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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

To: The Honorable Richard L. Sippel
Administrative Law Judge

**WIRELESS TELECOMMUNICATIONS BUREAU'S REPLY
TO TIME WARNER'S SUPPLEMENTAL PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

On June 11, 1997, Time Warner Cable of New York City and Paragon Cable Manhattan (collectively Time Warner) and Bartholdi Cable Co., Inc., formerly Liberty Cable Co., Inc. (Liberty) filed Supplemental Proposed Findings of Fact and Conclusions of Law in the above-captioned proceeding. The Acting Chief, Wireless Telecommunications Bureau (Bureau), by his counsel, hereby submits the Bureau's Reply to Time Warner's Proposed Findings and Conclusions.¹

¹ Replies to the Supplemental Proposed Findings of Fact and Conclusions of Law were initially due to be filed on June 18, 1997. The filing deadline, however, was extended to June

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1. Time Warner argues that the record evidence establishes that Liberty knowingly activated microwave paths without proper authorization in 1993. Time Warner argues that inventories prepared by Liberty's counsel in Spring 1993 put Mr. Nourain on notice that Liberty was operating paths that were not yet authorized. To this end, Time Warner lists several addresses, which, according to Liberty Installation Reports (TW/CV Ex. 14), Liberty began installing customers in February 1993. However, Time Warner argues, that none of the addresses it listed were identified as being licensed in the draft inventory sent by Jennifer Richter, counsel to Liberty, to Behrooz Nourain, Liberty's chief engineer, in March of 1993. (TW/CV Ex. 58)

2. Time Warner also argues that Mr. Nourain had a "working knowledge of the [microwave] paths that were in operation on a[ny] given date" because he provided information to Ms. Richter in order for her to prepare the inventories and because he was the person at Liberty responsible for activating the microwave paths. Time Warner Supplemental Proposed Findings at 11. This knowledge, argues Time Warner, should have led Mr. Nourain to realize that paths were being activated without proper authorization.

3. Time Warner also argues that others at Liberty were on notice that Mr. Nourain did not understand the Commission's licensing rules and that Liberty willfully disregarded its counsel's warning. Time Warner argues that the letter sent by Ms. Richter to Liberty on April 20, 1993, (TW/CV 51) (the Richter Letter), warns Liberty that because Mr. Nourain did not fully understand the Commission's Rules, "there was a high probability that Mr. Nourain had either activated paths without authorization or, if left unsupervised, would do so in the future." Time Warner Supplemental Proposed Findings at 14.

23, 1997. *See Liberty Cable Co., Inc.*, 97M-111 (released June 20, 1997).

4. Additionally, Time Warner argues that Liberty misrepresented facts to the Commission. Time Warner first points to a statement in a Surreply filed with the Commission by Liberty on May 17, 1995, (TW/CV Ex. 18), that it was Liberty's "pattern and practice to await a grant of either a pending application or request for Special Temporary Authority (STA) prior to making a microwave path operational." TW/CV Ex. 18 at 3; Time Warner Supplemental Proposed Findings at 22. Time Warner argues that Liberty in fact did not have such a pattern and practice.

5. Time Warner also argues that Mr. Nourain's affidavit included in Liberty's Surreply (TW/CV Ex. 18) and an affidavit signed by Mr. Nourain filed with the United States District Court (TW/CV Ex. 13) are inconsistent. Time Warner advances that even though Mr. Nourain's explained that when he signed the first affidavit, he was only aware of Time Warner petitions against Liberty's applications to serve buildings which were currently interconnected to other Liberty-served buildings by a coaxial hardwire, to accept this explanation would "strain credibility past the breaking point." Time Warner Supplemental Proposed Findings at 25.

6. In addition, with Time Warner argues that Liberty has misrepresented facts to the Commission in light of Liberty counsel, Howard Barr's May 28, 1997, testimony about why he "clarified" his January 28, 1997, testimony. Time Warner states in its Supplemental Proposed Findings that the Bureau raised the issue during its questioning of Mr. Barr on May 28, 1997, that Mr. Barr's answers did not appear to be fully consistent with information that was earlier conveyed to Bureau counsel by Liberty's counsel. Without having the benefit of the Bureau's Supplemental Proposed Findings which fully describe the earlier conversation between Liberty counsel and Bureau counsel concerning Mr. Barr's testimony "clarification," and without specifically stating as much, Time Warner's Proposed Findings seem to argue that something

more went on during the discussion between Liberty counsel and Bureau counsel. The implication being that the trier of fact in this proceeding is not receiving all relevant information regarding Mr. Barr's clarification of testimony given earlier in the proceeding. Time Warner concludes that Mr. Barr has not satisfactorily demonstrated why he made a meaningless change of his testimony, and further, that Liberty has failed to meet its burden to demonstrate that its witness testified truthfully and consistently on both January 28 and May 28, 1997. Time Warner Proposed Findings at 28.

7. The record evidence, however, *does not* establish that Liberty knowingly activated microwave paths without authorization in 1993. To the contrary, the record demonstrates that any such premature activation was done inadvertently and without intent to circumvent Commission Rules. As the Bureau pointed out in its Proposed Findings for Phase II, all the record evidence still establishes that Liberty did not know about any premature activations until April 1995, as the Bureau maintained in its earlier positions.

8. Time Warner may be correct in that Mr. Nourain knew which microwave paths were in operation at any given time; but that is entirely different from stating that Mr. Nourain knew which paths were authorized at any given time. The facts in this proceeding establish that Mr. Nourain, in fact, did not know which paths were authorized. Therefore, Mr. Nourain did not knowingly activate paths that were unauthorized.

9. Despite Time Warner's arguments regarding the inventories, as the Bureau pointed out in its Proposed Findings, the inventories did not provide Mr. Nourain with information regarding unauthorized activations. First, with regard to the earlier inventories, it is difficult, if not impossible, to ascertain from the face of the documents which paths are authorized and which

are not. Although, through a careful analysis of the information contained in the inventories, it could be possible to determine that certain paths have pending applications, it is not possible to determine whether any authorization for those paths exists. The inventory does not make clear whether the pending application is for a modification of an existing license, or whether any STA has been granted to cover that path during the pendency of the application. Without this information, the listings in the inventories cannot serve as indicators that OFS paths were being operated without authorization.

10. Secondly, the facts demonstrate that Mr. Nourain did not scrutinize the inventories. For instance, despite Ms. Richter's request for Mr. Nourain to review the March 16, 1993, draft inventory (TW/CV Ex. 58), it does not appear as though Mr. Nourain spoke to her until more than two weeks after receiving the draft with her request. (TW/CV Ex. 60 at 2) Mr. Nourain stated that he believed that the inventories were for Ms. Richter's use and not for his. (Tr. at 2225) Because he did not think the inventories were for him, he had no reason to closely review the information contained in them. It appears that in his mind, he already knew all the information contained within. (Tr. at 2252-53) As it turns out, Mr. Nourain was incorrect -- he did not know everything in the inventories -- but that does not demonstrate that he knowingly activated paths without proper authorization.

11. Finally, it was evident throughout Mr. Nourain's testimony during both phases of this proceeding that he believed that Commission licensing matters were the responsibility of the lawyers. In his previous positions, he had never been required to handle any matters concerning licensing. (Tr. at 2310-11) Therefore, Time Warner's arguments to the contrary, the record does

not establish that Mr. Nourain knowingly activated a microwave path without obtaining Commission authorization.

12. Likewise, the record also does not establish that anyone else at Liberty knew of illegal operations prior to April 1995. Time Warner argues that the Richter Letter put Liberty on notice that Mr. Nourain did not understand the Commission's Rules. Although from a reading today of the Richter Letter, that appears to be a reasonable inference, the letter did not in fact put Liberty on such notice when it was received by Liberty personnel.

13. The facts show that the only Liberty personnel who saw the Richter Letter were Messrs. Nourain and Price. Bruce McKinnon, the addressee of the letter, who left Liberty less than a month after the date of the letter (TW/CV Ex 58 at 5), did not receive a copy of the Richter Letter. (TW/CV Ex. 58 at 21)² Moreover, Mr. Price does not think he forwarded a copy to anyone else at Liberty. (Tr. at 2188, 2204)

14. Although at first blush, Mr. Price's testimony that he did not see the Richter Letter as any type of warning to Liberty is not credible; however, it is entirely consistent with the remainder of the evidence. The facts demonstrate that Mr. Price did call Ms. Richter after receiving the letter. (TW/CV Ex. 61 at 2) But the facts show that the only discussion between Mr. Price and Ms. Richter prompted by the letter were about STAs and not premature operation of microwave facilities. (Tr. at 2194) If, as Time Warner argues, the Richter informed Mr. Price that Mr. Nourain, due to a lack of understanding of the Rules, was likely to violate the Rules, it would follow that Mr. Price would speak with his communications counsel, Ms. Richter, about

² The Richter Letter was mailed to the incorrect address to reach Mr. McKinnon. (TW/CV Ex. 58 at 26)

that issue. Neither Ms. Richter nor Mr. Price testified that they discussed this issue. Because no such conversation took place, it is clear that Mr. Price did not read into the Richter Letter what hindsight will allow all of us to read into it today.³

15. Instead, the record establishes that Mr. Price thought Ms. Richter detailed a problem in the first paragraph of the letter and dedicated the remainder of the letter to solving that problem. (Tr. at 2193) Afterall, that is why Liberty retained a firm they considered to be expert in communications law -- to locate and solve any licensing problems Liberty may have.

16. Accordingly, record evidence clearly demonstrates that Liberty was not on notice that Mr. Nourain was likely to violate the Commission's Rules by activating OFS paths without authorization.

17. There is also no substantial record evidence that anyone at Liberty's communications counsel, Pepper & Corazzini, was aware of the premature operation of microwave paths prior to April 1995. Ms. Richter specifically testified that she did not know of any such illegal operations. (Tr. at 2060) Moreover, she cannot recall speaking with anyone else at the firm regarding her concerns about Mr. Nourain's lack of understanding of the Commission's Rules. (Tr. at 2044-45) Furthermore, it appears unlikely that anyone at the firm reviewed the Richter Letter before it was sent. Although Ms. Richter was a young attorney just out of law school, she was not closely supervised at Pepper & Corazzini. (Tr. at 2002-03) Furthermore, the opening paragraph of the Richter Letter contains a glaring grammatical error -- "gave both Behrooz and

³ It is significant to note that Ms. Richter's testimony about the conversation with Mr. Price after she sent the Richter Letter is consistent with Mr. Price's testimony. Although it could be argued that Mr. Price's testimony was self-serving or that Mr. Price would have reason to be less than fully candid, the same cannot be said about Mr. Richter's testimony. She possesses no reason to dissemble or lack candor in this proceeding.

I [sic] pause." One would hope that if more senior attorneys at the firm reviewed Ms. Richter's letter before it was sent, this grammatical error would have been caught. Therefore, the Bureau finds it credible that Ms. Richter, acting alone, sent the letter, unbeknownst to the other Pepper & Corazzini attorneys.

18. Time Warner argues that Mr. Barr's testimony regarding his "clarification" of previous testimony lacked candor. Time Warner is apparently arguing that Mr. Barr was indeed aware, prior to April 1995, of unauthorized operation of facilities by Liberty. Time Warner's argument, however, is based largely upon an exchange between Mr. Barr and Bureau counsel on May 28, 1997, during Phase II of this proceeding. The exchange between Mr. Barr and Bureau counsel occurred because Liberty's counsel, in an off the record discussion, divulged certain information that Mr. Barr purportedly had told them earlier. (Tr. at 2127-34) However, as the Bureau revealed in its Proposed Findings, the information conveyed to Bureau counsel by Liberty's counsel, was not an entirely accurate representation of the information conveyed to them by Mr. Barr. Although the Bureau was told that Mr. Barr knew of "issues" concerning unauthorized operations, apparently Mr. Barr did not know that such issues existed prior to April 1993 until he read the Richter Letter in June 1995. Accordingly, Time Warner's reliance of the Bureau's discomfort of Mr. Barr's testimony is misplaced.

19. While the Bureau certainly agrees that Mr. Barr's useless clarification of previous testimony is unusual, the Bureau does not agree that the peculiar nature of the change means that Mr. Barr is hiding anything. As the Bureau pointed out in its Proposed Findings, Mr. Barr's testimony is consistent with Ms. Richter's -- a witness the Bureau found entirely credible.

20. Similarly, the Bureau does not believe that Mr. Nourain has demonstrated a lack of candor or misrepresented facts before the Commission in his apparently inconsistent affidavits. As the Bureau argued in its Proposed Finds for Phase II, Mr. Nourain's state of mind must be taken into account when determining whether he has misrepresented facts to the Commission. *See Weyburn Broadcasting Limited Partnership v. FCC*, 984 F.2d 1220, 1232 (D.C. Cir. 1993) (Intent to deceive is an essential element of misrepresentation or lack of candor showing.) Because the record establishes that in the first affidavit, Mr. Nourain believed he was referring only to Time Warner's petitions against Liberty's applications to cover currently hardwired locations which he knew about, and the second he believed he was referring only to Time Warner's petitions against Liberty's applications for non-hardwired locations which were receiving service without authorization which he did not know about, the affidavits, from the standpoint of the declarant, are not inconsistent.

21. Because nothing in the record demonstrated that Liberty was aware of any unauthorized transmissions of microwave service prior to April 1995, and because the record does not demonstrate that the rule violations occurred for any reason other than mistaken assumptions made by a poorly supervised employee, the only remaining issue concerns sanctions. Liberty has admitted to activating the 19 paths listed in Appendix A of the Hearing Designation Order (HDO)⁴ without prior authorization. Time Warner has indicated several additional paths which it believes the record shows were also prematurely operated by Liberty prior to the time of the 19 unauthorized paths were discovered. Although the Bureau does not necessarily accept as fact that each of the additional enumerated paths listed by Time Warner was activated by Liberty

⁴ *Liberty Cable Co., Inc.*, 11 FCC Rcd 14133 (1996).

without authorization, based on the record, it is conceivable that additional violations occurred other than those instances listed in Appendix A of the HDO. The factors which led to the admitted violations existed throughout Liberty's existence.

22. Therefore, the question becomes one of determining what the appropriate sanction is for Liberty's repeated violations of activating microwave paths without authorization. It is certainly true that "[t]he unlicensed operation of a radio transmitter is one of the most serious violations under the Communications Act."⁵ Moreover, the Commission has held that the scope and nature of violations, even if not intentional, can reach the level of being "so wanton, gross, and callous, and in total disregard of [the licensee's] obligations to the Commission, as to be the equivalent to an affirmative and deliberate intent."⁶

23. The issue is therefore, whether Liberty's numerous violations rise to the level of meeting the *Golden Broadcasting* threshold of being in total disregard of our Rules. Although the Bureau believes this is a close call, we still believe the answer is that the violations do not reach that level. The majority of the cases that have relied on *Golden Broadcasting*, and found a licensee unqualified have involved instances of reporting errors or misrepresentations made to the Commission.⁷ Liberty's violations do not involve Liberty's failure to report required information to the Commission, but instead, Liberty's actions of activating OFS paths prior to

⁵ *Robert J. Hartman*, 9 FCC Rcd 2057 (FOB 1994), citing *Mebane Home Telephone Company*, 51 Rad. Reg. 2d (P&F) 926 (Com. Car. Bur. 1982).

⁶ *Golden Broadcasting Systems*, 68 FCC 2d 1099, 1106 (1978).

⁷ See, e.g., *Standard Broadcasting, Inc.*, 7 FCC Rcd 8571 (1992) (Applicant found disqualified for numerous EEO reporting violations).

obtaining an authorization. Accordingly, the issue does not overtly involve any misrepresentation on Liberty's part.

24. Moreover, based on the evidence, Liberty's violations should not be considered wanton, gross, and callous. While certainly serious and inexcusable, the violations did not occur because Liberty possesses a total disregard for the Commission processes. Liberty's owners, Howard and Edward Milstein, believed they hired experts to run Liberty. The Milsteins hired Mr. Price, whom they obviously believed to be an expert manager. Unfortunately for them, he was not. Mr. Price failed to adequately supervise his staff and failed to heed a warning from outside counsel regarding his staff.

25. Additionally, Mr. Nourain was hired as an expert microwave engineer. There is no evidence suggesting that his engineering skills are less than exemplary, but there is plenty of evidence that he did not pay attention to Commission licensing regulations. It is apparent that he did not believe this was his area of responsibility. In previous engineering positions he was not required to handle any licensing functions. Therefore, in his position with Liberty, he relied on Liberty's counsel for those responsibilities.

26. The Milsteins also retained Pepper & Corazzini as experts in communications law. However, perhaps inadvisably, Pepper & Corazzini relied primarily on young and inexperienced attorneys -- Jennifer Richter and later Michael Lehmkuhl -- to handle the Liberty file. In addition, Pepper & Corazzini did not closely supervise its attorneys who were handling the Liberty file on a day-to-day basis.

27. Because the owners of Liberty thought they had experts handling the company's operations, violations which occurred because those experts were not performing their functions

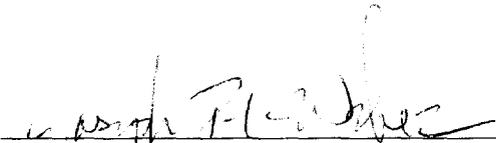
properly cannot be said to demonstrate a total disregard by Liberty for the Commission's Rules. Further illustrating that the appropriate sanction is a forfeiture and not denial of the pending applications is that Liberty has now put into place mechanisms to prevent any future violations. Therefore, Liberty can be trusted as a compliant licensee in the future. However, Liberty's violations, even if not disqualifying, are nonetheless inexcusable. Accordingly, the Bureau maintains that a forfeiture, albeit a substantial one, is the appropriate sanction for Liberty's violations. The Bureau has asked for, and Liberty has consented to, forfeitures totalling \$1,090,000.

For the foregoing reasons, the Acting Chief, Wireless Telecommunications Bureau, requests that Liberty's applications be granted and a forfeiture imposed against Liberty consistent with the Joint Motion for Summary Decision and the Bureau's Proposed Findings of Fact and Conclusions of Law (in Phase I).

Respectfully Submitted,

Daniel Phythyon
Acting Chief, Wireless Telecommunications Bureau

June 23, 1997

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CERTIFICATE OF SERVICE

I, Mark L. Keam, of the Enforcement Division, Wireless Telecommunications Bureau, certify that I have, on this 23rd day of June, 1997, caused to be transmitted by facsimile or hand delivery and sent by regular First Class United States mail, copies of the foregoing "Wireless Telecommunications Bureau's Reply to Time Warner's Supplemental Proposed Findings of Fact and Conclusions of Law," to:

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