

MAR 6 12 47 PM '98

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

DISPATCHED

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)

Appearances

Robert L. Begleiter, Esq., Eliot L. Spitzer, Esq., Yang Chen, Esq., Robert L. Pettit, Esq., Bryan N. Tramont, Esq. and Vipul N. Nishawala, Esq. on behalf of Liberty Cable Co., Inc.; *R. Bruce Beckner, Esq., Arthur H. Harding, Esq., Jill Kleppe McClelland, Esq. and Debra A. McGuire, Esq.* on behalf of Time Warner Cable & Paragon Cable Manhattan Cablevision; *Christopher A. Holt, Esq., James A. Kirkland, Esq., and Christopher J. Harvie, Esq.*, on behalf of Cablevision of New York City; and *Joseph P. Weber, Esq., Katherine C. Power, Esq. and Mark L. Keam, Esq.* on behalf of the Wireless Telecommunications Bureau.

**INITIAL DECISION
OF
ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL**

Issued: February 27 , 1998

Released: March 6, 1998

PRELIMINARY STATEMENT

1. Liberty Cable Co., Inc. ("Liberty")¹ is engaged in the business of distributing multichannel video programming utilizing facilities under Commission jurisdiction in the 18 GHz operational fixed microwave service. Liberty now participates in the delivery of video programming to approximately 30,000 subscribers in 150 buildings in Manhattan. Liberty has utilized the GHz service since 1991 for which it received 61 licenses. Liberty has filed for an additional 35 new licenses and 15 of those are the subject of this proceeding. HDO at Para. 2. None of the 15 licenses in question was ever granted. The Bureau has granted Liberty temporary authorizations to continue service to its customers while this case is in adjudication. Id.

2. The Commission questions the qualifications of Liberty to receive authorizations for private operational-fixed microwave service ("OFS") in light of the facts and circumstances concerning: (1) Liberty's unlawful hardwire interconnection of non-common systems² without first obtaining a cable franchise; (2) Liberty's unauthorized activation of microwave facilities serving 19 buildings; (3) Liberty's misrepresentations or lack of candor in statements to the Commission related to conduct that was in violation of the Communications Act. 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).

Liberty's Venture Into OFS Spectrum

3. In 1991, the Commission amended its rules to permit private cable systems to access the OFS spectrum in the 18 GHz band. In re Part 94 of the Commission's Rules to Permit Private Video Distribution Systems of Video Entertainment Access to the 18 GHz Band, Report and Order, 6 F.C.C. Rcd 1270 (1991). That ruling permitted Liberty to send point-to-point

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. But Bartholdi is the licensee/applicant.

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

transmissions from a single headend to multiple buildings using microwave antennas as receivers.³ It also enabled Liberty to use the 18 GHz band to expand its business. In the Spring of 1991, Liberty began to solicit new customers in other apartment buildings which were not owned by the Milsteins. Hardwired coaxial cable interconnects were used initially to service the buildings. In order to avoid local franchising laws while taking advantage of the OFS private cable system as a more efficient system for multichannel programming, Liberty aggressively sought FCC licenses for OFS microwave paths in direct competition with Time Warner and Cablevision, also parties to this proceeding. See Memorandum Opinion And Order, FCC 97M-154 released September 11, 1997 (granting partial summary decision on hardwire interconnect issues).

Time Warner And Cablevision (TWCV) Allegations ⁴

4. On January 9, 1995, Time Warner Cable of New York City and Paragon Cable Manhattan ("Time Warner") filed with the Commission a petition to deny or condition the grant of Liberty's application for OFS licenses which alleged that Liberty was unqualified to remain a Commission licensee. Time Warner alleged that Liberty was unlawfully operating a "cable system" in violation of the Communications Act and the Commission's cable television rules. Further, Time Warner alleged that Liberty lacked candor before the Commission because, in its license applications, Liberty claimed it was a private cable (SMATV) operator when, in fact, it was a "cable system" as defined by 47 U.S.C. §522(7).

5. Liberty opposed this pleading on January 24, 1995, claiming that it is eligible to be a licensee and it has filed all of its applications candidly and in good faith. On February 3, 1995, Time Warner filed a reply to this opposition, this time arguing that Liberty was obtaining OFS authorizations from the Commission under false pretenses because Liberty admitted in a New York federal district court that it was, in fact, a cable system by definition. Both parties filed additional petitions and oppositions with the Commission through May 17, 1995 arguing the question of the legality of hardwire interconnections and Liberty's related candor.

³ Liberty began operations in 1987 as a satellite master antenna (SMATV) operator by using satellite dish antennas on multi-family buildings. (Jt. Exh. 29 at 5.)

⁴ For the purpose of providing contextual background, official notice is taken in Paras. 3-7 of the prehearing pleadings that prompted the Bureau to investigate the allegations. See Wireless Telecommunications Bureau's Proposed Findings of Fact and Conclusions of Law filed February 28, 1997, at pp. 3-13.

6. On May 5, 1995, Time Warner filed another document with the Commission, reporting for the first time that Time Warner discovered two buildings at which Liberty was providing point-to-point OFS transmission service without having obtained prior authorization from the Commission. On May 17, 1995, Liberty filed a response and, for the first time, admitted that it had prematurely activated OFS service to those two buildings. In this filing, Liberty also disclosed an additional thirteen buildings to which it was already providing OFS service without having obtained Commission authorization. Liberty advised that on May 4, 1995, and May 17, 1995, it had filed with the Bureau requests for special temporary authority ("STA") for all of these paths which had been prematurely activated. However, Liberty never filed any amendments to the pending STA requests to disclose the violations.

7. Time Warner later alleged that one of Liberty's employees, Mr. Behrooz Nourain, lacked candor before the Commission. On February 21, 1995, Liberty filed an affidavit of Mr. Nourain in the federal court litigation which stated, "I am advised that Time Warner has opposed Liberty's pending applications to the Federal Communications Commission for various 18 [GHz] microwave licenses." In Liberty's Surreply filed with the Commission on May 17, 1995, Mr. Nourain signed a declaration attesting to the truth of a statement contained therein that "Mr. Nourain was unaware of the petitions against Liberty's applications until late April of 1995." Because the two statements on their faces contradict each other, Time Warner argued that Liberty misrepresented itself to the Commission.

8. On September 5, 1995, Cablevision of New York City - Phase I ("Cablevision") joined the Liberty licensing proceeding by filing a petition to deny or condition the grant of Liberty's application for an OFS license in Riverdale, New York, which is a Cablevision franchise area.

Current State Of Liberty's Authorizations

9. On June 9, 1995, the Chief of the Wireless Telecommunications Bureau's Microwave Branch ordered Liberty to explain the outstanding unlawful activations which had not been brought into compliance. On July 24, 1995, Liberty identified 4 additional buildings which were activated by Liberty prior to obtaining Commission authorization. That brought the total number of buildings prematurely activated in 1994-95 to 19. On August 14, 1995, Liberty submitted an Audit Report to the Bureau that was represented "to discover errors which occurred in Liberty's procedures and the reasons these errors occurred in a far more comprehensive,

precise and accurate way than could any investigative ongoing." (Joint Motion Exh. 4 at 2.) Based on Liberty's presentations, including those of the Audit Report, on September 7, 1995, the Bureau granted "interim operating authority to operate the locations that are the subject of the 15 [STA] grants" in order to permit Liberty to serve its customers during the pendency of this proceeding. The grants, however, were conditioned on the Commission's resolution of the pending petitions to deny or "any other action the Commission may take against Liberty in light of its numerous violations of the Commission's Rules." The STAs were periodically renewed until March 4, 1996, the day prior to the release of the HDO. Liberty continues to provide OFS services through a successor to the 19 sites under temporary conditional authorization.⁵ Liberty seeks to obtain final authorization for all of its activated OFS microwave paths through this proceeding.

Transfer Of Liberty Assets

10. Shortly before the release of the HDO, a substantial sale of Liberty's assets was made to an entity known as Freedom New York, L.L.C. ("Freedom").⁶ As a result of the sale, Liberty now provides OFS microwave transmission to Freedom which in turn provides the programming services to Liberty's former customers. See Joint Motion at page i n.1. See also Bartholdi's Reply to Opposition to Request for Renewal of Special Temporary Authority filed on September 23, 1997 at page 4. The asset transaction came on the heels of this proceeding and raised questions of a transfer of control and whether Freedom should be made a party to this case as the real party-in-interest. See Memorandum Opinion And Order, FCC 96M-178, released July 16, 1996. Under an agreement entered into with Liberty, Freedom is now applying for licenses for microwave paths in its own right.⁷ Freedom acquired equipment and the use in perpetuity of microwave paths assigned to Liberty and is now the provider of the OFS microwave

⁵ Liberty evidently considers their conditional authority to be ambiguous and in 1997, filed Requests for Renewal of Special Temporary Authority with respect to licenses numbered 708780 (WNTM555), 709332 (new) and 711937 (WNTM212).

⁶ Freedom is owned by RCN Corporation (80%) and by Liberty's successor, Bartholdi Cable Co., Inc. (20%). In February and March 1996, Liberty sold to Freedom 80% of its subscribers base and 20% of its marketing. (H. Milstein, Tr. 512.) See Memorandum Opinion And Order, FCC 96M-178, released July 16, 1996.

⁷ On February 26, 1997, in accordance the Asset Purchase Agreement, Freedom continued to file for licenses for certain of the temporarily authorized microwave paths which are the subject of this proceeding [767 5th. Ave. and 30 Waterside Plaza]. See HDO at App. A.

services. There has been no conclusive determination made that control has not in fact passed to Freedom.⁸ Liberty's President testified in May 1997, that at this time, Liberty is only maintaining the microwave network, is not engaged in any licensing activities, and has no knowledge of what licensing procedures Freedom is using. (Price, Tr. 2207.)

DESIGNATED ISSUES

11. Evidence was taken on the following issues:

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 [I](a) and (b) above, Liberty is qualified to be granted the above-captioned private operational fixed microwave authorizations.

⁸ The Presiding Judge determined that there was not sufficient evidence found to justify adding the issues. Memorandum Opinion And Order FCC 96M-178, supra. The Bureau thereafter undertook an investigation under Section 308(b) of the Act. The Bureau has not sought to renew the motion to enlarge the issues to include whether Freedom is the real party-in-interest. Id. at 9 n.15 and Tr. 356. However, termination of an investigation does not conclusively resolve the question of control. Cf. Alarm Industry Communications Committee v. F.C.C., 131 F.3d 1066, 1067-68 (D.C. Cir. 1997) (acquisition of a company's central hardware, software and all customer contracts and the employment of same work force, raised serious question of an illegal acquisition of an "entity").

II

(a) To determine the facts and circumstances surrounding Liberty's admitted violations of Section 301 of the Communications Act and Section 94.23 of the Commission's rules [47 U.S.C. § 301 and 47 C.F.R. §94.23] by operating certain private operational fixed microwave [OFS] facilities without first obtaining Commission authorization.

(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 premature operation of service in either its underlying applications or its requests for temporary authority.

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

III

(a) To determine whether Liberty, in relation to its interconnection of non-commonly owned buildings and its premature operation of facilities, misrepresented facts to the Commission, lacked candor in its 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].

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

IV

(a) To determine based on the evidence adduced in issues [I] through [III] above whether Liberty possesses the requisite character qualifications to be granted the above-captioned private operational fixed microwave authorizations for which it has applied and, accordingly, whether grant of its applications would serve the public interest, convenience and necessity.

HDO at Para. 30. The Commission assigned to Liberty the burden of proceeding and the burden of proof. HDO at Para. 34.

Procedural History

12. On July 15, 1996, the Wireless Telecommunications Bureau ("Bureau") joined Liberty in a Joint Motion For Summary Decision ("Joint Motion"). A combined opposition was filed on September 13, 1996, by Time Warner and Cablevision (collectively "TWCV"). Supplemental Memoranda were permitted and submitted on October 22, 1996. Candor and credibility hearings arising out of depositions and document discovery were held on January 13, 14, 15, 16, 21, 22, 1997, to determine whether Liberty had been less than candid with the Commission and whether Liberty could be trusted to be truthful as a licensee. Memorandum Opinion And Order FCC 96M-265, released December 10, 1996. Proposed Findings of Fact and Conclusions of Law were filed on February 28, 1997 and Reply Proposed Findings of Fact and Conclusion of Law were filed on March 7, 1997.

13. The last witness to testify on January 22, 1997, was Mr. Howard Barr, a partner at Pepper & Corazzini, Liberty's day-to-day communications counsel. After skirmishing on production and in camera inspection, it was determined through Mr. Barr's handwritten contemporaneous notes made during a telephone conversation with another Liberty attorney that there had been an advisory letter provided to Liberty in 1993 which warned Liberty's management against unlawful premature activations. (TWCV Exh. 51.) This discovery, initiated in open court, led to the production of a highly relevant document that should have been disclosed in the Joint Motion. At a minimum, it should have been produced in the first round of document production in June 1996. Discovery of the advisory letter prompted TWCV to file a motion for additional testimony that was supported by the Bureau. Memorandum Opinion And Order FCC 97M-63, released April 21, 1997. Limited additional discovery was permitted⁹ and a final hearing session was held on May 28 and 29, 1997. Supplemental Proposed Findings of Fact and Conclusions of Law were filed on June 11, 1997 and Reply Proposed Findings of Fact and Conclusions of Law were filed on June 23, 1997.

⁹ Depositions were taken of the letter's author, Ms. Jennifer Richter and of Messrs. Bruce McKinnon, Howard Barr and Behrooz Nourain. (TWCV Exhs. 52-55.)

14. On September 16, 1997, while the "last" round of pleadings were under consideration by the Presiding Judge, Liberty produced the Audit Report dated August 14, 1995, which until then had been the subject of federal court litigation. See discussion of Internal Audit Report below. The information in that report is highly relevant to the findings and conclusions of this proceeding. The parties filed their further Supplemental Proposed Findings of Fact and Conclusions of Law on November 19, 1997, and further Supplemental Proposed Reply Findings of Fact and Conclusions of Law on December 2, 1997.

Partial Summary Decision

15. The issues above that are related to hard wire interconnects¹⁰ have been decided by partial summary decision. Memorandum Opinion And Order, FCC 97M-154, released September 11, 1997. Liberty will pay a forfeiture in the amount of \$80,000 for admitted violations of the Act [47 U.S.C. §522(7) (defining "cable system") and 47 U.S.C. §541(b)(1)(cable operators may not provide cable services without a franchise)] by failing to obtain a local franchise for hard wire interconnected cable systems constructed between non-commonly owned or controlled buildings in New York City and for failing to disclose the violations under Section 1.65 in applications for modification of microwave service that would replace the hardwire systems. Id. The law on "cable systems" was in a state of flux, there were no procedures in place to obtain franchises, and Congress accepted the Commission's recommendation to further narrow the definition of "cable systems" that are subject to franchises. See HDO at Para. 12 (Telecommunications Act of 1996 now exempts service from local franchise where a facility does not use any public right of way).¹¹ Under the circumstances, it could not be determined that Liberty had intentionally violated the law on "cable systems" and franchises. Id. Nor could Liberty be found to have deceived the Commission in view of disclosures made in a local enforcement proceeding and Liberty's court action for declaratory judgment to which the Commission became a party. Tardy disclosure eventually was made and Liberty admitted

¹⁰ Issues I(a), (b), (c) supra; HDO at Paras. 5, 6, 10, 11, 12, 13, 18, 30(1)(3), and 35.

¹¹ Prior to the legislative change, in order to qualify for an exemption from local franchise regulation there had to be common ownership or control of any hard wire interconnected buildings in addition to the non-use of any public right-of-way. Liberty was not using any rights-of-way but it was interconnecting buildings which were not under common ownership or control with hardwire cable.

violating the Cable Act and the Commission's Rules [47 C.F.R. §1.65] for the late disclosures.¹² Liberty agreed to pay the forfeiture. Id. There was no granting of a license in the resolution of the hard-wire issues by forfeiture .

Reliability And Credibility Of Testimony

16. In May and June 1996, Liberty made key personnel available and Time Warner and Cablevision took nineteen depositions. Thereafter, as a result of discovery of a key memorandum that was authored in February 1995, and produced in June 1996, a second waive of depositions was authorized for key witnesses. Order 96M-188, released July 29, 1996. The parties were permitted to file supplemental memorandums in October 1996. In those supplemental pleadings it was disclosed:

the Bureau has some concerns that Mr. Price [Liberty's President] may not have been fully candid in this deposition---

See Bureau's Supplemental Comments filed October 22, 1996. That observation by Bureau trial counsel raised serious doubt as to the credibility of a key witness whose deposition and affidavit testimony is relied upon by Liberty and the Bureau.

¹² The admissions by Liberty of violations under the hardwire issues constitute added evidence of a tendency on the part of Liberty not to comply timely and fully with the Act and the Commission's Regulations. The admitted violations also tend to negate Liberty's reliability for future compliance as a Commission licensee with the Act and the regulations.

17. After multiple hearing sessions,¹³ it is clear that summary decision no longer is suitable as the procedure for terminating this case. See Summary Decision Procedures, 34 F.C.C. 2d 485, 487-488 (1972).¹⁴ The issues on premature OFS microwave activations and related misrepresentations cannot be summarily decided because of their dependency on credibility and candor issues that permeate Liberty's non-disclosures, inadequate disclosures and the explanations made in related testimony. But the Joint Motion's record will be used in this Initial Decision where uncontested or basic fact findings can be made.¹⁵ The parties have been placed on notice of these procedures. Order FCC 97M-64, released April 21, 1997 and Order 97M-79, released May 6, 1997 (Presiding Judge will take appropriate notice of the record that has been compiled in connection with the Joint Motion For Summary Decision). See 47 C.F.R. §1.361 (other proof of official record).

18. The findings and conclusions below relate to the evidence on Liberty's unlawful activations of OFS paths and the inconsistent sworn statements of Mr. Behrooz Nourain, a key employee, relating to the OFS paths.

FINDINGS OF FACT

Identity Of Key Persons

19. Liberty and the buildings serviced for microwave video distribution are owned and controlled by Mr. Howard Milstein, his brother Mr. Edward Milstein, and a cousin who is inactive in the business, Mr. Philip Milstein. (H. Milstein, Tr. 512.) Mr. Howard Milstein, the most senior executive officer, has advanced degrees in law and business and varied business interests. (H. Milstein, Tr. 508-510.) He estimates that in 1995 he spent only about ten to fifteen

¹³ What was thought would be a "mini hearing" at the outset evolved by necessity into a thorough examination of the facts and circumstances under which Liberty prematurely activated multiple microwave paths, of its intentional lateness in notifying the Commission, and of its failure to disclose facts in STA applications.

¹⁴ The Bureau concludes in its ultimate pleading that an award of a summary decision on the premature activation issues is a "close call." Wireless Telecommunications Bureau's Reply To Time Warner's Supplemental Proposed Findings of Fact and Conclusions of Law filed June 23, 1997, at 10.

¹⁵ The Commission authorizes a bifurcated procedure where "testimony [or candor] may still be appropriate to determine whether [a licensee] was acting in good faith, or for base or worthy motives." Summary Decision Procedures, 34 F.C.C. 2d at 488, n.3.

percent of his time on Liberty matters. (H. Milstein, Tr. 511-512.) Mr. Edward Milstein assists Mr. Howard Milstein in the management and marketing aspects of the business and on special projects. Mr. Edward Milstein has no supervisory or consultive responsibilities with respect to OFS licensing. (E. Milstein, Tr. 1615-16.) To keep apprised of Liberty's business developments, Mr. Howard Milstein met regularly with his subordinates each Thursday afternoon to discuss new installations of OFS facilities. (H. Milstein, Tr. 522-523.)

20. Mr. Peter Price ("Price"), Liberty's President and Chief Operating Officer, was responsible for running the day-to-day operations of Liberty in all aspects. (H. Milstein, Tr. 513.) From Liberty's expansion in 1991 to the present, Mr. Price managed Liberty's day-to-day business. Mr. Price has a degree from an accredited law school. Joint Motion at 7. Mr. Price supervised outside counsel, including its FCC licensing law firm, Pepper & Corazzini, Washington, D.C. The employees reporting to Mr. Price included Mr. Anthony Ontiveros ("Ontiveros"), Director of Operations and Mr. Behrooz Nourain ("Nourain"), Director of Engineering. (H. Milstein, Tr. 514.) Mr. Bruce McKinnon ("McKinnon"), a senior subordinate of Mr. Price, was at one time in charge of day-to-day operations as Executive Vice President and Chief Operating Officer. Mr. McKinnon was the officer in charge of installations of buildings that contracted with Liberty for OFS service. Mr. McKinnon left Liberty in May 1993. (H. Milstein, Tr. 522.)

21. The mid-town executive offices of Messrs. Howard and Edward Milstein, Mr. Price and Mr. McKinnon were at a different location from Mr. Nourain. (Nourain, Tr. 2215-16.) "Behrooz is in another office substantially uptown from us." (Price, Tr. 1377.) The primary responsible officer for Liberty's licensing in the relevant period was Mr. Price. Mr. Price was alleged to be the first executive level officer to learn about the unauthorized activations. (Joint Motion at 7-9.) As the most senior executive responsible for Liberty's day-to-day operations, Mr. Price was at all times in an excellent position to be fully knowledgeable of OFS activations and related licensing.

22. Mr. Michael Lehmkuhl ("Lehmkuhl") is an associate attorney at Pepper & Corazzini who prepares and files applications for OFS licenses and STAs. Ms. Jennifer Richter ("Richter") is a former associate attorney who had performed the same services prior to Mr. Lehmkuhl from April 1992 to July 1994. (Richter, Tr. 1998-2003.) Mr. Todd Parriott ("Parriott") is a former associate who preceded Ms. Richter. Mr. Howard Barr ("Barr") is a partner at Pepper & Corazzini who is senior to Mr. Lehmkuhl with respect to the firm's representation of Liberty.

23. Mr. Joseph Stern ("Stern") was a consultant who preceded Mr. Nourain as the person responsible for Liberty's licensing. (H. Milstein, Tr. 515; Price, Tr. 1350, Joint Motion at 9.) Mr. Lloyd Constantine ("Constantine") was responsible for the conduct of an audit of Liberty's licensing and activation practices and the subsequent preparation and submission to the Commission of the Audit Report. (See "Constantine Affidavit," Joint Motion Exh. 4.)¹⁶

24. Liberty used the services of Comsearch, a Washington, D.C. technical consulting firm. Comsearch provided the engineering and coordination with existing users of the 18 GHz frequency to insure against interference with other transmissions. (Joint Motion at 9.) Comsearch was a technical firm that was used by Mr. Nourain and by Mr. Lehmkuhl to coordinate clearance from interference with other microwave systems on the paths identified by Liberty for licensing. Comsearch received inventory reports from Ms. Richter and Mr. Lehmkuhl. (TWCV Exh. 3.)

The Internal Audit Report

25. On August 4, 1995, the Bureau required Liberty to furnish the results of a Liberty initiated internal audit report ("Audit Report" or "Report"). (TWCV Exh. 28.) It was to be submitted under Section 308(b) of the Act [47 U.S.C. §308(b)]. Liberty submitted the Audit Report on August 14, 1995, under a claim of confidentiality. (TWCV Exh. 67.) Liberty contends it was forthright with the Commission in its Audit Report and relies on the Report as support for granting the license applications which are in question. See Joint Motion at 19-20, 55 and Jt. Exh. 4 at Para. 4. Liberty also relies on the Audit Report as a basis for representing to the Commission that it now has a reliable system in place which will prevent a reoccurrence of premature activations. The Bureau's counsel had seen the Report prior to this proceeding and considered it to have relevant information. The Report was seen for the first time in this proceeding on September 16, 1997. There was attached to the Report the advisory letter of Ms. Richter and a detailed memorandum of instruction from Mr. Stern to Mr. Nourain. Liberty now takes the position that its Report is unnecessary for reaching a decision in this case. See Reply to Supplemental Proposed Findings of Fact and Conclusions of Law dated June 23, 1997 at 26-27. Liberty's disclaimer of the Audit Report's nonrelevance is not accepted. The Joint Motion refers to the Audit Report five times to show that Liberty will be a candid and reliable

¹⁶ The Constantine Affidavit represents that the auditing attorneys were given "complete access to Liberty's books and records and an unfettered and unlimited opportunity to interview all Liberty personnel, officers and outside-retained counsel." (Id.) Although not specified in the Constantine Affidavit, "outside-retained counsel" would include Messrs. Barr and Lehmkuhl of Pepper & Corazzini as well as Ms. Richter.

licensee in the future. (See Joint Motion at 19, 45, 47, 53 and 55.) The Joint Motion states that "Stern did not give Nourain a written memorandum detailing the application process." (Joint Motion at 13.) That statement, based on Stern's deposition, is flatly contradicted by the Audit Report. The refusal to make available the Audit Report for use in this proceeding would have created an adverse inference against Liberty on all of the issues relating to the premature activations of OFS microwave paths. The Audit Report was highly relevant evidence that was being withheld until late in the proceeding.

26. After engaging in prolonged litigation over a claim of privilege, Liberty produced the Audit Report on September 16, 1997, and it was received in evidence on November 5, 1997. (TWCV Exh. 67; Tr. 2353-57.) Upon review, it was perfectly clear that the Report always had relevance to the issues. The Bureau repeatedly confirmed that the Audit Report contains highly relevant information and that it should be produced by Liberty for use as evidence in this case. See Wireless Telecommunications Bureau's Proposed Findings of Facts and Conclusions of Law, February 28, 1997 at Paras. 114, 130. The Commission ruled more than a year ago that Liberty failed to establish that the Report was entitled to confidential treatment. In re Liberty Cable Company, Inc., 11 F.C.C. Rcd 2475, released January 26, 1996. The Court of Appeals affirmed the Commission and held that Liberty's "challenges to the Commission's order were without merit." Bartholdi Cable Company, Inc. v. F.C.C., 114 F.3d 274 (D.C. Cir. 1997). The Court of Appeals also found that the Audit Report was a "comprehensive report" that "contains a description of Bartholdi's [Liberty's] internal business and licensing operations ... [and] the history of management breakdown that led to the premature activations." Bartholdi Cable Co., Inc. v. F.C.C., supra at 278. By Orders of the Court of Appeals dated September 10, 1997, a request for rehearing and suggestion for rehearing en banc were denied and Liberty had no excuse for withholding it.

27. Without the Audit Report it would not be possible to adequately test Liberty's conclusory arguments with respect to the Report's significance in this case. Memorandum Opinion And Order, FCC 96M-265, released December 10, 1996 at 4. See also Memorandum Opinion And Order, FCC 97M-63, released April 21, 1997 at 6, n.8 and Memorandum Opinion And Order, FCC 97M-12, released January 31, 1997 at n.4. There was a motivation to utilize litigation in order to keep it out of this proceeding as long as possible. The significance of the information contained in the Audit Report is apparent from its comprehensive nature as found by the Court of Appeals. It is certainly far more comprehensive than the Joint Motion. Its

significance is heightened by its disclosure for the first time of a total of 93 unauthorized path activations by Liberty since 1992, far exceeding the 19 charged in the HDO.¹⁷

28. A Prehearing Conference was held on November 5, 1997, where it was ruled that in view of Liberty's manifest intent to continue to litigate adverse ruling on privilege, there was no public interest to be served by permitting further discovery and the resulting additional delay. (Tr. 2384-86; 2396-2401.)¹⁸ The Audit Report was received in evidence as TWCV Exh. 67. (Tr.2357.) A final pleading cycle ending on December 2, 1997, was set to permit proposed findings and conclusions on the Audit Report as evidence. See Order FCC 97M-185, released November 10, 1997.

29. The Audit Report is represented to the Commission, the Bureau and the Presiding Judge to be an accurate representation of the facts known to Liberty's counsel as of August 14, 1995. (Tr. 2362, 2381.) It was prepared in order to account for the 19 unauthorized OFS activations that are cited in the HDO. The Report was accompanied by a Declaration of Liberty's President affirming to the Commission that the Report contains the "results of Liberty's internal audit." (TWCV Exh. 67.) The Report was represented to be a comprehensive and accurate assessment of the events as of the date that the Audit Report was submitted to the Commission. (Tr. 2377.) The Report had been represented in the Joint Motion as "comprehensive, precise and accurate." (L/B Exh. 4 at 2.) The attorneys conducting the investigation had "complete access to Liberty's books and records and an unfettered and unlimited opportunity to interview all Liberty personnel, officers, and outside - retained counsel" and "thousands of documents were

¹⁷ The 19 activations which were set for hearing never received approval from the Commission (except for temporary authorization permitted during the pendency of this proceeding). The additional 74 paths were activated initially without authorization but were later authorized by the Commission without knowledge that they had been prematurely activated. (TWCV Exh. 67 at Exh. B, Chart 3.) The Bureau notes that the 74 paths were authorized between 1994 and 1995. Bureau's Supplemental Proposed Findings of Fact and Conclusions of Law Regarding the Audit Report filed November 19, 1997, at 9. But there is no assertion that the Commission knew of their premature activations when the approvals were granted. The Commission could not have known before Liberty disclosed the activations on August 14, 1995. The Bureau believes that the additional violations would support an increase in the forfeiture amount now asked to be set at \$1,090,000 by agreement between Liberty and the Bureau. Id. at 12. That would increase the forfeiture by an estimated \$1,850,000 for a total forfeiture of \$2,940,000.

¹⁸ The Audit Report appears in large part to be the product of interviews and written analyses of attorneys. Further discovery would create more occasion to raise issues of attorney-client privilege and/or the work product exception. Liberty has manifested a determination to continue to assert privilege for any such discovery and would file interlocutory appeals of adverse rulings to the Commission under Section 1.301(2). Thus, there would be significant delay if further discovery were allowed and there would be no assurance of the usefulness of the results.

reviewed." (TWCV Exh. 29 at Para.5-6.) The Report was submitted in response to a Bureau request under §308(b) of the Act. The Report is a statement by Liberty's agents concerning matters within the scope of an agency relationship (attorneys retained to conduct investigation and prepare Report) and therefore constitutes an admission by a party-opponent. FRE 801(d)(2). For these reasons, the Audit Report is found to be reliable evidence of the fact that in 1992-94, there were multiple unauthorized activations of OFS paths in addition to the 19 cited in the HDO (Tr. 2381).

**Highly Relevant Evidence Withheld In An Avoidance
Of Complete Discovery And Disruption Caused By Withholding Evidence**

30. Liberty was assigned the burden of proof. HDO at Para. 34. The argument for summary decision is that Liberty negligently failed to detect 19 path activations in 1994-95. Yet Liberty deliberately withheld significant documentary evidence concerning activations. The most recent and the most significant document disclosed is the Audit Report (TWCV Exh. 67) which was strategically withheld under a waived assertion of the attorney-client privilege. The Report had been furnished to the Bureau before designation for hearing in order to convince the Bureau to authorize the activations. When that effort did not succeed and the case was set for hearing, Liberty withheld the Report for use as evidence. The motivation to keep the Audit Report from the fact-finder is evident. The Audit Report disclosed 74 additional premature activations. It identified a senior employee, Mr. McKinnon, as a person who probably knew of premature activations. (TWCV Exh. 67 at 18.) The Audit Report concluded that Mr. Nourain, Mr. Ontiveros, Mr. McKinnon and Ms. Richter also probably knew there were illegal activations. (TWCV Exh. 67 at 11, 13, 15.) As a direct result of lengthy litigation which finally ended in September 1997, significant leads could not be followed up without further interminable delays and interlocutory appeals. And none of the substantial questions raised in the Audit Report concerning the knowledge of activations on the part of Mr. Nourain, Mr. McKinnon or Ms. Richter could be conclusively determined. (TWCV Exh. 67; Audit Report at 6, 12 [McKinnon interpreted a test license as authority to prematurely activate]; Audit Report at 10 [Nourain believes he told Mr. Price that approvals may not be received on time]; Audit Report at 11 [McKinnon appears to have been aware from Nourain that buildings were prematurely activated].

31. Liberty also failed to disclose in a timely fashion other key documents which were prepared by Liberty's outside counsel for the purpose of warning, monitoring and assuring that there would be no premature microwave activations.¹⁹ Evidence was withheld until discovered in the course of the hearing, reviewed in camera, ordered to be produced, testified to in depositions, and finally presented as exhibits through their authors and recipients who were examined in open court. Although these documents would be needed to test Liberty's denials of knowledge, they were not readily produced and there was never any explanation offered other than a simple oversight. (Lehmkuhl, Tr. 1293-94.)

Mr. Lehmkuhl's February 24 Inventory

32. Mr. Lehmkuhl had prepared an inventory of the universe of Liberty's licenses and pending applications as of February 24, 1995. (L/B Exh. 1; Lehmkuhl, Tr. 1058-59.)²⁰ Such inventories were prepared and furnished to Liberty as a standing practice. (Lehmkuhl, Tr. 1059.) The inventory contained four sections on pending applications, granted licenses, transmit location information, and the station and path information for each transmitter site. (L/B Exh. 1.) It had been prepared two months before the "late April" date that Liberty declared in the Constantine Affidavit and in the Joint Motion to be the earliest date that its officers knew of the microwave activations. (Joint Motion at 17.) The inventory was addressed to Mr. Price and Mr. Nourain. It contained information from which it could readily be determined by comparison with Liberty's Weekly Reports (TWCV Exh. 1)²¹ that prematurely activated paths had pending (not granted) license applications. Liberty was first required to produce discovery documents on

¹⁹ Mr. Nourain's memorandum of April 26, 1995, described below was central to determining when Mr. Price knew for certain of unlawful activations. Yet the memorandum was neither volunteered nor produced in response to an initial document request.

²⁰ "L/B" applies to documents submitted by Liberty and the Bureau in support of summary decision. The document L/B Exh. 1 is entitled "Inventory of 18 GHz Licenses Issued to Liberty Cable Co., Inc." It is a 25 page document which is described by Mr. Lehmkuhl in his cover memorandum as an "inventory [that] includes four sections detailing pending applications, granted licenses, transmit location information, and the status and path information for each transmitter site." The memorandum further instructs that the license status of each path is indicated by "P" (pending) or "G" (granted). Ms. Richter had prepared a similar inventory in April 1993 and these inventories became a course of day-to-day business between Liberty and Pepper & Corazzini. (Richter, Tr. 2068; TWCV Exhs.. 3, 59.)

²¹ Liberty's Weekly Reports contained information on the status of installations but provided no information on the status of license applications. (H. Milstein, Tr. 530-31; Ontiveros, Tr. 1699-1701; Price, Tr. 69; L/B Exh. 9.)

April 15, 1996. See Order FCC 96M-53, released March 20, 1996 (15,000 documents produced). The Lehmkuhl inventory had been furnished to a third-party, Comsearch, which was hired to coordinate new paths. (Nourain, Tr. 620.) Yet, Liberty withheld the document from discovery on a clearly unmerited assertion of the attorney-client privilege. After an in camera inspection, the document was ordered to be produced. It became available to the parties for the first time on June 27, 1996. See Order FCC 96M-164, released June 27, 1996.

Mr. Nourain's April 26 Memorandum

33. Mr. Nourain prepared a memorandum on Wednesday, April 26, 1995. (TWCV Exh. 35.) Mr. Nourain prepared his memorandum at the request of Mr. Edward Milstein after Mr. Nourain had spoken with Mr. Milstein and Mr. Price about activations. (TWCV Exh. 35; Nourain, Tr. 819, 821.) Mr. Nourain listed the site for which STAs had been filed. (Nourain, Tr. 822.) As he wrote the memorandum, Mr. Nourain knew that all but two of the facilities listed in the document were receiving service without authorization. (Nourain, Tr. 826-29; TWCV Exhs. 30, 35.) Mr. Price testified that he learned of the unauthorized activations from Mr. Nourain's memorandum. (Price Tr. 1362-64; 1373.) The document did not qualify for inclusion in any log of documents claimed to be privileged. Yet this document was not produced until January 13, 1997, six months after the filing of the Joint Motion and on the first day of the credibility hearings when Mr. Nourain was scheduled to testify. (Tr. 492-500.) There was no justification for its late production.

Mr. Lehmkuhl's April 28 Inventory

34. Mr. Lehmkuhl prepared an inventory on Friday, April 28, 1995. (TWCV Exh. 34.) Mr. Nourain had requested Mr. Lehmkuhl to prepare it after Mr. Nourain acknowledged learning of the premature activations. (TWCV Exh. 34; Nourain Tr. 648.) The inventory constituted clear evidence that OFS paths had been prematurely activated before receipt of authorizations. (Nourain, Tr. 749-50.) Mr. Price acknowledged that Mr. Lehmkuhl's inventory disclosed the applications for OFS authorizations that had not been granted. (Price, Tr. 1386.) Mr. Lehmkuhl warned that future STAs probably would not be granted in view of pending Time Warner petitions to deny but advised that STAs still should be applied for due to the "seriousness of the situation." (TWCV Exh. 34.) Despite its significance, the document was not disclosed until January 6, 1997, eight months after the HDO was issued and one week before the

commencement of the hearings. The document had not been identified in Liberty's log of documents that were claimed to be privileged. There was no reason stated why the document was not found in April 1996, when a document search had been made. The document was reported to have been found fortuitously by Mr. Lehmkuhl on the eve of the hearing as he was preparing for his testimony set for January 18, 1997. (Lehmkuhl, Tr. 1292-94; 1317.)²² There was no justification for its late production.

Ms. Richter's 1993 Letter

35. The earliest dated and most highly relevant document which Liberty failed to produce in discovery was the last document to be uncovered. It was produced over objection in the course of the cross-examination of Mr. Howard Barr on January 28, 1997. The Richter letter, which was being kept from this proceeding by Liberty, was attached as a significant document to the Audit Report of August 1995. (TWCV Exh. 67.) In April 1993, Ms. Richter wrote a letter to Mr. McKinnon "to detail the parameters within which construction and operation of new paths and new stations is permissible." (TWCV Exh. 51.) The two-page letter was not identified on Liberty's log of documents claimed to be privileged. After an in camera review, the document was ordered to be produced on a finding of waiver. Order FCC 97M-14, released February 5, 1997. Notes written on the letter in Liberty's files reflect that it was directed to Mr. Nourain who in turn forwarded it to Mr. Price and asked Mr. Price for guidance. The self-evident significance of the Richter letter required yet another round of depositions of Ms. Richter, Mr. McKinnon, Mr. Nourain and Mr. Price and the additional hearing testimony of Ms. Richter, Mr. Nourain and Mr. Price in May 1997. In September 1997, it was learned through the Audit Report that Ms. Richter, without being identified by name, probably became aware that services had been activated without authorization. (TWCV Exh. 67, Audit Report at 11.)²³

²² Mr. Lehmkuhl testified that the relevant file at Pepper & Corazzini had been searched in April 1996 and that his memorandum and inventory of April 28, 1995, was in the files of Pepper & Corazzini at that time. (Lehmkuhl, Tr. 1293.) With that explanation, there is absolutely no excuse for this inordinate delay in discovery.

²³ In the Audit Report the Richter letter was referred to and incorporated as an attached Exh. F. (Id.)

Newly Discovered Documents Prompted Changes In Testimony

36. Despite a representation in the Constantine Affidavit and the Joint Motion that the unauthorized activations were first discovered in "early April", during the first deposition phase of this case in May 1996, Messrs. Howard and Edward Milstein, Peter Price and Behrooz Nourain each testified that they may have first learned of the premature activations in early May 1995 through allegations made in Time Warner's May 5 petition to deny. (H. Milstein Depo. Tr. 28; E. Milstein Depo. Tr. 41; 44-45; Price Depo. (5/28) Tr. 95-97; Nourain Depo. (5/29) Tr. 77.) But when confronted in their January 1997 courtroom testimony with the February 24 and April 28 Lehmkuhl inventories and the Nourain Memorandum of April 26, these recollections became focused on the earlier dates of April 26 and April 28. (H. Milstein, Tr. 517-518; E. Milstein, Tr. 1623-24; Price, Tr. 1362-64, 1417-18; Nourain, Tr. 645-646.) It is inexplicable how these executives and key employee could have been uncertain of April 26 and April 28, 1995, when they were first deposed in May 1996. The Milsteins and Mr. Price were knowledgeable of the Audit Report which had been submitted to the Commission in August 1995, a document that was represented to be the definitive presentment of the facts and circumstances of the unlawful activations. By the time they were deposed in May 1996, Liberty's officers would at least have read the Constantine Affidavit and probably the Audit Report to refocus and be sure of the date of "late April 1995." With the benefit of the Audit Report, the Richter letter, the Lehmkuhl inventories and the Nourain memorandum, in addition to the Constantine Affidavit, these witnesses could have been fully prepared to give much more truthful and accurate deposition testimony in May 1996. If the document were timely produced, all parties would have been focused on late April 1995 at the depositions.

Inconsistencies In Key Documents And Testimony

37. The Joint Motion was submitted before there was any discovery or disclosure of highly relevant documentary evidence: Mr. Stern's memorandum, Ms. Richter's letter, Mr. Lehmkuhl's inventories, Mr. Nourain's memorandum, none of which were disclosed in the Joint Motion. These documents were in the possession of Liberty and counsel throughout this proceeding. The Joint Motion is premised on Liberty's promised but totally unsupported reliability to comply with Commission regulations. It is also premised on an unproven propensity to be forthcoming with the Commission before events occur. Liberty and the Bureau asked the

Presiding Judge to summarily agree with their predictive conclusions without ever seeing the Stern memorandum, the Richter letter, the Lehmkuhl inventories, Nourain's memorandum, and the comprehensive Audit Report.

38. This reckless or intentional withholding of highly relevant evidence must be considered in context. All parties have recognized throughout this proceeding that the date on which Mr. Price was informed of unauthorized activations is a highly significant pivotal fact. Yet in his depositions used in support of the Joint Motion Mr. Price testified inconsistently. He first claimed to have learned of unauthorized activations in January 1995 or "somewhere in that area" and that he was first informed by counsel. (Price Depo. at 93-94; L/B Exh. 9.) He then changed his deposition testimony to April 1995, but named counsel as the source through a conversation and not a memorandum. (Price Depo. at 95; L/B Exh. 9.) At the hearing he testified that the date was April 1995 and that the source was Mr. Nourain's memorandum of April 26, 1995. (Price, Tr. 1416-19.) The testimony of Mr. Price has failed to establish conclusively when he knew and how he was first informed of unauthorized activations.

39. Mr. Lehmkuhl testified in direct examination that his memorandum was "an inventory of the state of Liberty's licenses." (Lehmkuhl, Tr. 1059.) He testified that no one at Liberty had asked for the inventory but that Pepper & Corazzini had a "standing practice [to] issue these inventories to Liberty." (*Id.*) He testified that he thought that he had furnished Liberty with one other pre-April inventory "very early on" and that he thought that in preparing the inventories he had reviewed Ms. Richter's earlier inventories of April 6, 1993. (*Id.* and TWCV Exhs. 3 and 4.) Mr. Lehmkuhl stated that it took six hours to prepare the inventory of February 24, 1995, and that the reason for preparing that inventory was his receipt of new computer software that contained a new database. (Lehmkuhl, Tr. 1061.) He believed that his inventory was an improvement over earlier ones because it included the public notice acceptance dates, the date on which licenses were granted, the number of days that applications were pending, the type of application [license or STA], and in some instances the FCC file number. (Lehmkuhl, Tr. 1060.) He testified that he did not discuss this inventory with anyone at Liberty (other than "administratively") in February, March or April 1995; that he never discussed the substance of the inventory with anyone at Liberty; and that he never attempted to discuss the inventory with anyone. (Lehmkuhl, Tr. 1061.) That no one at Liberty who had a responsibility for activations knew the substance of the law firm's inventories is too incredible to accept as a finding.

40. Mr. Price testified in his direct testimony that he had no knowledge of unauthorized activations before April 1995. (Price, Tr. 1360.) He testified that he had no list and no knowledge of when particular buildings had received Commission authorization to activate whether through the grant of licenses or STAs. (Price, Tr. 1360-61.) Mr. Price testified:

It was my assumption based upon the procedure I requested and what other people had told me that operations was keeping a list of buildings that were activated and coordinating the licensing of those buildings with counsel in Washington.

(Price, Tr. 1361.) Neither substantial nor reliable evidence supports Mr. Price's assumptions. Mr. Price attended weekly staff meetings at which all departments reported. (Price, Tr. 1361.) Those meetings were concerned with marketing matters and scheduling for construction related to the installation of the OFS paths. (Price, Tr. 1361-62.) Mr. Price testified that through Mr. Nourain's memorandum of April 26, 1995, he could independently detect a "gap there between the turning on of service and the obtaining of authority." (Price, Tr. 1363-64; 1420.) There is no reason given why Mr. Price did not reach the same conclusion in February. He testified on direct that he probably received Mr. Lehmkuhl's inventory of February 24, 1995, but he did not recall ever reading it and he has no present recollection about the document. (Price, Tr. 1434.) He testified that it was his practice to send such documents to Mr. Nourain. But he never called Mr. Nourain to discuss such items. (Price, Tr. 1437.) There is an unexplained inconsistency in the significance that Mr. Price attributed to Mr. Nourain's memorandum of April 26 and the complete ignoring of Mr. Lehmkuhl's earlier memorandum and detailed inventory of February 24. Mr. Price was able to detect unauthorized activations by seeing the buildings and microwave paths on April 26, 1995, but he could not or would not make the same connection in February 1995 through Mr. Lehmkuhl's memorandum and inventory. From a review of the February inventory, it could have been determined by Mr. Price or anyone else at Liberty who was familiar with the buildings to be serviced that by February 24, 1995, at least six paths had been prematurely activated at: 25 W. 54th Street - February 6, 1995; 114 E. 72nd Street - January 30, 1995; 433 E. 56th Street - December 27, 1994; 639 West End Avenue - February 14, 1995; 35 West end Avenue - January 3, 1995; and 441 E. 92nd Street - January 23, 1995. (Compare pending applications in L/B Exh. 1 and Table I below.) This variance in the timing of Mr. Price's exercise of care to detect unauthorized activations on two different occasions cannot be explained by stating that he looked at the later Nourain memorandum in April and readily saw the premature activations but that he did not in the same or similar manner

consider the February memorandum and inventory which was addressed to him by Mr. Lehmkuhl or the earlier inventories of Ms. Richter and Mr. Parriott.

Unauthorized Activations Were Too Numerous To Deny Knowledge

41. From 1991 to 1994, Liberty held (and still holds) 43 OFS licenses and filed applications for 35 additional licenses. Time Warner and Cablevision filed petitions to deny those applications. The Bureau granted Special Temporary Authorities (STAs) which allowed Liberty to operate under pending applications for 120 days beginning on September 7, 1995. Successive extensions of the STAs were granted through March 7, 1996. The HDO granted Liberty uninterrupted operating authority which allows it to continue providing service to customers until there is a resolution of the issues. HDO at Para. 21. See In re Request of Liberty Cable Co., Inc. for Special Temporary Authority for Private Operational Fixed Microwave Radio Service in New York, New York, 11 F.C.C. Rcd 4070 (1996). Liberty admits that it prematurely activated OFS service to 19 buildings. See Joint Motion at ii. Liberty also admits that the premature activations arose from a failure on the part of Liberty to supervise its engineer, Behrooz Nourain, a key employee who was given the responsibility and authority for OFS microwave activations. See Joint Motion at iii. Facts not disclosed in the Joint Motion but determined through the recent production of the Audit Report establish that since 1993 there were a total of 93 unauthorized premature activations and that on 36 occasions the activations were made before application was made for a license or STA.

42. The premature activations began simultaneously with the employment of Mr. Nourain in April 1992. The microwave network had been set up by Mr. Stern when Mr. Nourain took over as Director of Engineering. (Nourain Depo. Tr. 21.) According to Mr. Stern, Mr. Nourain rejected instruction because he felt himself to be sufficiently familiar with Commission procedures. (Stern Depo. Tr. 70-71.) Mr. Stern testified that he did not provide Mr. Nourain with written instructions on the application process. (Stern Depo. Tr. 73.) See also

Joint Motion at 13.²⁴ The Milstein brothers, Mr. Price and Mr. McKinnon took no measures to assure that Mr. Nourain was prepared to independently deal with FCC licensing. By virtually writing his own job description, Mr. Nourain considered his job to be only that of coordinating frequencies. He believed that all responsibilities with respect to licensing were handled by outside counsel who had that expertise. (Nourain Depo. Tr. 52-53.) He believed that Pepper & Corazzini had the responsibility to obtain Commission authorizations prior to activations. (Nourain Depo. Tr. 67-68.)

43. Coordination between licensing and activation was not a priority for Mr. Nourain. Nor was coordination supervised by Liberty's counsel who prepared and filed the applications. The record shows that Mr. Nourain signed his signature in blank to 35 applications for licenses and sent them to Pepper & Corazzini for completion and filing. (Nourain Depo. Tr. 44-45; Lehmkuhl Depo. Tr. 70.) Mr. Lehmkuhl may have reviewed and filed as many as 100 applications in that manner. (Lehmkuhl Depo. Tr. 13.) Mr. Price, who was physically removed from Mr. Nourain in his mid-town office, failed to supervise Mr. Nourain to assure that licenses were obtained before activating microwave paths. Five paths were activated before applications were even filed.

The Nineteen Unauthorized Activations

44. Substantial and reliable evidence establishes that for ten months between July 11, 1994, and April 24, 1995, Liberty activated 19 OFS microwave paths before receiving any authority from the Commission. HDO at Para. 7 and Appendix A. The following chart is a

²⁴ Disclosure of the Audit Report shows that on June 12, 1992, Mr. Stern provided Mr. Nourain with specific instructions on the "process of coordination and license application." (TWCV Exh. 67 at Exh. E.) Mr. Price was noted as a recipient of the Stern document. There was no basis to withhold the memorandum which was not an attorney-client communication or an attorney work product. It was a straightforward written instruction to Mr. Nourain which was directly relevant to the issues and which was in contradiction of Mr. Stern's broad testimonial denial, cited unequivocally in the Joint Motion, that Mr. Stern never gave written on the application process.

recapitulation of the building locations, dates of applications filings, and dates of unauthorized activations: (TWCV Exh. 30; HDO at Appendix A.)²⁵

TABLE I

FCC File Number	Address	Comsearch Frequency Coordination Report	License Application	STA Request	Activation Date	Days Between Comsearch Report and Activation
708778	35 W. End Ave.	11/16/94	12/22/94	5/4/95	1/3/95	48 days
708779	639 W. End Ave.	11/16/94	12/22/94	5/4/95	2/14/95	90 days
	441 E. 92nd St./ 1775 York Ave.	1/12/95	2/21/95	5/4/95	1/16 or 1/23/95	4 or 11 days
	767 Fifth Ave.	9/26/94	11/7/94	5/4/95	4/12 or 4/17/95	198 or 203 days
	1295 Madison Ave.	7/3/95	7/17/95	7/24/95	7/27 or 7/28/94	
	38 E. 85th St.	7/3/95	7/17/95	7/24/95	7/18/94	
708780	564 First Ave. (NYU)	9/26/94	11/7/94	5/4/95	1/3 or 1/11/95	99 or 107 days
	545 First Ave. (NYU)	9/26/94	11/7/94	5/4/95	1/3 or 1/23/95	99 or 119 days
	200 E. 32nd St.	2/16/95	3/23/95	5/4/95	3/27/95	39 days
708781	30 Waterside Plaza	1/12/95	2/21/95	5/4/95	3/15/95	62 days
	430/440 E. 56th St.	7/3/95	7/17/95	7/24/95	7/11/94	
	433 E. 56th St.	12/21/94	1/31/95	5/4/95	12/27/94	6 days
	114 E. 72nd St.	11/17/94	11/23/94	5/4/95	1/30/95	74 days
	524 E. 72nd St.	9/26/94	11/7/94	5/4/95	11/16/94	51 days
709332	25 W. 54th St.	10/13/94	11/23/94	5/4/95	2/6/95	116 days
712203	380 Rector Place	7/3/95	7/17/95	7/24/95	10/12/94	
712218	16 W. 16th St.	1/12/95	2/21/95	5/4/95	3/28/95	75 days
712219	6 E. 44th St.	1/12/95	2/21/95	5/4/95	4/12 or 4/19/95	90 or 97 days
	2727 Palisades Ave.	2/16/95	3/24/95	5/19/95	4/24/95	67 days

²⁵ The data in Table I appear in Time Warner/Cablevision Proposed Findings of Fact and Conclusions of Law filed on February 28, 1997, at pp. 7-8. Paths at 1295 Madison, 38 E. 85th St., 430/440 E. 56th St. and 433 E. 56th St. are highlighted here to show with emphasis that they were activated before an application was filed. The accuracy of the data has not been contested by the Bureau or by Liberty. It is found to be reliable data.