

Before the FCC 97M-154
FEDERAL COMMUNICATIONS COMMISSION 71801
 Washington, D.C. 20554

In re Applications of	)	WT DOCKET NO. 96-41	
)		
LIBERTY CABLE CO., INC.)		
)		
For Private Operational Fixed	)	File Nos:	
Microwave Service Authorization	)	708777	WNTT370
and Modifications	)	708778, 713296	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)

MEMORANDUM OPINION AND ORDER

Issued: September 9, 1997 ; Released: September 11, 1997

Background

1. This is a partial ruling on a Motion For Summary Decision ("Joint Motion") submitted by Liberty Cable Co., Inc. ("Liberty")¹ and the Wireless Telecommunications Bureau ("Bureau"). The Joint Motion was filed on July 15, 1996. On September 13, 1996, a Combined Opposition To Joint Motion For

¹ Liberty changed its name to Bartholdi Cable Co., Inc. ("Bartholdi") after the commencement of this proceeding. The name Liberty is used throughout this proceeding because business documents received in evidence refer to Liberty and Liberty is the name of the licensee in the caption of the designation order.

Summary Decision ("Combined Opposition") was filed by Time Warner Cable of New York City and Paragon Cable Manhattan (collectively "Time Warner") and by Cablevision of New York City - Phase I ("Cablevision").

2. The Commission questions, inter alia, Liberty's unlawful hardwire interconnections of non-common cable systems² without first obtaining a franchise from New York City and related non-disclosures concerning unlawful operations. Hearing Designation Order and Notice of Opportunity for Hearing, FCC No. 96-85, released March 5, 1996 ("HDO") reported at 11 F.C.C. Rcd 14133 (1996). Only "hardwire" issues are appropriate for summary decision. See 47 C.F.R. §1.251(e) (where only some issues can be decided by summary decision an interlocutory ruling will be made by the Presiding Judge).

3. The Commission also set issues on Liberty's unauthorized activations of OFS microwave service facilities and related misrepresentations or lack of candor in disclosures or failures to disclose. Id. Summary decision cannot be granted on those issues. Hearings and additional discovery were made necessary by Liberty's continuous refusal to make available a highly relevant, comprehensive Audit Report which Liberty submitted to the Commission in August 1995, in response to the Bureau's request.³ See Joint Motion at 19-20, 55 (Liberty's comprehensive disclosure of violations in the Audit Report). (Jt. Exh. 4 at Para. 4.) In January and May 1997, eight days of testimonial hearings were held wherein it was learned that Liberty failed to produce additional highly relevant documents. Hearing issues on the unauthorized activations relating to misrepresentations, lack of candor and inconsistent disclosures by Liberty and Liberty's entitlement to OFS authorizations will be determined in a subsequent initial decision.

² The term "non-common systems" refers to the configuration under which Liberty provided video programming to its customers by hardwire interconnections of multiple dwelling units that were not commonly owned, controlled or managed. Liberty's non-common systems at issue here did not use any public property or right of way.

³ The Commission and the United States Court of Appeals for the District of Columbia Circuit have found the Audit Report to be non-privileged. In re Liberty Cable Company, Inc., 11 F.C.C. Rcd 2475, released January 26, 1996, aff'd sub nom. Bartholdi Cable Company, Inc. v. F.C.C., 114 F.3d 274 (D.C. Cir. 1997). Liberty is seeking a rehearing.

Summary Decision On Hardwire Issues

4. The following issues were set under the HDO pertaining to Liberty's hardwire interconnections:

I

(a) To determine the facts and circumstances surrounding Liberty's operation of hardwire interconnected non-commonly owned buildings without first obtaining a franchise.

(b) To determine whether Liberty has violated Section 1.65 of the Commission's Rules [47 C.F.R. §1.65] by failing to notify the Commission of its provision of service to interconnected, non-commonly owned buildings.

(c) To determine whether based on 1(a) and 1(b) above, Liberty is qualified to be granted the above-captioned private operational fixed microwave authorizations.

!!!

(a) To determine whether Liberty, in relation to its inter-connection of non-commonly owned buildings ---, misrepresented facts to the Commission, lacked candor in dealings with the Commission, or attempted to mislead the Commission, and in this regard, whether Liberty has violated Section 1.17 of the Commission Rules [47 C.F.R. §1.17].

HDO at Para. 30. Since all hearing issues are not being disposed of here, this is only an interlocutory ruling. See 47 C.F.R. §1.251(e) (interlocutory rulings are not subject to an immediate appeal as a matter of right).

Liberty

5. The Liberty/Bureau description represents that:

Liberty, --- is a multichannel video programming distributor ("MVPD") that operates satellite master antenna television ("SMATV") systems in the New York metropolitan area. Signals carrying video programming are received at a satellite master antenna and distributed in a "hub and spoke" configuration to transmitting and receiving antennas located on rooftops of multiple dwelling units. In a small percentage of cases, Liberty further transmits the cable signal via hardwire interconnections to buildings in the same block as a building with a microwave receiver antenna.

See Joint Motion at i. fn.1. and HDO at Para. 2. In March 1996, Liberty sold substantial assets to Freedom New York, L.L.C. ("Freedom"), which is 80% owned by RCN Corporation and in which Liberty (now Bartholdi) has a 20% equity interest. Memorandum Opinion and Order, FCC 96M-178, released July 16, 1996, at 3 n.3. Liberty now provides microwave transmission services to Freedom and Freedom provides video programming to former Liberty customers. See Joint Motion at i fn.1.

Unfranchised Hardwire Interconnections

6. Thirteen instances of unauthorized hardwire interconnects occurred between November 23, 1992 and April 13, 1995, as specified in Appendix B of the HDO:

<u>FCC File Number</u>	<u>FCC Call Sign</u>	<u>Hardwired Location (New York City)</u>	<u>Receiver Location (New York City)</u>	<u>Date Liberty Began Service</u>
708777	WNTT370	220 E. 52nd St.	211 East. 51st St.	6/13/94
708778	WNTM210	55 Central Park W.	10 W. 66th St.	9/21/94
	WNTM210	170 W. End Ave.	160 W. End Ave.	5/26/94
	WNTM210	152 W. 57th St.	118 W. 57th St.	1/31/94
708779	WNTM385	120 E. End Ave.	510 E. 86th St.	7/18/94
	[WNTM385	525 E. 86th St.*	535 E. 86th St.*	5/5/94]
	WNTM385	44 W. 96th St.	12 W. 96th St.	12/15/93
708781	WNTM212	60 Sutton Pl.	420 E. 54th St.	11/23/92
	WNTM212	425 E. 58th St.	400 E. 59th St.	5/25/94
	WNTM212	239 E. 79th St.	229 E. 79th St.	3/28/94
	WNTM212	225 E. 74th St.	207 E. 74th St.	2/6/95
709426	Consolidated with 708781			
711937	Consolidated with 708781			
713296	Consolidated with 708781			
713300	New[NJ]	Lincoln Harbor Yacht Club	600 Harbor Blvd.	4/13/95
717325	WPJA278	164 E. 8th St.	170 E. 87th St.	10/21/93

[*Commonly owned or controlled by Liberty and not required to be franchised]

7. On December 8, 1994, in a civil action for declaratory judgment filed in a United States district court, Liberty admitted to having interconnected wiring to twelve pairs of non-commonly owned buildings. Liberty Cable Co., Inc. v. City of New York, 893 F. Supp. 191 (SDNY 1995), aff'd., 60 F.3d 961 (2nd Cir. 1995); HDO at Para. 5. Liberty's multichannel expansion scheme required constructing microwave reception antennas atop multiple unit dwellings that were used to deliver video services to two or more multiple unit dwellings. Liberty admitted in a letter to New York City dated June 28, 1994, that without applying for local franchises, the company was running cables among residential buildings. Liberty Cable Co., Inc. v. City of New York, supra 893 F. Supp. at 196-197. On October 28, 1994, Liberty informed the local authority that it was interested in

applying for a franchise. (Jt. Exh. 20.) At that time, there were no procedures in place for MVPD operators to apply for local franchises and Liberty took no further steps to comply.

8. On December 9, 1994, New York issued a standstill order prohibiting Liberty from constructing any new system. (Jt. Exh. 24.) Liberty protested in court and claimed that it was denied due process in being required to obtain a franchise at a time when the City had no procedure in place for requesting and obtaining a franchise for that particular cable service. (Jt. Exh. 15.) The district court found no denial of due process as long as the City was addressing the issue and Liberty was found to have operated non-common facilities which were "cable systems" that were not exempted from local franchising. Liberty Cable Co., Inc. v. City of New York, 893 F. Supp. at 207-209 and 214-215, aff'd 60 F.3d 961, 963 (2nd Cir. 1995).

9. Operation as a New York City franchisee requires conformance with an application process, payment of fees up to 5% of revenues, must carry obligations, customer service standards, rate regulations, political programming, and other burdens. See Combined Opposition at 43. (Combined Exh. 13 [Ceccarelli Depo. at 65, 71-74].) See also Liberty Cable Co., Inc. v. City of New York, supra 893 F. Supp. at 206. Time Warner and Cablevision argue that Liberty could have been motivated to misrepresent its service to the Commission as an excluded SMATV system in order to avoid the burdens of the franchise requirement. Combined Opposition at 43. Clearly, as the deposition testimony of Ms. Ceccarelli confirms, it was in Liberty's short-term economic interest to avoid a local franchise.

10. Before passage of the Telecommunications Act of 1996, "cable systems" which interconnected by hardwire non-commonly owned or controlled buildings needed to apply for a local franchise. The Cable Communications Act ("Cable Act") [47 U.S.C. §521 et seq.] specifically excluded from the definition of a "cable system":

a facility that serves only subscribers in one or more multiple dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way.

Cable Act, Section 602(7)(B)[47 U.S.C. §522(7)(B)]. But when a system inter-connected separately owned or controlled buildings (i.e. non-common), whether crossing a public right of way or not, it did not qualify for an exclusion. Id. 47 U.S.C. §522(7)(B). See Report and Order 5 F.C.C. Rcd 7638. Liberty's non-common systems should have been franchised and it was a violation of the Cable Act [47 U.S.C. §541(b)(1)] for Liberty to provide hardwired cable services without a franchise.

Liberty's Non-Common Cable Systems

11. Since November 1992, Liberty was representing itself to the Commission as "a private cable or SMATV [satellite master antenna system] operator serving approximately 30,000 subscribers who live mainly in buildings in the New York metropolitan area." (Combined Opp. Exh. 11.) Compare HDO at Para. 2. There were similar disclosures made in connection with a series of microwave modification applications filed by Liberty on November 7, 1994, by which Liberty was seeking to replace the illegal hardwire connections. Liberty took the position that its "cable business" was incidental to providing multichannel video programming as a "private" cable company. (Jt. Exh. 30 at 4.) These are admitted violations of Section 602(7)(B) [47 U.S.C. §522(7)(B) and Section 621(b)(1) [47 U.S.C. §541(b)(1)] of the Cable Act which the Joint Movants concede are deserving of a forfeiture. See HDO at Para. 5. See also Joint Motion at 22 n.8 (Liberty does not claim that it was in compliance with Section 602(7)(B)) and Joint Motion at 40-41 (Liberty agrees to pay \$80,000 forfeiture for franchised hardwire interconnections).

12. Liberty saw its opening into hardwire systems in April 1992, when New York City's franchising authority, the Department of Telecommunications and Energy, issued an opinion letter to the Russian American Broadcasting Company ("RABC"), and determined that no license was required for RABC to operate a local satellite-delivered service. See Joint Motion at 22. RABC proposed to utilize hardwire interconnecting systems for multiple dwelling units that were not under common ownership, control or management. (Jt. Exh. 13.) New York City allowed the system to commence operating without being franchised because "RABC does not intend to utilize the inalienable property of the City for either private or public purposes [and therefore] neither a revocable consent nor a franchise is required." (Jt. Exh. 13.) Liberty relied on a literal reading of that

opinion and concluded, without benefit of further advice from the City of New York, that since Liberty was not encroaching on any public right of way or easement rights, it was lawful to operate interconnected systems between multiple residential dwellings that were not commonly owned, controlled or managed. (Joint Motion at 21.) However, Liberty failed to take into account the fact that RABC's system was only a single channel private satellite feed. (Jt. Exh. 13 [satellite delivered Russian language video and audio service].) Liberty's system, which involved hardwire building to building interconnects, would provide multichannel service for up to 72 channels. Liberty Cable Co., Inc. v. City of New York, 893 F. Supp. at 203-204 n.21. Thus, Liberty was skating on thin ice from the outset.

13. On November 23, 1992, Liberty provided its first hardwire interconnect services to 60 Sutton Place from its receiver location at 420 East 54th Street. See HDO at Appendix B. Joint Motion at 23.⁴ From November 23, 1992 to April 13, 1995, Liberty established non-franchised hardwire interconnections at additional pairs of buildings which are found to not have been under common ownership, control or management. HDO at Appendix B and Combined Opposition at 32. By the fall of 1994, Liberty had interconnected eleven pairs of buildings by hardwire. Joint Motion at 24, 26.⁵ Liberty's active participation in Commission proceedings which resulted in the formation of the definition of a "cable system" establishes that Liberty had reason to believe that it could be violating the Cable Act and local franchise laws when it constructed interconnected hardwire services. In defending its conduct, Liberty was contending that the law was unconstitutional, not that it did not exist. Joint Motion at 22 n.8.

⁴ Two buildings located at 525 and 535 E. 86th Street were represented by Liberty as being under common ownership. Joint Motion at 24, Para. 53. That representation is accepted here.

⁵ The Joint Motion asserts but does not verify that three of these building pairs were commonly owned or managed. Joint Motion at 26. Only one pair was identified. Joint Motion at 24. On April 13, 1995, Liberty commenced service at the Lincoln Harbor Yacht Club in New Jersey by hardwire interconnection. Liberty entered into a contract directly with the Yacht Club and, as a result, Liberty claims it had no individual subscribers. Joint Motion at Para. 66. (Jt. Exh. 33; Price Depo. I at 280-281.) The source of the wire was a microwave receiver at 600 Harbor Boulevard. See HDO, App. B. Liberty has not shown a common ownership or control. These are not controlling fact issues in view of the outcome here.

The Changing Definition Of A "Cable System"

14. In 1991, the Commission permitted private SMATV multichannel operators to apply for 18 GHz point-to-point microwave licenses. In Re Amendment of Part 94, Report and Order, 6 F.C.C. Rcd 1270 (1991) (action as proposed to allow OFS licensees to use channels in the 18 GHz band to distribute video entertainment). That rulemaking, in which Liberty actively participated, made clear that SMATV operators⁶ (and similar alternative multichannel distributors) could not use their 18 GHz licenses to provide video programming service over a "cable system" without first obtaining a local cable franchise. Id. at 1272 and n.36. From 1992 to the passage of the Telecommunications Act of 1996, the law required that local franchise authority be obtained for hardwire systems where the buildings involving the interconnects are not commonly owned, controlled or managed. See In the Matter of Definition of a Cable Television System, 5 F.C.C. Rcd 7638, 7642 (1990) (where cable is used to interconnect SMATV equipped buildings the system is a cable unless there is common ownership and no right of way usage - the "Cable Definition Rule").

15. In June 1992, a United States Circuit Court of Appeals held that the definition of a "cable system" under the Cable Communications Policy Act of 1984 [47 U.S.C. §§521-559] ("Cable Act") was unconstitutional because no rational basis existed for a distinction that was based on common ownership, control or management of multiple dwelling units. Beach Communications v. F.C.C., 965 F.2d 1103, 1105 (D.C. Cir. 1992). The decision was favorable to Liberty by providing a short reprieve. But that decision was reversed the following year.

⁶ Time Warner and Cablevision charge Liberty with misleading the Commission by referring to itself as "SMATV operator". See Combined Opposition at 44-46, 48. That charge is not supported by the evidence. First, Liberty was unable to conceal its activities from the Commission by characterizing itself in its OFS applications as an "SMATV operator". Second, SMATV operators and similar alternative multichannel distributors which serviced non-common buildings were all required to obtain franchises. Liberty conceded that an extension of SMATV service via hardwire connections may be subject to local franchise requirements. (Jt. Exh. 30 at 7.) It is the non-common element which triggered the franchise requirement. See further analysis at Paras. 27-29, infra.

Beach Communications v. F.C.C., 113 S.Ct. 2096. (1993).⁷ Liberty's continuous involvement in the debate indicates that Liberty had first-hand knowledge of the law. Liberty continues to assert that there is merit to its Constitutional argument and that it acted in good faith.

16. In November 1992, Liberty introduced hardwire at Sutton Place. By June 1993, the United States Supreme Court effectively reinstated the Cable Definition Rule and made the point that MVPD operators which interconnect non-commonly owned buildings with cable are subject to the Cable Act's franchise requirement. Beach Communications, supra, 113 S.Ct. at 2099. On May 31, 1994, Time Warner filed a complaint with New York City against Liberty's unlawful, non-franchised hardwire interconnects. On June 28, 1994, Liberty made a denial of the allegations but admitted to the interbuilding transmissions. (Jt. Exh. 6.) On July 6, 1994, Liberty asked New York City for an opinion. (Jt. Exhs. 17-18.) On July 22, 1994, an Assistant Corporation Counsel in New York City's Law Department replied:

The question raised is whether a microwave video transmission service such as Liberty requires a "franchise" (as that term is defined in federal law) from the City to operate.

* * *

The answer, very briefly, is that such a "franchise" from the City is not required to provide a microwave transmission service unless such service uses cable or a similar closed transmission path to connect (whether across City streets or only using private property - see F.C.C. v. Beach Communications, Inc., 113 S.Ct. 2096 (1993)) buildings which are not commonly owned, controlled or managed.

⁷ The Supreme Court decided only the equal protection question and remanded the question of First Amendment analysis under a heightened scrutiny standard. On October 22, 1993, the Circuit Court of Appeals issued its Order on remand in which it dismissed a petition for review because it determined that heightened scrutiny was unwarranted and there were no other meritorious issues for the Court to consider. That Order was not approved for publication until December 21, 1993. Beach Communications v. F.C.C. 10 F.3d 811 (D.C. Cir. 1993).

(Id.) This advice did not provide Liberty with much comfort. The next month, on August 23, 1994, New York City issued an order to show cause. On October 31, 1994, Liberty filed an Answer wherein it reiterated its earlier reliance on the RABC opinion and posited its position as a policy of New York to not require a franchise to provide cable services which do not use any public rights of away. (Jt. Exh. 14.) However, in October 1994, Liberty informed the New York Department of Information Technology and Telecommunications that it was interested in applying for a franchise. (Jt. Exh. 20.) On December 9, 1994, the New York State Commission on Cable Television issued a standstill order prohibiting Liberty from establishing any new non-common systems. (Jt. Exh. 24.) Liberty was never required or requested to disconnect the hardwiring already installed. (Id.)

17. In the meantime, on September 28, 1994, the Commission recommended that Congress modify the Cable Act to exclude from the definition of "cable system" separately owned interconnected dwellings which do not use a public right of way. Annual Assessment of the Status of Competition, 9 F.C.C. Rcd 7442, 7448 (1994). On February 1, 1996, in response to the Commission's recommendation to expand the definition, Congress passed the Telecommunications Act of 1996, which deleted the non-common ownership requirement of the Cable Act leaving only the prohibition against using public rights of way. See Section 602(7)(B) of the Telecommunications Act of 1996 [47 U.S.C. §522(7)(B)] (excludes from the definition of "cable system" any "facility that serves subscribers without using any public right-of-way"). See also HDO at Para. 12. Thus, Liberty's quest to change the law succeeded in 1996 and there should be no further violations of the Communications Act under this scenario.

Tardy Disclosures

18. Since November 1992, Liberty was acting in open violation of the Cable Act. It was on or about May 31, 1994, that Time Warner decided to formally bring the matter to the attention of the New York State Commission on Cable Television. Liberty could not deny the operative facts. Certain of its buildings already had been hardwired without a franchise. Liberty asserted in its defense the earlier RABC opinion. In July 1994, Liberty formally requested a similar opinion which Liberty never received. Liberty was merely advised by New York authorities that it did not require a franchise unless Liberty used cable to connect buildings not commonly controlled, owned or managed "to provide a

microwave transmission service." (Joint Exh. 18.)⁸ Such advice did not provide Liberty with any comfort. By December 1994, when Liberty was served with a standstill order, it was well known that there had been unfranchised hardwire interconnects by Liberty, and the scope of the activities were a matter of public record. (Jt. Exh. 24) Now Liberty admits that it was "technically" wrong in not disclosing its non-franchised operations to the Commission in conjunction with its microwave applications. See Joint Motion at Para. 113.

19. Specific omissions occurred on November 7, 1994, when Liberty filed for modifications to previously granted OFS authorizations to open paths for four building locations being served by hardwire at: 239 E. 79th Street; 525 E. 86th Street; 44 W. 96th Street; and 60 Sutton Place. (Jt. Exh. 21 at Para. 3.)⁹ The reason given for seeking the modifications was a contingency in the event that New York ordered a cessation of the hardwire connections. See Joint Motion at Para. 62. In none of the disclosures related to at least four and as many as nine OFS applications did Liberty disclose the fact that it was operating through the means of non-franchised hardwire interconnects and that microwave paths were being sought to replace the hardwire connections. Thus, Liberty sought microwave (18 GHz) modifications which would provide open paths to serve the non-common buildings at nine locations that were being served by interconnected hardwire coaxial cable. (Jt. Exh. 5 at Para. 4; Combined Opp. Exh. 14.) Liberty represented to the Commission that it was eligible to receive OFS authorizations and that it was proposing to serve "private cable" buildings and subscribers. (Combined Opp. Exh. 14.) But there was no disclosure made contemporaneous with the OFS applications of the fact that the microwave paths were being sought to replace illegal hardwire connections.

⁸ New York advised Liberty that an official would be available to discuss franchising with Liberty. (Id.) Earlier, in March 1992, Liberty's president met with a New York official and the general counsel of the local regulatory body. Conflicting recollections of the meeting could not be resolved by the district court. See Liberty Cable Co., Inc. v. City of New York, supra 893 F. Supp. at 203 and 203 n.19-20.

⁹ Actually, there were nine locations. Liberty failed to include 425 E. 58th Street; 170 West end Avenue; 120 East End Avenue; 220 E. 52nd Street; and 55 Central Park West where Liberty also was providing hardwire services. (HDO App. B; Jt. Exh. 21 at Para. 3.)

20. In the Fall of 1994, Liberty was preparing for the contingency of a move from hardware interconnections to transmission by microwave. On November 7, 1994, according to factual assertions of Time Warner and Cablevision, Liberty had filed applications with the Commission for modifications of previously granted 18 GHz licenses to open paths for buildings.¹⁰ At the time, Liberty was illegally providing unfranchised hardwire service to each of the nine buildings. At the same time, Liberty also failed to disclose that these paths were to replace the unfranchised hardwire services. But by April 1992, Liberty had disclosed its SMATV operations. Between June 1992 and December 1993, Liberty was provided a "window of opportunity" under Beach Communications, supra. By June 1994, Liberty had provided New York City with a list of its noncommon systems. By November 1994, the public record in New York City was replete with allegations of Liberty's violations. While Liberty was failing to disclose as promptly, as accurately and in the form that the Commission requires under Section 1.65, Liberty's activities were well known in New York City and beyond. Finally, on July 12, 1995, Liberty filed a series of STA requests and Statements of Eligibility and Use (Form 402) which disclosed ten receive sites that were being fed by hardwire connections from non-commonly owned, controlled or managed buildings. (Jt. Exh. 31.) In these filings Liberty stated to the Commission:

Grant of this STA request would permit Liberty to convert the connection to microwave and discontinue the hardwire connection as soon as possible without disrupting service to the public.

(Id.) [Emphasis added.] Such disclosure corrected the earlier incomplete OFS applications.

¹⁰ The nine building sites for the path modifications are identified in separate FCC Forms 3060-0064: "Application For Station Authorization In The Private Operational Fixed Microwave Radio Service." (Combined Exh. 14.)

Discussion And Legal Conclusions

21. The Commission standard for summary decision provides:

The party filing the motion may not rest upon mere allegations or denials but must show, by affidavit or other materials subject to consideration by the presiding officer, that there is no genuine issue of material fact for determination at the hearing.

47 C.F.R. §251(a)(1). As the moving parties, Liberty and the Bureau have the burden of establishing that summary decision would be appropriate. Summary Decision Procedures, 34 F.C.C. 2d 485, 487-88 (1972). The Joint Motion and related exhibits must establish that the truth of the position asserted is clear, that the basic facts are undisputed, and that the parties are not in disagreement regarding significant factual inferences that may be properly drawn from the facts. Big Country Radio., Inc., 50 F.C.C. 2d 967 (1975). After consideration of all circumstances (including the change of statutory policy in a way that was favorable to Liberty regarding commonly controlled buildings, the public disclosure of the situation by December 1994, the formal disclosure to the Commission in July 1995, the resulting unlikelihood that Liberty would ever again unlawfully operate without a local franchise, the admission of wrongdoing, and the absence of evidence of an intent to deceive), Liberty's offer to pay a forfeiture of \$80,000 will be accepted and partial summary decision favorable to Liberty will be granted with respect to the hardwire interconnect issues set forth above.¹¹

¹¹ The granting of summary decision on only hardwire issues does not resolve the issues regarding unauthorized OFS microwave activations. The failure and refusal to provide the most comprehensive factual account in the Audit Report raises a substantial question on the factual adequacy of the Joint Motion as to unauthorized OFS activations. Also, it has been determined by the Presiding Judge that the issues on unauthorized activations can only be resolved after consideration of the hearing testimony which concluded on May 28, 1997. Order FCC 97M-64, released April 21, 1997, and Order 97M-79, released May 6, 1997. Cf. 47 C.F.R. §1.251(d) (hearing and initial decision may be required for some issues depending on the nature of the proceeding, the nature of the issues, the nature of the proof, and the need for cross-examination).

Failures To Disclose Substantial Information

22. The pertinent portion of §1.65(a) provides as follows:

-- whenever the information furnished in the pending application is no longer substantially accurate and complete in all respects, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of his application so as to furnish such additional or corrected information as may be appropriate.

Section 1.17 provides:

No applicant, permittee or licensee shall in any response to Commission correspondence or inquiry or in any application, pleading, report or any other written statement submitted to the Commission, make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission.

These disclosure requirements consider substantially the same proof as the issues on misrepresentation and candor which are discussed below.

23. Liberty and the Bureau argue in the Joint Motion:

Liberty did not immediately disclose its hardwiring to the Commission, but at the same time, it did not conceal this fact from the Commission. Indeed, the Commission participated in Liberty's litigation in which the legality of Liberty's hardwire interconnections were directly at issue. Under these circumstances, the facts show only that Liberty acted in accordance with its good faith belief as to the lawfulness of the conduct, and Liberty did not intentionally violate the law.

Joint Motion at 36-37. Liberty believed that its view of the law was correct and therefore it had no duty to disclose. Liberty argues that not even the Supreme Court's decision "affected Liberty's view that it could legally provide service without a franchise." Joint Motion at 37. Liberty also argues that the facts do not show that Liberty intentionally interconnected buildings by hardwire in order to violate the law or to avoid legal requirements. The Bureau joins in those conclusions.

Unlawful Non-Disclosure

24. The Commission has held that an inquiry into a reporting violation is justified only when a prima facie showing has been made that: (1) unreported interests are of decisional significance, (2) an intent to conceal is present, or (3) there exists a pattern of repeated violations or other circumstances reflecting significant carelessness or inattentiveness. Merrimack Valley Broadcasting, Inc., 55 Radio Reg. 2d (P&F) 23 (1983), modified, 99 F.C.C. 2d 681, 683-84 n. 9 (1984). In its Merrimack modification opinion, supra, the Commission noted that "circumstances surrounding a particular violation which indicate significant carelessness or inattentiveness may warrant inquiry even where no evidence of repeated violation is present. But carelessness or inattentiveness are only grounds for an inquiry. For a violation, the unreported event must have decisional significance and there must be an intent to conceal. Id.

Section 1.65

25. There was a violation of Section 1.65 in failing to disclose to the Commission in and after November 1992, the facts related to the alleged hardwiring and in failing to assure that its OFS applications were "substantially accurate and complete in all respects." Compare Memorandum Opinion and Order FCC 96M-178, Para. 23, released July 16, 1996 (Liberty also failed to disclose its asset sale to Freedom in violation of Section 1.65). But the preponderance of the evidence establishes that there was no realistic ability and therefore no deliberative intent on Liberty's part to mislead the Commission in failing to timely report. See Pinelands, 7 F.C.C. Rcd 6058, 6065-6066 (1992) (licensee found tardy in reporting was not disqualified because no intent to conceal was found). See also Hampshire County Broadcasting Co., Inc., 3 F.C.C. Rcd 6137 (1988) (disqualification for

failures to report the unfranchised hardwire violations require knowledge and intent). Cf. Knox Broadcasting, Inc., 12 F.C.C. Rcd 3337, 3343-44 (1997) (delayed disclosure of collapse of financial plan warranted only an admonition.) Cf. also David A. Bayer, F.C.C. Rcd 5054, 5055 (subsequent disclosure cured the failure to disclose).

Section 1.17

26. Section 1.17 requires that applicants and licensees be truthful in their written submissions to the Commission. There must be intentional false or misleading disclosures or intentional failures to disclose significant information for which there is a duty to disclose, in order to support findings of misrepresentation (false statement of fact) or lack of candor (concealment, failure to disclose, failure to be fully informative). Swan Creek Communications, Inc. v. F.C.C., 39 F.3d 1217, 1222 (D.C. Cir. 1994). An intent to deceive is a required element for a disqualifying violation to be found for lack of candor. Fox Television Stations, Inc., 10 F.C.C. Rcd 8452, 8478 (1995), recon. denied, 11 F.C.C. Rcd 7773 (1996). Liberty's failure to affirmatively submit information to the Commission between November 1992 and June 1995, without a proven intent to deceive, while violative of Section 1.65 does not constitute a disqualifying misrepresentation or lack of candor under Section 1.17. Fox River Broadcasting, 93 F.C.C. 2d 127, 129 (1983). Liberty was egregiously tardy in not disclosing the hardwire interconnects until July 12, 1995, and only in response to Time Warner's petition to deny. (Joint Motion at 52 and Jt. Exh. 31.) But tardiness alone does not support an inference of an intent to deceive. See Pinelands, 7 F.C.C. Rcd 6058, 6065-66 (1992) (lack of diligence in reporting does not warrant disqualification for misrepresentation where there is no "suitable evidence of an intent to conceal pertinent information from the Commission"). The absence of any deceitful intent is also circumstantially supported by the publication of the two highly informative opinions in March and July, 1995 in the New York federal court litigation. See Liberty Cable Co., Inc. v. City of New York, *supra*.¹²

¹² As important as these sources were, Peter Price, Liberty's president and a lawyer, testified that he never read the district court's opinion which the court of appeals considered to be "comprehensive and carefully reasoned". 60 F. 3d at 962-963. (Combined Exh. 3, Price Depo. of May 31 at 33-34, 38-41.)

27. The Commission's regulations hold applicants and licensees responsible for:

the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application.

47 C.F.R. §1.65(a). Overall, Liberty has shown a lack of respect for Section 1.65 reporting obligations. There was carelessness, inattentiveness, tardiness and indifference on Liberty's part in failing to report the non-franchised hardwire interconnects while seeking OFS authorizations. By April 1995, Liberty finally made disclosures to the Commission. That long-delayed disclosure is positive evidence of an intention to comply with the law, albeit after efforts to avoid compliance failed. In the interim, Liberty consistently and openly challenged the non-common element of the definition of a "cable system" under the Cable Definition Rule. Much of Liberty's conduct and its sua sponte determination to avoid franchising were matters of common knowledge to the Commission through the New York cable authorities and Liberty's competitors in the cable service community. These attendant circumstances show circumstantially through inference the absence of an intent to deceive the Commission. California Public Broadcasting Forum v. F.C.C., 752 F.2d 670, 679 (D.C. Cir. 1985) (where factual question is intent the proof may turn on inferences drawn from other facts). But Liberty did operate in violation of the Cable Act and did fail to disclose under Section 1.65. Joint Motion at 40. Therefore, Liberty should pay and is willing to pay a forfeiture of \$80,000. Joint Motion at 41.

Alleged Mischaracterization As SMATV Operator

28. Time Warner and Cablevision allege that Liberty "always" has mischaracterized itself to the Commission as an "SMATV operation" and yet:

Liberty has, for many years, covertly built cable connections between non-commonly owned buildings that it serves (non-common buildings).

Combined Opposition at 32. First, it is virtually impossible to "covertly build cable connections" between twelve pairs of high rise buildings in Manhattan. HDO at Para. 12. Second, there is insufficient proof to support the allegations that Liberty concealed its illegal hardwiring activities from the Commission by characterizing itself as an "SMATV operator" in order not to jeopardize its pending applications. See Combined Opposition at 33-34, 55. Liberty was highly knowledgeable of the Cable Definition Rule proceeding and was concerned about the outcome. Liberty did not want the entire Rule declared unconstitutional. Liberty merely wanted an exception carved out that would require franchising only when public rights of way were used.¹³ Liberty was a visible participant and could not have successfully deceived the Commission about its hardwire systems merely by describing itself as an "SMATV operator." With all facts out in the open, the inference will not be drawn that Liberty actually believed that it could hoodwink the Commission by referring to itself as an "SMATV operator" and thereby not jeopardize its OFS applications.

29. There are other factors to support that conclusion. On April 7, 1992 (before installing hardwire in noncommon buildings) Liberty informed the Commission that it began its operations in 1987 as a "traditional SMATV operation" at multi-family properties under common control or ownership. (Jt. Exh. 29 at 5.) Liberty advised the Commission that in 1991, it began interconnecting SMATV systems at non-commonly owned buildings and used 18 GHz equipment in reliance on the Cable Definition Rule that Liberty's operation was not a "cable system." (Jt. Exh. 29 at 5-6.) In April 1992, Liberty had both a "microwave option" and a "cable option". If cost of equipment was the only factor, Liberty would choose cable over microwave. But because of costs, regulatory burdens and inconveniences of franchising, Liberty found microwave to be the more economical approach. (Jt. Exh. 29 at 8-9.) Thus, the disclosure made in April 1992, was not false and was partially accurate in advising the Commission that SMATV was the technology then being used for economic reasons to provide 18 GHz microwave services to noncommonly owned or controlled residences. (Jt. Exh. 29 at 5-6.) There was no affirmative denial of the fact that the clearly visible hardwire was being used in conjunction with those SMATV operation.

¹³ An SMATV facility for multi-unit dwellings was considered to be a "cable system" if (and only if) the wires were "external" (i.e., connected separate buildings) and the interconnected buildings were not commonly owned, controlled or managed. Beach Communications, Inc. v. F.C.C., 959 F.2d 975 (D.C. Cir. 1992). Liberty was in that category and needed legislative relief.

Other Issues Raised By Time Warner And Cablevision

30. Time Warner and Cablevision also argue that Liberty had no basis to rely on the RABC opinion because RABC had made no application for a franchise, only a request for a license. See Combined Opposition at 39-40. They also argue that Liberty was foreclosed from relying on the RABC opinion because it did not cover the federal requirement for a local franchise. Id. They further allege that Liberty misrepresented its business operations to New York City by failing to disclose its providing of cable service to non-common buildings. Id. at 42. These were not representations made to the Commission and therefore they are not directly related to the issues for which summary decision is sought. To the extent that the disclosures to State and City authorities are used by Time Warner and Cablevision in attempting to raise issues of improper motive in Liberty's lack of disclosure to the Commission, those arguments are found to be tangential and remote and therefore not decisionally significant.

31. In anticipation of a directive from New York to remove its hardwiring, Liberty's management prepared to provide substitute service with microwave. (Jt. Exh. 5 at Para. 4.) Liberty was aware that in December 1994, the Commission had recommended to Congress that separately-owned dwellings which do not use rights-of-way in their interconnects be excluded from the definition of "cable system." 1994 Report on Competition, 9 F.C.C. Rcd 7442, 7558 (1994). This development indicating a possible change may have effected Liberty's view of its duty to disclose. In December 1994, Liberty filed an action in the Southern District of New York seeking declaratory and injunctive relief that would either declare the franchise law illegal on Constitutional grounds or provide Liberty with a means to obtain a franchise. Ultimately, Time Warner and the Commission joined in the action. Liberty Cable Co., Inc. v. City of New York, supra. The information already was the subject of proposed legislation and a lawsuit. While these New York disclosures do not justify non-disclosures to the Commission in Liberty's OFS applications of November 1994 (and even earlier under Section 1.65), there is insufficient evidence in this record to conclude that Liberty had deliberately embarked on a workable scheme to mislead the Commission for any appreciable period of time with respect to its undisclosed hardwire interconnects.

Conclusion

32. It is concluded that between 1992 and 1993, Liberty acted on its misplaced belief that it qualified for the exclusion embodied in Section 602(7)(B) of the Cable Act by virtue of the RABC opinion and the Beach Communications decision of March 1992, declaring unconstitutional the common - noncommon distinction of the Cable Definition Rule. From June 1992 until issuance of the Circuit Court of Appeal's order in October 1993,¹⁴ Liberty had a "brief window of opportunity to legally interconnect non-commonly owned buildings with cable." See Joint Opposition at 37. These circumstances show a lack of ability as well as a lack of intent to deceive the Commission at least during that "window of opportunity." See California Public Broadcasting Forum v. F.C.C., *supra*. By the time the window was shut, Liberty's hardwire interconnects were well known and Liberty ultimately made disclosure.

Forfeiture

33. The Commission directed that there be a determination pursuant to Section 503(b)(3) of the Communications Act [47 U.S.C. §503(b)(3)] and Section 1.80(g) of the Commission Rules [47 C.F.R. §1.80(g)] as to whether an order of forfeiture shall be issued in an authorized amount. HDO at Para. 35. Liberty is prepared to pay such a forfeiture in the amount of \$80,000 for the hardwire interconnect violations.¹⁵ That amount of forfeiture is acceptable to the Wireless Telecommunications Bureau and is found to be appropriate by the Presiding Judge. The reason given by Liberty and the Bureau for agreeing to a forfeiture is Liberty's

¹⁴ See fn. 7, *supra*.

¹⁵ The forfeiture in the amount of \$80,000 could be in addition to a potential further forfeiture of \$710,000 that Liberty is willing to pay to dispose of the pending issues of unauthorized activations of microwave services. See Joint Motion at 51. The Bureau also argues for a further additional forfeiture in the amount of \$300,000 for Liberty's willful misstatements in authorization requests for prematurely activated microwave paths. See Wireless Telecommunications Bureau's Proposed Findings of Fact and Conclusions of Law, filed February 28, 1997, at Pp.41-42, Paras. 111-112. The issues concerning unauthorized activations of microwave paths, including whether forfeiture is appropriate as an exclusive remedy for those violations, will be addressed in a forthcoming initial decision.

admission of wrongdoing that is mitigated by facts that are found to be convincing, namely, (1) Liberty has consistently maintained a position that the "cable system" definition was unlawful as applied to Liberty, (2) the definition of "cable system" was amended by the Congress in 1996 to delete the common ownership requirement, and (3) the appropriate sanction for an admitted technical failure to report the violations is a forfeiture. See Joint Motion at iv, 40-41.

34. Forfeiture is a remedy that the Commission may utilize to sanction a violation which does not involve deceit. Abacus Broadcasting Corp., 8 F.C.C. Rcd 5110, 5114-5118 (Review Bd 1993)(forfeiture was appropriate sanction in absence of intent to deceive Commission). Liberty failed to disclose or report the fact that it was in violation of the Cable Definition Rule for failing to obtain local franchises. The omission was based on a mistake of fact and a stretched interpretation of the law, i.e., that the RABC letter applied to Liberty and that Liberty was not legally required to apply for franchises since there was no use being made of public rights-of-way. There were no appropriate forms and procedures available to facilitate filing for local franchises which tends to further mitigate. Significantly, the non-disclosure could not mislead Liberty's competitors or the Bureau for any appreciable period of time given the wide publication of Liberty's conduct and the Commission's involvement in related litigation. Liberty's conduct was motivated by an avoidance of substantial franchise costs. Although Liberty's violations of the Cable Act and Section 1.65 are not disqualifying, a substantial forfeiture is a fitting remedy.

Order

IT IS ORDERED that the Joint Motion By Bartholdi Cable Co., Inc. (formerly Liberty Cable Co., Inc.) and Wireless Telecommunications Bureau For Summary Decision IS GRANTED ONLY IN PART under the hardwire interconnection issues cited above.

IT IS FURTHER ORDERED that pursuant to Section 503(b) of the Communications Act of 1934, as amended, this ruling constitutes an ORDER OF FORFEITURE against Bartholdi Cable Co., Inc. (formerly Liberty Cable Co., Inc.) in the amount of \$80,000.

IT IS FURTHER ORDERED that this case remains in hearing status in order to consider in an initial decision the facts and circumstances of unauthorized OFS activations, related candor and credibility issues, and whether the captioned microwave OFS authorizations should be approved for Bartholdi Cable Co., Inc. (formerly Liberty Cable Co., Inc.)¹⁶

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, appearing to read "Richard L. Sippel". The signature is written in a cursive, flowing style.

Richard L. Sippel
Administrative Law Judge

¹⁶ This is an interlocutory ruling governed by Section 1.301 [47 C.F.R. §1.301] which is not subject to an appeal of right until the issuance of an initial decision. See 47 C.F.R. §1.251(e).