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BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554
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JUN 23 1997

Federal Communications Commission
Office of Secretary

In Re Applications of)
)
 LIBERTY CABLE CO., INC.)
)
 For Private Operational Fixed) WT DOCKET NO. 96-41
 Microwave Service Authorizations and)
 Modifications)
)
 New York, New York)

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

**TIME WARNER CABLE OF NEW YORK CITY AND PARAGON
COMMUNICATIONS' REPLY TO SUPPLEMENTAL PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF LAW OF BARTHOLDI CABLE CO., INC.
AND THE WIRELESS TELECOMMUNICATIONS BUREAU**

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SUMMARY

Liberty's pattern of consciously activating microwave facilities in 1993 prior to obtaining Commission authorization demonstrates that Liberty knowingly violated the Commission's rules. Liberty activated nine microwave facilities in February through April 1993. Liberty did not have licenses in hand for these nine paths. Although Mr. Nourain denies that he knew he was activating any of these paths without authorization, the evidence indicating that he did know weighs heavily against his denial. Mr. Nourain reviewed a draft license inventory in March 1993, and had discussions with Ms. Richter regarding unauthorized operations. Such discussions prompted Ms. Richter to write a detailed letter to Liberty regarding proper procedures for construction and operation of microwave facilities. Mr. Nourain admits that the Richter letter did not provide him with any new information.

Liberty does not have to have intended to violate the Commission's rules; it just must have intended to perform the act that results in a violation of those rules. Intent to perform the act that results in a violation of the Commission's rules can be determined from the facts in the record. The facts of this case undeniably prove that Mr. Nourain intended to turn on unlicensed microwave facilities, as he did in 1993. As such, Liberty had the requisite intent to violate the Commission's rules. TWCNYC does not need to prove the existence of an admission by Liberty that it knew it was violating the law; rather, Liberty bears the burden of affirmatively proving its candor and credibility in dealing with the Commission.

Liberty's complete failure to either deny or explain the substantial evidence of premature activation of microwave facilities in February through June 1993 necessarily means that the Presiding Judge must conclude that Liberty was in fact operating such facilities without Commission authorization in 1993.

Liberty's claim that the Richter letter is insignificant is contradicted by the fact that Lloyd Constantine specifically requested a copy of that letter in a June 1995 conversation with Howard Barr. Mr. Constantine's knowledge of the letter over two years after it was written, and his request for it in the context of a conversation regarding the discovery of additional instances of unlicensed microwave operations implies that the letter was significant to someone at Liberty.

Finally, TWCNYC notes its objection to statements made by the Bureau regarding Mr. Barr's explanation of his clarification of his January 1997 hearing testimony that are not supported by material contained in the record. If the Bureau had wanted this information on the record, it should have had someone testify under oath regarding the facts that it alleges in its Supplemental Findings, so that TWCNYC could have exercised its right to cross-examination.

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Time Warner Cable of New York City and Paragon Communications (collectively, "TWCNYC") submit this Reply to Supplemental Proposed Findings of Fact and Conclusions of Law of Bartholdi Cable Co., Inc. (hereinafter, "Liberty")¹ and the Wireless Telecommunications Bureau ("Bureau") in accordance with the Presiding Judge's Order. Order, WT Docket No. 96-41, FCC 97M-74 (rel. May 1, 1997), *modified*, Order, WT Docket No. 96-41, FCC 97M-111 (rel. June 20, 1997).

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."

**REPLY TO SUPPLEMENTAL PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

I. The Evidence Shows That Liberty's Conscious And Deliberate Act Of Turning On Microwave Paths, Without Commission Authorization To Do So, Constitutes The Requisite Intent To Deceive The Commission.

Liberty's pattern of behavior in 1993 demonstrates that Liberty knowingly disregarded the Commission's rules requiring FCC authorization before activating microwave facilities. During 1993, Liberty activated several microwave facilities without authorization, was explicitly advised by counsel that prior authorization was necessary, and then continued to activate microwave facilities without authorization.

The documentary and testimonial evidence adduced at the May 1997 hearing indicates that in 1993, Liberty activated nine microwave facilities without FCC authorization. Liberty's business records show that Liberty installed customers -- an activity that occurred after activation of a microwave path -- at these nine locations in February through April 1993.² TWCV Ex. 14; TWCNYC Supp. Findings, ¶ 23. However, a March 1993 draft inventory prepared by counsel does not list licenses for these paths and an April 1993 inventory lists these paths as the subject of pending applications. TWCNYC Supp. Findings, ¶¶ 24-25. Jennifer Richter testified that the pending applications were for new microwave paths, rather than for modification of existing licensed paths. TWCNYC Supp. Findings, ¶¶ 26-27. Therefore, Liberty was operating these paths without authority to do so.

²The nine microwave facilities, discussed in TWCNYC's Supp. Findings, are: 175 E. 74th Street, 812 Fifth Avenue, 400 E. 59th Street, 180 East End Avenue, 90 Riverside Drive, 510 E. 86th Street, 116 E. 66th Street, 200 E. 36th Street, and 302 E. 88th Street. TWCNYC Supp. Findings, ¶ 23.

Although Mr. Nourain denies that he knew of any unauthorized activations, the substantial evidence indicating that he did have such knowledge must be weighed against his denial. In particular, the oral and written communications between Mr. Nourain and Ms. Richter in March and April of 1993 show that Mr. Nourain was aware that his actions were in violation of the Commission's rules. During this time period, Mr. Nourain and Ms. Richter discussed Liberty's active and dormant microwave paths; Mr. Nourain reviewed a draft license inventory compiled by Ms. Richter; and Mr. Nourain received the April 1993 inventory. TWCNYC Supp. Findings, ¶¶ 20-21; TWCV Ex. 3. Mr. Nourain also received licenses from the Commission and testified that he knew which licenses Liberty possessed. TWCNYC Supp. Findings, ¶¶ 35, 38. Mr. Nourain's knowledge regarding the operational status of microwave paths, as well as his knowledge of licenses received by Liberty, demonstrates his awareness of unlicensed activations in 1993. TWCNYC Supp. Findings, ¶ 39.

In addition, during March and April 1993, the FCC was taking a long time to process license applications. TWCNYC Supp. Findings, ¶ 40. In April 1993, this delay prompted Mr. Nourain to have two discussions with Ms. Richter concerning whether he could construct and operate unlicensed paths. TWCNYC Supp. Findings, ¶¶ 40-41. Ms. Richter told him that he could not operate a microwave facility without a license. TWCNYC Supp. Findings, ¶ 40. Ms. Richter then detailed her advice in an April 20, 1993 letter (the "Richter letter"). TWCNYC Supp. Findings, ¶¶ 42-43; TWCV Ex. 51. Mr. Nourain testified that the Richter letter did not provide new information. TWCNYC Supp. Findings, ¶ 50. Nevertheless, any possible confusion about the Commission's rules was resolved by the Richter letter. Despite the clear guidance in the Richter letter and Mr. Nourain's

admitted knowledge of the Commission's requirements, Liberty's business records and license applications show that Mr. Nourain activated four microwave facilities without authorization in May and June of 1993. TWCNYC Supp. Findings, ¶¶ 53-56.

While Liberty correctly asserts that an intent to deceive is necessary to support disqualification of Liberty's applications (Liberty Supp. Conclusions, ¶ 50; Liberty Conclusions, ¶ 100), Liberty continues to rely on an incorrect standard for determining whether there exists such an intent to deceive. Liberty's repeated assertions that it did not know it was violating the Commission's rules, nor did it intend to violate the Commission's rules, are not proof that Liberty lacked the requisite intent to deceive. Similarly, Liberty's repeated claim that the absence of any admission by Liberty -- either written or oral -- that it knew it was violating the Commission's rules precludes a finding of intent to do so, is hardly dispositive. See Liberty Supp. Findings and Conclusions, ¶¶ 15, 22, 28-30, 33, 40, 43, 46-47, 50-51.

Liberty does not have to have intended to violate the Commission's rules; it just has to have intended to perform the act that results in a violation of those rules. See 47 U.S.C. § 312(f)(1). Congress expressly stated that the knowing or "willful"

commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States.

Id. (emphasis added). Furthermore, Congress explained that "willful means that the licensee knew he was doing the act in question, regardless of whether there was an intent to violate the law." H.R. Rep. No. 97-765, 97th Cong., 2d Sess. 51 (1982) (emphasis added).

The Commission has repeatedly held that the willful violation of Commission regulations does not mean that the licensee intended to violate the law, but rather, that he knew he was doing the act that resulted in such violation.³ Moreover, a determination of a party's intent is a factual question that can be inferred from reasonable inferences in the record. See California Public Broadcasting Forum v. FCC, 752 F.2d 670, 679 (D.C. Cir. 1985); Capitol City Broadcasting Co., 8 FCC Rcd 1726, 1734 (Rev. Bd. 1993).

Liberty apparently believes that some other party -- perhaps TWCNYC -- has the burden of proof in this proceeding and that the only way for TWCNYC to prove that Liberty had the requisite intent to deceive the Commission is to prove some admission by Liberty that it knew it was violating the law, and committed the act anyway. See Liberty Supp. Findings and Conclusions, ¶¶ 15, 22, 28-30, 33, 40, 43, 46-47, 50-51. Since there is no such admission by Liberty anywhere in the record, Liberty apparently believes that it has proven its lack of intent to violate the law, or deceive the Commission, and that denial of its

³See Paging Network of Los Angeles, Inc., 10 FCC Rcd 12213, ¶ 9 (1995) (violations were willful "because they were the result of Respondents' conscious and deliberate actions, irrespective of any intent to violate [the] Commission's Rules"); Esaw Industries, Inc., 9 FCC Rcd 2693, ¶ 4 (1994) ("willful nature of a violation is established by a showing that the actions resulting in the violation were intended; not on a showing that there was any specific intent to violate the law"); Capitol Radiotelephone Inc., 8 FCC Rcd 6300, ¶ 11 (1993) ("[f]or purposes of revocation. . . establishing that a violation of the Act or the rules is willful does not require us to establish that the licensee knew he was acting wrongfully; but only that the licensee knew that he was doing the acts in question"); Virginia RSA 6 Cellular Limited Partnership, 7 FCC Rcd 8022, ¶ 4 (1992) (fact that the licensee "may not have intended specifically to violate the Act or the rules and may have relied upon incorrect legal advice does not excuse the willfulness of the repeated, unauthorized preconstruction" of cellular facilities (footnotes omitted)); Benito Rish, 7 FCC Rcd 6036, ¶ 7 (1992) ("deliberate intent to violate the law or to evade detection is not an essential element of the violations"); Southern California Broadcasting Co., 6 FCC Rcd 4387, ¶¶ 4-5 (1991) (consistent with congressional intent, recent Commission interpretations of 'willful' do not require licensee intent to engage in a violation"); MCI Telecommunications Corp., 3 FCC Rcd 509, n.22 (1988) (subsequent history omitted).

applications is, therefore, entirely unwarranted. However, Liberty's belief is mistaken. As TWCNYC stressed in its Supplemental Conclusions, it is Liberty that bears the burden of proving its candor and credibility with the Commission. TWCNYC Supp. Conclusions, ¶ 88.

First, as illustrated supra, at note 3, the evidence need show only that Liberty intended to turn on the microwave paths in issue prematurely. Mr. Nourain has testified that he was responsible for making microwave paths operational, and that he turned on the paths in question. TWCNYC Findings, ¶ 68; TWCNYC Supp. Findings, ¶ 31. This deliberate act of turning on microwave paths, whether or not Mr. Nourain actually knew that, in so doing, he was violating the Commission's rules because no authorization had been granted for the paths, establishes the requisite intent to commit violations of the Commission's rules. See 47 U.S.C. § 312(f)(1); supra, at note 3. Moreover, where "a willful intent to deceive is discerned," as it is here, total disqualification of a licensee or applicant is an appropriate remedy. Fox River Broadcasting, Inc., 88 FCC 2d 1132, 1137 (Rev. Bd. 1982).

Second, there are other ways to prove a party's intent to violate the law besides an outright admission of such knowledge or intent. The fact that Mr. Nourain was explicitly told the proper procedure for constructing and operating microwave paths, and that he knew he had to have licenses in hand before operating such paths, but that he deliberately turned on paths without licenses in hand, necessarily means that Mr. Nourain knew he was violating the Commission's rules.

In March 1993, Ms. Richter and Mr. Nourain were involved in a collaborative effort to develop a comprehensive inventory of Liberty's licenses. TWCNYC Supp. Findings, ¶¶ 19-21. Mr. Nourain was furnishing copies of licenses to Ms. Richter and telling her what

paths were licensed, but not operating because they were unneeded. TWCNYC Supp. Findings, ¶¶ 18, 20. Ultimately, Ms. Richter provided Mr. Nourain with a draft inventory of the status of Liberty's licenses, and with a final version of that inventory. TWCNYC Supp. Findings, ¶¶ 21-22, 36-38; TWCV Exs. 3, 58, 59. Mr. Nourain reviewed the draft version (TWCNYC Supp. Findings, ¶ 21-22, 36; TWCV Exs. 3, 59), but chose to ignore the final version even though he admits having received it (TWCNYC Supp. Findings, ¶ 38). Meanwhile, Mr. Nourain had just activated new paths that were not on the draft inventory and that were on the final, April 6 inventory as pending applications that had not gone on public notice. TWCNYC Supp. Findings, ¶¶ 23-30, 47. Mr. Nourain was also a party to at least two telephone calls with Ms. Richter in April 1993 in which the subject of "unauthorized paths" was discussed, and which Ms. Richter wrote "gave [her] pause." TWCNYC Supp. Findings, ¶¶ 40-41; TWCV Exs. 51, 61. Finally, on April 20, Mr. Nourain received a copy of the Richter letter describing the legal "parameters within which construction and operation of new paths and new stations is permissible." TWCV Ex. 51; TWCNYC Supp. Findings, ¶ 42. Mr. Nourain sent this letter to Mr. Price with the notation, "please advise." TWCV Ex. 51; TWCNYC Supp. Findings, ¶ 61.

Nevertheless, at least through June 1993, Mr. Nourain continued to activate microwave paths prior to receiving a grant of FCC authority to do so. TWCNYC Supp. Findings, ¶¶ 53-56. There is only one explanation that fits all this evidence: that Mr. Nourain discovered he was operating unlicensed paths in March 1993, and tried to figure out a way to cover his mistake in consultation with Ms. Richter, without telling her exactly what he had done. Ms. Richter warned Mr. Nourain of the legal consequences of unlicensed operation; but, after consulting Mr. Price, Mr. Nourain persisted in activating microwave

paths before receiving FCC authority to do so. This is a pattern similar to the events of February through April 1995, in which Mr. Nourain and Mr. Price received in February an updated inventory from Ms. Richter's successor, Mr. Lehmkuhl, that identified as the subject of pending applications a number of microwave paths that Liberty had recently activated. TWCNYC Findings, ¶ 44; L/B Ex. 1. In addition, the "Lehmkuhl Inventory" identified a number of other paths as the subject of pending applications that Liberty activated between the date of that inventory and April 27, 1995, when it claimed to have learned of its unlicensed operations. TWCNYC Findings, ¶¶ 47-48; L/B Ex. 1. In both circumstances, Liberty's key personnel were given information by their attorneys that, together with what they already knew, told them that they were operating unauthorized facilities. In both cases, Mr. Nourain and Mr. Price denied such knowledge, saying that they had not read what their attorneys had sent them, or that they did not view the information as significant. TWCNYC Findings, ¶ 46; TWCNYC Supp. Findings, ¶¶ 38, 63-69; TWCNYC Supp. Conclusions, ¶¶ 110-11.

The record is replete with evidence that Liberty deliberately and consciously turned on the microwave paths in question, and that it did not have Commission authorization to do so. As such, the record evidence demonstrates that Liberty had the requisite intent to violate the Commission's rules, and the pending applications should, therefore, be denied.

II. Evidence Of Liberty's Unauthorized Activations Remains Unrebutted And Undenied.

Significantly, Liberty has neither denied nor explained the evidence of premature activation of microwave facilities in February through June 1993, which was presented at the May 1997 hearing. Since March 3, 1997, when TWCNYC filed its motion that led to the

May 1997 hearing, Liberty has been aware of TWCNYC's assertions that 33 W. 67th Street was prematurely activated. However, Liberty provided no response in its opposition to TWCNYC's motion nor in its Supplemental Proposed Findings of Fact and Conclusions of Law filed on June 11, 1997. See TWCNYC Supp. Findings, ¶ 9. Furthermore, at the hearing, Liberty offered no evidence to rebut this or any other admitted evidence that shows numerous instances of "premature" activation in the first six months of 1993. In its Supplemental Proposed Findings of Fact and Conclusions of Law, Liberty neglected to address any of the evidence of premature activations in 1993. Given the substantial undisputed evidence of Liberty's premature activations, the Presiding Judge has no alternative but to conclude that Liberty was in fact operating without FCC authorization in 1993.

III. Liberty's Position Regarding The Significance Of The Richter Letter Is Unsupported.

In its Supplemental Proposed Findings of Fact and Conclusions of Law, Liberty states that the Richter letter "appeared not to have played a significant role in Liberty's licensing application process pre-April 1995." Liberty Supp. Conclusions, ¶ 52. Liberty's view that the Richter letter is insignificant is contradicted by the fact that Lloyd Constantine requested the letter in a June 1995 conversation with Howard Barr. Barr, Tr. 2112; TWCV Ex. 50. Mr. Barr provided no explanation of how the Richter letter related to his discussion with Mr. Constantine. Barr, Tr. 2112-13. When the Richter letter was sent to Liberty, Mr. Constantine was not even counsel for Liberty. Price, Tr. 2189. Therefore, Mr. Constantine likely learned of the letter from someone at Liberty. Mr. Constantine's specific knowledge of the letter over two years after it was drafted, and his request for it in a telephone

conversation that concerned recently discovered additional instances of unlicensed activation of microwave facilities by Liberty implies that it was significant to someone at Liberty.

Liberty's current attempts to render the Richter letter a non-event are not surprising, in light of its prior attempts to blame its lawyers for the company's violation. Howard Milstein, Liberty's chairman, testified on January 13, 1997, in response to a question that suggested that the best the law firm could do was to keep Liberty informed about applications that are pending or granted, as follows:

Question: So, what you're saying is that they -- the Pepper & Corazzini lawyers should have compared the installation progress reports against their list of licenses. And if they found a building scheduled for installation that wasn't licensed, they should have called somebody.

Answer: Right. . . . More than somebody. In other words, if they had discovered any problem, they should have called up the line to a minimum of Peter because that would mean that the system was not working as it should have worked. . . . They evidently did nothing about it than take whatever information Behrooz gave them. That's my complaint about what they did. . . . Peter had a right to think that they were monitoring this in a more aggressive way than they were.

Milstein, Tr. 556-57 (January 13, 1997).

In fact, as we know from her testimony, that was precisely what Ms. Richter was doing when she sent her April 20, 1993 letter. TWCNYC Supp. Findings, ¶ 62. The letter repeated what she had told Mr. Nourain orally. TWCNYC Supp. Findings, ¶ 50. The purpose of the letter was to alert Mr. Nourain's superiors to a potential problem. TWCNYC Supp. Findings, ¶ 62. Nevertheless, even though he received the letter, Mr. Price did not acknowledge that it contained any kind of warning. TWCNYC Supp. Findings, ¶ 67. Nor was Mr. Price even sufficiently curious about what it was that Mr. Nourain said to Ms.

Richter that "gave [her] pause" to even discuss the subject when he talked with her on the telephone a few days later. TWCNYC Supp. Findings, ¶ 63.

Fantastic as Howard Milstein's testimony is that he expected the *lawyers* to match up two pieces of information in Liberty's hands -- activated paths and FCC licenses -- to keep Liberty out of trouble, Mr. Price's testimony that he ignored the kind of warning that Howard Milstein said the lawyers were supposed to send is even more fantastic. If Ms. Richter's letter were not a "torpedo in the water," it was, at the least, a loud ping on the sonar that Liberty chose to ignore.

IV. TWCNYC Objects To The Bureau's Reliance On Material Not Contained In The Record With Regard To Mr. Barr's Explanation Of His January 1997 Hearing Testimony Clarification.

Finally, TWCNYC takes this opportunity to note its objection to statements made by the Bureau regarding Mr. Barr's explanation of his clarification of his January 1997 hearing testimony that are not supported by material contained in the record. See Bureau Supp. Conclusions, ¶ 25. The Bureau's statement regarding the "correct understanding on Mr. Barr's awareness of 'issues' relating to Liberty operating microwave paths without authorization" does not cite to any part of the record, nor can it. Such information was not elicited on the record despite the attempts of the Presiding Judge and counsel for TWCNYC to do so. If the Bureau had wanted the explanation offered in its Supplemental Conclusions

to appear in the record, it should have had someone testify regarding those facts under oath, where TWCNYC could have exercised its right to cross-examination.

Respectfully submitted,

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Dated: June 23, 1997

CERTIFICATE OF SERVICE

I, Debra A. McGuire, hereby certify that a copy of the foregoing Time Warner Cable of New York City and Paragon Communications' Reply to Supplemental Proposed Findings of Fact and Conclusions of Law of Bartholdi Cable Co., Inc. and the Wireless Telecommunications Bureau was served, via facsimile and regular mail, this 23rd day of June, 1997 upon the following:

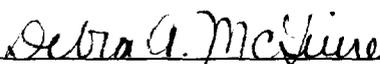
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