup>

26. Mr. Price did not specifically recall getting the Richter Letter in April or May 1993 but presumes that he saw it.<sup>49</sup> Mr. Price does not recall discussing the letter or its contents with Mr. Nourain in April or May 1993.<sup>50</sup> It was uncommon for Mr. Nourain to route correspondence to Mr. Price, and Mr. Price does not know why Mr. Nourain sent him a copy of the Richter Letter.<sup>51</sup> Mr. Price thought it may have been due to the fact that Mr. McKinnon was leaving Liberty at that time.<sup>52</sup>

27. Like Ms. Richter, Mr. Price had his recollection refreshed by the Pepper & Corazzini bill that, at the end of April 1993, he discussed the subject of filing for STAs

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<sup>46</sup> Tr. 2164:16-20 [Price].

<sup>47</sup> Tr. 2164:21-24 [Price].

<sup>48</sup> Tr. 2165:3-5 [Price]; McKinnon Dep. 5:10-15 (TW/CV 53).

<sup>49</sup> Tr. 2167:16-21 [Price].

<sup>50</sup> Tr. 2168:8-11 [Price].

<sup>51</sup> Tr. 2168:12-24 [Price].

<sup>52</sup> Tr. 2168:24 - 2169:2 [Price]; McKinnon Dep. 5:10-15 (TW/CV 53).

with Ms. Richter.<sup>53</sup> Mr. Price believed that the discussion was related to the Richter Letter.<sup>54</sup>

28. Mr. Price took from the Richter Letter that Pepper & Corazzini was highlighting a problem of delay in the license application process and that Liberty should be filing for STAs.<sup>55</sup> The Richter Letter did not indicate to Mr. Price that Mr. Nourain was not following the Commission's rules or that he did or might have done something in contravention of those rules.<sup>56</sup> As Mr. Price explained, "I think what it [the Richter Letter] says to me is that it outlines the policy that should prevail and I thought was prevailing regarding the filing of licenses and the activation of paths and advises us that STAs should be filed, and we did so."<sup>57</sup>

29. Nothing in the Richter Letter indicated to Mr. Price that unauthorized activations had occurred.<sup>58</sup> If it had, Mr. Price would have reacted very differently: "I would have stopped. We would have had a meeting. I would have hit an alarm. We would have gotten together. We would have called in people. And we would have done

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<sup>53</sup> Tr. 2170:17 - 2171:5 [Price]; TW/CV 61.

<sup>54</sup> Tr. 2170:20-22 [Price].

<sup>55</sup> Tr. 2171:9-14 [Price]. Mr. Price also testified that due to ongoing concerns at Liberty regarding Commission delays in processing Liberty's license applications, Liberty had been applying for STAs "a couple of years before" the time of the Richter Letter. Tr. 2171:3-5 [Price].

<sup>56</sup> Tr. 2173:15-18 [Price].

<sup>57</sup> Tr. 2173:4-8 [Price].

<sup>58</sup> Tr. 2194:3-8 [Price].

what we did a couple of years later when we found out that there was something broken.”<sup>59</sup>

30. Mr. Price explicitly affirmed that he had no knowledge of premature activations in April 1993:

THE WITNESS [MR. PRICE]: And, Your Honor, I did not know at that time, in April 1993, that we were operating paths or activating paths in an unauthorized manner. I did not have conversations with Behrooz Nourain on that subject.

I didn't gather from this letter at all that I should have conversations with him on that subject, and had counsel told me that, even hinted at it, after writing to me and talking to me I would have done something about it. But, Your Honor, I did not know.<sup>60</sup>

**D. Behrooz Nourain<sup>61</sup>**

31. Mr. Nourain reaffirmed that he had no prior licensing or regulatory responsibility at his prior two positions before working for Liberty.<sup>62</sup> At most, his pre-Liberty experience entailed providing technical information to in-house counsel for the filing of license applications.<sup>63</sup> Accordingly, Mr. Nourain relied upon the legal expertise

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<sup>59</sup> Tr. 2195:3-7 [Price].

<sup>60</sup> Tr. 2195:9-17 [Price].

<sup>61</sup> Mr. Nourain was represented at the hearing by counsel for Freedom New York, L.L.C. Consistent with Liberty counsel's letter dated February 6, 1997, Liberty continues not to rely on Mr. Nourain's testimony regarding when he first learned of premature activations. This position should not be deemed or be construed as an admission that anyone at Liberty learned about premature activations in 1993 from the Richter Letter or otherwise.

<sup>62</sup> Tr. 2310:11-20 [Nourain].

<sup>63</sup> Tr. 2310:21 - 2311:9 [Nourain].

and advice of Pepper & Corazzini for the legal aspects of the license application process:

“Technical part of it was my job, legal aspect of it was Pepper & Corazzini. I was comfortable in the technical part.”<sup>64</sup> During the time period relevant to this round of hearings, Mr. Nourain worked with Jennifer Richter on the license applications.<sup>65</sup>

32. Mr. Nourain recalled conversations with Ms. Richter regarding construction of paths that were not yet licensed.<sup>66</sup> Mr. Nourain testified that it was his practice, as part of an effort to save the company time and money, to have the physical stations constructed but inactive.<sup>67</sup> Mr. Nourain did so on his own initiative and not in response to any directive from his superiors to “[g]et the construction up as fast as you can.”<sup>68</sup>

33. Mr. Nourain’s discussion with Ms. Richter about construction of paths resulted in the Richter Letter, which Mr. Nourain received at least as of April 28, 1993.<sup>69</sup> Mr. Nourain did not know what Ms. Richter meant by her statement that certain things she discussed with Mr. Nourain “gave [them] pause.”<sup>70</sup> Mr. Nourain testified that there

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<sup>64</sup> Tr. 2269:13-15 [Nourain].

<sup>65</sup> Tr. 2209:20 - 2210:7 [Nourain].

<sup>66</sup> Tr. 2257:8 - 2258:21 [Nourain].

<sup>67</sup> Tr. 2259:1-10 [Nourain].

<sup>68</sup> Tr. 2259:11-19 [Nourain].

<sup>69</sup> Tr. 2264:7-9 [Nourain].

<sup>70</sup> Tr. 2268:14 - 2269:1 [Nourain].

was nothing in his conversation with Ms. Richter about construction that gave him pause.<sup>71</sup>

34. Mr. Nourain acknowledged that he routed a copy of the Richter Letter to Mr. Price with the following handwritten note: "Peter, Pls. [please] review and advise. B.N. 4/28/93."<sup>72</sup> Mr. Nourain believed that he did this because the letter came at the time when Mr. McKinnon was leaving Liberty, and the Richter Letter contained information which Mr. Nourain thought Mr. Price should know, in case Mr. McKinnon had not seen or forwarded the Richter Letter to Mr. Price.<sup>73</sup> As Mr. Nourain pointed out, Mr. Price was not copied on the Richter Letter.<sup>74</sup>

35. The advice Mr. Nourain sought from Mr. Price related to filing requests for STA. Mr. Nourain wanted Mr. Price to know about the relevant licensing application time lines and the need for STAs in order for Liberty to fulfill its contractual obligations to its buildings.<sup>75</sup> Mr. Nourain does not recall that he discussed the Richter Letter with Mr. Price, but Mr. Nourain did generally discuss with Mr. Price the issue of the time

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<sup>71</sup> Tr. 2269:2 - 2270:8 [Nourain].

<sup>72</sup> Tr. 2263:21 - 2264:6 [Nourain].

<sup>73</sup> Tr. 2272:15-24 [Nourain]. Mr. Nourain recalled that Mr. McKinnon departed from Liberty on May 14, 1993. Tr. 2281:6-9 [Nourain]; McKinnon Dep. 5:10-15 (TW/CV 53). Mr. McKinnon stated that he did not recall receiving the Richter Letter. McKinnon Dep. 21:16 - 22:3 (TW/CV 53).

<sup>74</sup> Tr. 2272:20 [Nourain].

<sup>75</sup> Tr. 2273:5 - 2274:11 [Nourain].

needed to process licensing applications and the need to file for STAs in order to activate certain buildings.<sup>76</sup>

36. Mr. Nourain was questioned about Ms. Richter's license inventories. Mr. Nourain reviewed the drafts for technical accuracy.<sup>77</sup> He believed the inventories were being prepared by Ms. Richter for her own purposes.<sup>78</sup> Mr. Nourain did not use the inventories in his activation of buildings.<sup>79</sup> He most likely filed away his copies of the license inventories "because the information here was most of the technical information that I had before."<sup>80</sup>

37. Mr. Nourain testified that he did not use the installation progress reports in the course of his duties.<sup>81</sup> Moreover, Mr. Nourain did not compare the customer installation information in those reports with the information contained in Ms. Richter's license inventories.<sup>82</sup>

38. Pursuant to Order FCC 97M-79 (rel. May 6, 1997), Mr. Nourain was questioned again about the allegedly inconsistent statements in his February 21, 1995 affidavit filed in New York Federal Court and the May 17, 1995 declaration filed in support of Liberty's Surreply to Time Warner's May 5, 1995 petition to deny or condition

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<sup>76</sup> Tr. 2274:13-25 [Nourain].

<sup>77</sup> Tr. 2224:24 - 2225:5 [Nourain].

<sup>78</sup> Tr. 2225:13-18 [Nourain].

<sup>79</sup> Tr. 2241:16-18 [Nourain].

<sup>80</sup> Tr. 2252:25 - 2253:2 [Nourain].

<sup>81</sup> Tr. 2230:5-7 [Nourain]; TW/CV 14.

<sup>82</sup> Tr. 2240:24 - 2241:2 [Nourain].

grant of Liberty's licenses.<sup>83</sup> Mr. Nourain, in his February 21, 1995 Federal Court affidavit stated that he had been advised on Time Warner's opposition to Liberty's pending applications for "various 18 [GHz] licenses."<sup>84</sup> Mr. Nourain later submitted a declaration on May 17, 1995 which affirmed that he "was unaware of the petitions against Liberty's applications until late April of 1995."<sup>85</sup>

39. In Mr. Nourain's view, the statements were correct in their own context and thus not inconsistent.<sup>86</sup> The February 21, 1995 affidavit was submitted in response to Time Warner's arguments about the feasibility of serving certain locations by microwave instead of hardwire.<sup>87</sup> In the course of preparing this affidavit, one of Liberty's attorneys told Mr. Nourain that Time Warner had petitioned against certain of these buildings which were being served by hardwire, the so-called "I-Block" buildings.<sup>88</sup> Mr. Nourain did not understand that the petitions applied to the paths other than the "I-Block" buildings until the premature activations were disclosed in late April 1995.<sup>89</sup> Mr.

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<sup>83</sup> TW/CV 13, 18.

<sup>84</sup> TW/CV 13.

<sup>85</sup> TW/CV 18.

<sup>86</sup> Tr. 2289:14 - 2290:13 [Nourain].

<sup>87</sup> Tr. 2289:18 - 2290:3 [Nourain]. The Federal Court action in New York was Liberty's constitutional challenge to New York City's attempt to impose a franchising requirement for Liberty's provision of service solely on private property even though no process was in place for Liberty to secure a franchise from New York City. *Liberty v. City of New York*, 893 F. Supp. 191 (S.D.N.Y. 1995), *aff'd*, 60 F.3d 961 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1262 (1996).

<sup>88</sup> Tr. 2291:25 - 2292:18 [Nourain].

<sup>89</sup> Tr. 2290:4-12 [Nourain].