

ORIGINAL

BEFORE THE
Federal Communications Commission
WASHINGTON, DC 20554

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In Re Applications of **DOCKET FILE COPY ORIGINAL**)
LIBERTY CABLE CO., INC.)
For Private Operational Fixed)
Microwave Service Authorizations and)
Modifications)
New York, New York)

Federal Communications Commission
Office of Secretary

WT DOCKET NO. 96-41

To: Hon. Richard L. Sippel, Administrative Law Judge

**SUPPLEMENTAL PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW OF TIME WARNER CABLE OF
NEW YORK CITY AND PARAGON COMMUNICATIONS**

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SUMMARY

The substantial record evidence in this proceeding shows that Liberty Cable Co., Inc. ("Liberty") did indeed violate the Communications Act, and the Federal Communications Commission ("Commission" or "FCC") rules and policies in the application process and the hearing proceeding, in 1993 as well as in the 1994-1995 time period, and as a result, the pending applications should be denied.

The recent May 1997 hearing focused on whether Liberty operated unauthorized microwave facilities in 1993 and whether Liberty knew of such operations in 1993. Testimonial and documentary evidence presented at the May 1997 hearing overwhelmingly demonstrates that Liberty knowingly activated at least thirteen microwave paths without FCC authorization in February through June 1993. Liberty's installation progress reports, which indicated the activation dates for microwave facilities, together with license inventories prepared jointly by counsel and Liberty's chief engineer show that in 1993, Liberty was operating microwave facilities without FCC authorization. The license inventories omit licenses for microwave paths that were currently activated and list other activated paths as the subject of pending license applications.

Mr. Nourain, Liberty's Director of Engineering, was aware of both the activation status of Liberty's microwave facilities and the licenses that Liberty possessed. In fact, Mr. Nourain testified that he did not even need to consult a license inventory because he knew the inventory of licenses. Therefore, Mr. Nourain's knowledge should have apprised him that Liberty was operating microwave facilities without FCC authorization. In addition, an April 20, 1993 letter from counsel ("the Richter letter") clearly advised Liberty that Mr. Nourain had been operating under a mistaken belief about the Commission's rules. The Richter letter further informed Liberty that Mr. Nourain's misunderstanding either had

resulted in past unlicensed operations or suggested a high probability of unlicensed operations in the future.

Liberty's unlicensed operations in 1993, and in 1994-1995, were caused by Liberty's deliberate and complete disregard for the Commission's rules. Mr. Nourain repeatedly testified that he knew he needed FCC authorization prior to activating a microwave facility. In April 1993, by verbal and written communication, Jennifer Richter, Liberty's counsel, explicitly reminded Mr. Nourain that he needed FCC authorization prior to activation. Despite his knowledge about the rules and counsel's distinct guidance, Mr. Nourain proceeded to activate microwave paths without authorization. Mr. Nourain continued to operate under his assumption that he had authorization, even though he knew that it was necessary to have a license or Special Temporary Authority (STA) in hand before activating microwave paths.

Mr. Price, Liberty's president, also ignored counsel's admonition in the Richter letter. Mr. Nourain had forwarded the Richter letter to Mr. Price with a request for advice. However, Mr. Price never discussed the letter with Mr. Nourain or with anyone else at Liberty and failed to heed the clear warning from counsel that Mr. Nourain needed to be supervised. His only reaction to the letter was to request Ms. Richter to apply for STA after filing each license application.

In addition to routine unauthorized operation of microwave facilities, Liberty has engaged in a pattern of misrepresentations to the Commission. In its May 17, 1995 Surreply, Liberty stated that it had a pattern and practice of awaiting FCC authorization before activating a microwave facility. Liberty's knowing widespread unauthorized operations in 1993 demonstrate that it had no such pattern or practice. Liberty also

represented to the Commission, in its Surreply, that Mr. Nourain's assumption that STA requests were granted within a certain time period was based on Mr. Nourain's experience. Mr. Nourain actually had no experience with examining STAs prior to activation of paths, and did not even understand the information contained on an STA.

Liberty further lacked candor with the Commission regarding when Mr. Nourain became aware of petitions against all of Liberty's license applications. Not only are Mr. Nourain's statements inconsistent with each other, but they are contrary to testimony offered by Mr. Lehmkuhl in the January 1997 hearing. Mr. Barr's request to limit his testimony that he had never heard anyone suggest that Liberty had engaged in unauthorized operations to the January through April 1995 time period also lacks candor. Mr. Barr's hearing testimony rendered his "clarification" meaningless, and events at the hearing indicated that Liberty was not being candid with the Commission. Even the Presiding Judge could not extract the full story regarding Mr. Barr's clarification from either Mr. Barr or from counsel.

As a matter of law, Liberty is not qualified to be a Commission licensee because it lacks the requisite candor and credibility in its dealings with the Commission. Liberty bears the burden of affirmatively proving that it acted forthrightly with the Commission during the application process and this hearing proceeding, and that it did not flagrantly disregard the Communications Act and the Commission's rules and policies. Liberty has not met this burden.

The evidence shows that Liberty was operating several microwave facilities without licenses or STAs in the 1992-93 time period, as well as in 1995. The evidence further shows that Liberty had received notice from counsel regarding its licensing practices, and

simply chose to disregard such notice. Rather, Liberty made knowingly false statements to the Commission in its Surreply, thereby demonstrating its lack of candor in dealing with the Commission. Liberty also failed to prove that Mr. Nourain acted forthrightly with the Commission when he swore to an affidavit and a declaration in 1995 containing contradictory statements of fact about his knowledge of TWCNYC's petitions to deny Liberty's microwave applications. Finally, Liberty failed to establish a plausible reason for Mr. Barr's substantive clarification to his January 1997 hearing testimony.

Liberty's attempt to exonerate its failure to act candidly with the Commission cannot be excused by an alleged good faith reliance on counsel. Liberty not only did not rely on its counsel's advice in many instances, it completely disregarded such advice. In such situations, the reliance on counsel defense is inapposite.

The most appropriate sanction for Liberty's flagrant disregard to the Commission's rules and policies and the Communications Act is denial of Liberty's applications. The imposition of a forfeiture is inappropriate in cases involving such egregious violations of the Commission's rules as have occurred here.

Finally, Liberty's failure to produce its Internal Audit Report as evidence in this proceeding must result in the Presiding Judge making an adverse inference with regard to the information contained therein. All four factors exist that are necessary for invoking an adverse inference: the Report exists; Liberty has possession and control of the Report; the Report is available to Liberty, but not to TWCNYC or the Presiding Judge; and Liberty has actively sought to withhold the Report from this proceeding. Thus, the Presiding Judge must make an adverse inference regarding the contents of the Report.

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Microwave Service Authorizations and)
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To: Hon. Richard L. Sippel, Administrative Law Judge

**SUPPLEMENTAL PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW OF TIME WARNER CABLE OF
NEW YORK CITY AND PARAGON COMMUNICATIONS**

Time Warner Cable of New York City and Paragon Communications (collectively, "TWCNYC") submit these Supplemental Proposed Findings of Fact ("Supp. Findings") and Conclusions of Law ("Supp. Conclusions") in accordance with the Presiding Judge's Order. Order, WT Docket No. 96-41, FCC 97M-74 (rel. May 1, 1997).

SUPPLEMENTAL PROPOSED FINDINGS OF FACT

I. Background.

A. Procedural History.

1. This proceeding implements the Commission's Hearing Designation Order and Notice of Opportunity for Hearing, 11 FCC Rcd 14133 (1996) ("HDO"), in which the

character qualifications of Liberty Cable Co., Inc. ("Liberty")¹ to hold operational fixed microwave service ("OFS") licenses are at issue. Findings, ¶ 1.²

2. After some initial discovery, Liberty and the Wireless Telecommunications Bureau (the "Bureau") jointly moved for summary decision on July 15, 1996, which TWCNYC and Cablevision of New York ("Cablevision") opposed in a filing made on September 13, 1996. Findings, ¶ 6. Liberty's belated production of a February 24, 1995 microwave license inventory precipitated an additional round of depositions, as well as the filing of supplements to the initial summary decision papers. Findings, ¶¶ 7-8; L/B Ex. 1.³

3. In December 1996, the Presiding Judge determined that a hearing was necessary to evaluate the credibility and candor of Liberty's witnesses regarding the facts and circumstances of Liberty's activation of several microwave paths without FCC authorization. Findings, ¶ 8. This hearing occurred on January 13-16, 21, 27, and 28, 1997 (hereinafter, the "January 1997 hearing"). All parties submitted Proposed Findings of Fact and Conclusions of Law on February 28, 1997, and Replies to the Proposed Findings and Conclusions of Law on March 10, 1997. *Id.* at ¶ 9.

¹TWCNYC is aware that Liberty Cable Co., Inc. is now known as "Bartholdi Cable Company, Inc." following the sale of most of the former Liberty's assets (including its name) to a subsidiary of RCN Corporation. However, for clarity, the applicant for the licenses at issue in this proceeding will be referred to by its former name, "Liberty."

²TWCNYC's Proposed Findings of Fact and Conclusions of Law, filed on February 28, 1997, will be cited as "Findings, ¶ ____" and "Conclusions, ¶ ____," respectively. TWCNYC's Reply to Liberty's Proposed Findings of Fact and Conclusions of Law, filed March 10, 1997, will be cited as "Reply Findings, at ____" and "Reply Conclusions, at ____," respectively.

³Liberty and the Bureau's exhibits are cited as "L/B Ex. ____."

4. On February 5, 1997, after the January 1997 hearing, the Presiding Judge ordered Liberty to produce a copy of Jennifer Richter's letter to Bruce McKinnon, dated April 20, 1993 (the "Richter letter") (TWCV Ex. 51).⁴ Order, WT Docket No. 96-41, FCC 97M-14 (rel. February 5, 1997). Copies of this letter were produced, as ordered.

5. On February 6, 1997, Liberty's counsel 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." Order, WT Docket No. 96-41, FCC 97M-63 (rel. April 21, 1997).

6. On February 26, 1997, Liberty filed a Motion to Correct Hearing Transcript. In particular, Liberty requested that Mr. Barr's testimony that he had not heard anyone suggest that Liberty had engaged in premature service, be limited to the January through April 1995 time period. Motion to Correct Hearing Transcript, Exhibit A at 7.

7. TWCNYC filed a Motion for Limited Discovery and the Taking of Additional Hearing Testimony, Or, in the Alternative, to Enlarge Issues ("TWCNYC's Motion") on March 3, 1997. TWCNYC's Motion was based in part on the post-hearing production of the Richter letter and Mr. Barr's purported "clarification" of his January 1997 hearing testimony. TWCNYC Motion, at 3-6. In addition, TWCNYC presented evidence showing that Liberty had activated facilities serving 33 W. 67th Street in June 1993 prior to receiving FCC authorization. Id. at 6-7.

⁴TWCNYC and Cablevision's exhibits admitted at the January 1997 hearing are cited as "TWCV Ex. ____." Although Cablevision did not participate in the May 1997 hearing, TWCNYC's exhibits admitted at that hearing are cited as "TWCV Ex. ____," continuing the exhibit numbering system established at the January 1997 hearing.

8. In its Motion, TWCNYC requested additional discovery and testimony regarding whether Liberty was operating unlicensed OFS microwave facilities in 1993, and whether Liberty discovered that fact in 1993. TWCNYC Motion, at 1.

9. Liberty filed its Opposition to TWCNYC's Motion on March 21, 1997. On that same date the Bureau filed its Comments on TWCNYC's Motion. Liberty did not respond to TWCNYC's charge of unlicensed activation of a microwave path to 33 W. 67th Street.

10. The Presiding Judge granted TWCNYC's Motion for Limited Discovery and the Taking of Additional Hearing Testimony because there were "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." Order, WT Docket No. 96-41, FCC 97M-63, ¶ 10 (rel. April 21, 1997). The Presiding Judge, however, denied TWCNYC's Motion to Enlarge Issues. Id. at ¶ 7.

11. Discovery was conducted, including production of documents and depositions of Jennifer Richter, Bruce McKinnon, Howard Barr and Behrooz Nourain. See TWCNYC's Additional Request for Production of Documents, April 25, 1997; TWCV Exs. 52-55.

12. Hearing sessions were held in Washington, D.C., on May 28 and 29, 1997 (hereinafter, the "May 1997 hearing"). These Supplemental Proposed Findings of Fact and Conclusions of Law are filed June 11, 1997, and Replies are scheduled to be filed June 18, 1997. Order, WT Docket No. 96-41, FCC 97M-74 (rel. May 1, 1997).

B. Witnesses.

13. Jennifer Richter, Howard Barr, Peter Price, and Behrooz Nourain testified at the May 1997 hearing. Ms. Richter was the only witness that had not previously provided hearing testimony in this proceeding. Bruce McKinnon's second deposition transcript was received in evidence, but he did not testify in person.

14. Jennifer Richter was employed at Pepper & Corazzini as an attorney from April 1992 through July 1994. Richter, Tr. 1998, 2000. During her employment, she was responsible for filing Liberty's microwave license applications. Richter, Tr. 2001-03. Mr. Nourain was Ms. Richter's primary contact at Liberty. Richter, Tr. 2004. Generally, they spoke on a weekly basis. Richter, Tr. 2005.

II. Liberty's Microwave License Application Process In Late 1992 And 1993.

15. When Ms. Richter started working on the Liberty account, Liberty did not make a direct request to her that she prepare an application for a new microwave path. Rather, she learned that a microwave license application was needed as a result of receiving a frequency coordination for the proposed new path from Comsearch. Richter, Tr. 2005. Mr. Nourain sometimes notified Ms. Richter that technical information from Comsearch would be arriving soon. Nourain, Tr. 2210. After completing the application, she would send it to Liberty for signature. Richter, Tr. 2005. Later in Ms. Richter's work with Liberty, Mr. Nourain directly requested her to file an application. For example, Mr. Nourain would telephone Ms. Richter to request that license applications be filed for new paths. Ms. Richter would then request a frequency coordination from Comsearch. Richter,

Tr. 2005-08; TWCV Ex. 60. By March of 1993, Mr. Nourain was calling Ms. Richter directly to request that she prepare applications for new paths. TWCV Ex. 60.

16. After she filed an application, Ms. Richter monitored the Commission's public notices to ascertain when Liberty's applications were accepted for filing. Richter, Tr. 2009-10. When Liberty's applications were placed on public notice, it was Ms. Richter's regular practice to inform Liberty of this fact by letter, attaching the public notice. Richter, Tr. 2010-11; Nourain, Tr. 2212; TWCV Exs. 56, 57. Mr. Nourain also received a copy of the application as filed. Nourain, Tr. 2210.

17. On December 8, 1992 and February 3, 1993, Ms. Richter sent letters attaching public notices to Messrs. McKinnon and Nourain. TWCV Exs. 56, 57. In both cover letters, Ms. Richter advised that the relevant applications could not be granted until after the application had been on public notice for thirty days. In addition, she stated that the processing time for microwave applications should take between 60 and 90 days, but that recently the actual processing time was about 120 days. Richter, Tr. 2013; TWCV Exs. 56, 57.

18. The Commission sent licenses directly to Liberty. Upon receipt of a license, Mr. Nourain sent a copy of it to Ms. Richter for her files. Richter, Tr. 2013-14; Nourain, Tr. 2212, 2305. Mr. Nourain maintained a file of licenses in his office organized by transmitter. Nourain, Tr. 2212, 2218.

III. Liberty Activated Unlicensed Microwave Paths Prior To 1995.

A. The April 1993 Inventory Lists Pending Applications For Nine Microwave Paths That Were Already Activated.

1. Preparation of the April 1993 inventory.

19. In March of 1993, Ms. Richter began to compile an inventory of Liberty's microwave licenses. Richter, Tr. 2014-15; Nourain, Tr. 2216; TWCV Ex. 60. The inventory was organized by call sign or license, and listed microwave paths that were already licensed or for which an application was pending. Richter, Tr. 2016-17, 2023; TWCV Ex. 58. Ms. Richter's inventory was based on the licenses and other information she received from Mr. Nourain. Nourain, Tr. 2218-19.

20. Ms. Richter relied on Mr. Nourain to inform her about which microwave paths were licensed, but were not being used by Liberty. Richter, Tr. 2021; Nourain, Tr. 2219-20. Mr. Nourain was able to discern which paths were no longer necessary by looking at the licenses. See Nourain, Tr. 2221-22. On March 16, 1995, Ms. Richter and Mr. Nourain discussed Liberty's active and dormant microwave paths and whether certain paths could be deleted. Richter, Tr. 2018-21; TWCV Ex. 60.

21. On March 16, 1993, Ms. Richter also sent Mr. Nourain a draft inventory by facsimile and requested that he "review [it] and call [her] if anything needs changing." TWCV Ex. 58; see Richter, Tr. 2017-19. Ms. Richter wanted Mr. Nourain to review the draft to ensure that the inventory was a complete and accurate list of licensed paths. Richter, Tr. 2022, 2059-60. Mr. Nourain reviewed the draft inventory. Richter, Tr. 2022; Nourain, Tr. 2224-26. Ms. Richter believed that Mr. Nourain understood the information presented in the inventories. Richter, Tr. 2028, 2034.

22. On April 6, 1993, Ms. Richter sent a cover letter and final inventory (the "April 1993 Inventory") to Messrs. McKinnon and Nourain. Richter, Tr. 2068; TWCV Exs. 3, 59. In the cover letter Ms. Richter informed Mr. McKinnon that she and Mr. Nourain had scrutinized the licenses and determined which paths needed to be moved and which paths should be deleted. TWCV Ex. 59.

2. The Spring 1993 inventories put Mr. Nourain on notice that he had operational, unlicensed paths by omitting certain paths from the "licensed" list and by identifying others as the subject of applications that had not yet gone on public notice.

23. Liberty's business records show that it was installing customers at the following addresses in February 1993: 175 E. 74th Street, 812 Fifth Avenue, 400 E. 59th Street, 180 East End Avenue, 90 Riverside Drive and 510 E. 86th Street; and at the following addresses in March 1993: 116 E. 66th Street and 200 E. 36th Street. TWCV Ex. 14. Liberty also installed customers at 302 E. 88th Street in April 1993. *Id.* As a general rule, Liberty did not begin installing customers in a particular building until *after* the microwave path to that building had been activated. Nourain, Tr. 2317-19.

24. None of the addresses at which Liberty began installing customers in February, March or April were identified as licensed paths in the draft inventory Ms. Richter sent to Mr. Nourain to review on March 16, 1993, and which Mr. Nourain did review. TWCV Ex. 58. Mr. Nourain did not ask Ms. Richter about the missing paths. Nourain, Tr. 2226. There was a "system diagram" attached to the draft inventory that identified some of these paths as "future" paths. TWCV Ex. 58.

25. The final version of this Inventory, dated April 6, 1993, does include paths to these addresses, but identifies them as the subject of pending applications that have not gone on public notice. TWCV Ex. 3.

26. In a memorandum accompanying the April 1993 Inventory, Ms. Richter explained that items differentiated with a "(3/93)" in the right-hand margin were applications to add new paths that were filed in March 1993. As of the date of the inventory, no FCC file number had been assigned. TWCV Ex. 3. The April 1993 Inventory contains eight such paths: from Normandie Court to 180 East End, 510 E. 86th Street and 90 Riverside Drive; from Bristol Plaza to 175 E. 74th Street, 400 E. 59th Street, 812 Fifth Avenue and 116 E. 66th Street; from Windsor Court to 200 E. 36th Street. Id. at 9, 13, 21; Richter, Tr. 2072, 2074, 2076-77.

27. A handwritten notation on the April 1993 Inventory indicates that an application to add a new path from Normandie Court to 302 E. 88th Street was filed in April 1993. TWCV Ex. 3, at 9; Richter, Tr. 2072-73.

28. Although the April 1993 Inventory indicates that the applications for the above-mentioned new paths were filed in March and April of 1993, in actuality their filing dates ranged from late March through mid-May 1993. See Liberty Application, Normandie Court to 180 East End Avenue, 510 E. 86th Street and 90 Riverside Drive, signed March 25, 1993 (Attachment A); Liberty Application, Normandie Court to 302 E. 88th Street, filed May 13, 1993 (Attachment B); Liberty Application, Bristol Plaza to 175 E. 74th Street, 400 E. 59th Street, 812 Fifth Avenue and 116 E. 66th Street, filed April 1, 1993 (Attachment C);

Liberty Application, Windsor Court to 200 E. 36th Street, signed March 26, 1993

(Attachment D).⁵

29. These paths are identified as "new" paths or "added" paths on their respective applications. Attachments A-D. In addition, Ms. Richter identified them as "new" paths in her hearing testimony. Richter, Tr. 2072-77. They are not, therefore, modifications of previously licensed paths.

30. Thus, although Mr. Nourain denies having such knowledge (see Nourain, Tr. 2227, 2241-42, 2282), the totality of the evidence shows that Mr. Nourain had activated microwave paths to a number of buildings in February, March and April 1993 that Mr. Nourain knew either at the time he activated them, or immediately thereafter, were unauthorized.

IV. The Evidence Demonstrates That Liberty Knew It Was Operating Unauthorized Microwave Paths In 1993.

A. Mr. Nourain Was Aware Of The Activation Status Of Microwave Facilities And The Licenses Possessed By Liberty.

31. Mr. Nourain was responsible for activating microwave facilities. Findings, ¶ 68; Price, Tr. 2166. As such, he was aware of when Liberty activated its facilities. For example, on occasion in April 1993, Mr. Nourain gave Ms. Richter activation dates for her to prepare construction certificates. Richter, Tr. 2055-56. Pepper & Corazzini's billing records indicate that on April 20, 1993, Ms. Richter drafted ten certificates of construction. TWCV Ex. 61; Richter, Tr. 2057. Ms. Richter received the dates that Liberty began

⁵All attachments, which are Liberty Applications, are found in the Appendix filed with this paper.

operation at certain locations from Mr. Nourain. Richter, Tr. 2057. Mr. Nourain believed that Ms. Richter worked for him "as far as all the FCC regulations and FCC work [was] concerned." Nourain, Tr. 2261. Accordingly, Mr. Nourain believed that it was entirely Ms. Richter's job to ensure that everything pertaining to licensing was done correctly. Nourain, Tr. 2261, 2269.

32. During April and May 1993, Ms. Richter and Mr. Nourain communicated about the dates that Liberty commenced operation for buildings that were currently licensed. Richter, Tr. 2057-58. On May 7, 1993, Ms. Richter and Mr. Nourain discussed service commencement dates. TWCV Ex. 63.

33. When Ms. Richter was compiling the draft microwave license inventory in March 1993, she relied on Mr. Nourain to tell her which paths were not active. Mr. Nourain was able to provide this information. See Supp. Findings, ¶ 20.

34. Based on Mr. Nourain's numerous conversations with Ms. Richter regarding the activation status of microwave paths and operation commencement dates, and the fact that he was responsible for activating microwave facilities, Mr. Nourain clearly had a working knowledge of the paths that were in operation on a given date.

35. Mr. Nourain was also aware of the licenses that had been granted to Liberty because he received granted licenses from the Commission. See Supp. Findings, ¶ 18. Upon receipt of a license, Mr. Nourain reviewed it and posted it at the transmittal location. Nourain, Tr. 2255.

36. Mr. Nourain reviewed a draft inventory of microwave licenses and received a final April 1993 Inventory. See Supp. Findings, ¶¶ 21-22; TWCV Exs. 3, 59. Mr.

Nourain's review of the March 1993 draft inventory should have revealed that at least one microwave path was operating without a license. For example, the draft inventory did not list a license for 175 E. 74th Street. TWCV Ex. 58. However, that building had been active since March 1993. TWCV Ex. 14. Given that Mr. Nourain knew which microwave paths were active (Nourain, Tr. 2217), he should have realized that the inventory did not include a license for that particular path.

37. A review of the April 1993 Inventory would have also revealed that Liberty did not have a license for several microwave paths that were operating as of the date of the inventory. See Supp. Findings, ¶¶ 23-24.

38. Mr. Nourain claims that he did not review the final April 1993 Inventory or use it in performing his job. See Nourain, Tr. 2252-53. He testified that he "went based on the licenses that we got and what I authorized [Ms. Richter] to go ahead with the STAs." Nourain, Tr. 2241. According to Mr. Nourain, he did not need to consult the inventory because he "knew exactly the inventory of the licenses [him]self" (Nourain, Tr. 2217) and "the information here was most of the technical information that I had before." Nourain, Tr. 2252-53.

39. Mr. Nourain's knowledge of which microwave paths were active, together with his knowledge of the licenses possessed by Liberty, should have indicated to him that Liberty was operating without proper authorization.

B. The Richter Letter Put Liberty On Notice That Mr. Nourain Did Not Understand The FCC's Rules And That Misunderstanding Either Had In The Past, Or Might In The Future, Lead To Unlicensed Operations.

40. On April 2, 1993, Ms. Richter had a discussion with Mr. Nourain regarding the "construction and operation of paths that [had] not been granted and future modifications." TWCV Ex. 61; Richter, Tr. 2037. Ms. Richter testified that Mr. Nourain was interested in whether he could construct and operate a path that was not licensed. Richter, Tr. 2037. Mr. Nourain's inquiry was prompted by a long FCC processing time for license applications -- in excess of 90 to 120 days. Richter, Tr. 2038. Ms. Richter advised Mr. Nourain that he could construct, but not operate, a facility before it was licensed. Richter, Tr. 2038.

41. On April 13, 1993, Ms. Richter had another discussion with Mr. Nourain regarding construction of unauthorized paths. Richter, Tr. 2039; TWCV Ex. 61. Mr. Nourain recalled that his discussion with Ms. Richter on April 13, 1993 concerned whether he could construct a building prior to receiving authorization. Nourain, Tr. 2257-60.

42. These April 1993 conversations with Mr. Nourain prompted Ms. Richter to draft a letter to Mr. McKinnon, dated April 20, 1993. Mr. Nourain received a copy of the letter. Richter, Tr. 2040-41; TWCV Ex. 51.

43. The first paragraph of Ms. Richter's letter states:

Behrooz Nourain and I have had several discussions recently regarding when it is permissible for Liberty to construct and operate new microwave paths and stations, and when it is not. Some things were revealed during these conversations that gave both Behrooz and I pause. In order to ensure that everything Liberty does is in strict accordance with the rules, and to ensure that your competitors are given no ammunition against you, I am writing this

letter to detail the parameters within which construction and operation of new paths and new stations is permissible.

TWCV Ex. 51.

44. As a result of her discussions with Mr. Nourain, Ms. Richter developed the impression that Mr. Nourain was confused about the Commission rules and about "what could be done and what could not be done." Richter, Tr. 2042. Ms. Richter further testified that Mr. Nourain had "a mistaken belief about the circumstances under which he would be able to turn on a microwave facility." Richter, Tr. 2044. In particular, Ms. Richter was "concerned that some confusion about the rules could lead them to turn on facilities that had not yet been authorized," if Mr. Nourain's confusion was not resolved. Richter, Tr. 2042, 2044, 2048, 2054, 2060.

45. Ms. Richter focused her concern on future illegal activations only. Richter, Tr. 2060-61. However, at the time of the letter, Ms. Richter knew that Mr. Nourain did not fully understand the Commission rules and had been activating microwave paths. Richter, Tr. 2036.

46. The letter states in part that "[s]ome things were revealed during these conversations that gave both Behrooz and I pause." In the letter, Ms. Richter informs Liberty that she and Mr. Nourain had been discussing when it was permissible to operate a microwave path. It was those discussions about Mr. Nourain's understanding of the Commission rules that gave her pause. Therefore, the letter unquestionably informed Liberty that there was a high probability that Mr. Nourain had either activated paths without authorization or, if left unsupervised, would do so in the future.

47. In fact, in the two months preceding the April 1993 discussions between Ms. Richter and Mr. Nourain, Liberty had activated eight microwave paths prior to filing applications for those paths. See Supp. Findings, ¶¶ 23-28 (microwave paths installed in February and March 1993).

V. Liberty Willfully Disregarded The Commission's Rules And Ignored Warnings By Counsel.

A. Mr. Nourain Repeatedly And Blatantly Ignored The Commission's Rules Without Any Basis To Do So.

1. Mr. Nourain understood that he needed FCC authorization prior to activating a microwave path.

48. At the beginning of her dealings with Mr. Nourain "it was clear to [Ms. Richter] that [Mr. Nourain] did not have a full grasp on the rules and regulations as they related to 18 gigahertz frequencies." Richter, Tr. 2035. Prior to his employment at Liberty, Mr. Nourain did not have experience with the rules regulating 18 GHz microwave service. Richter, Tr. 2035-36, 2038-39. Therefore, throughout their working relationship, Ms. Richter explained the Commission's rules to Mr. Nourain. Richter, Tr. 2035, 2038-39. Specifically, she informed Mr. Nourain that Liberty needed a license or Special Temporary Authority ("STA") to turn on a microwave facility. Nourain, Tr. 2263, 2267.

49. In April 1993, discussions with Mr. Nourain gave Ms. Richter the impression that he did not fully understand when it was permissible to activate a microwave path. Supp. Findings, ¶¶ 40-41. In her discussions with Mr. Nourain, Ms. Richter explained that Liberty could construct, but not operate, a microwave path prior to receiving FCC authorization. Supp. Findings, ¶ 40.