

45. Table I tracks the 19 buildings at which paths providing programming to occupant-customers were unlawfully activated. The data show that activations were effected after the passage of as little as 4 days to as many as 198 days from the finalizing of Comsearch reports. There is no pattern of same or similar times for the activations upon which any assumptions of authorizations could be based. The Lehmkuhl memorandum of April 28 accounts for 12 of the 19 sites. (TWCV Exh. 34.) It also shows the petitions to deny that are pending as to each site and that the latest petition was filed on April 17, 1995. (*Id.*) The first allegation in a Time Warner pleading that Liberty had made unauthorized activations was May 5, 1995. (Time Warner's Reply to Liberty's Opposition to a Time Warner Petition to Deny; *see* Surreply, TWCV Exh. 18.) It is clear from the weight of the credible evidence that management did not learn of these activations through any pending petitions to deny. Liberty and its counsel responsible for filings had sufficient information on April 28, 1995, of at least 12 of the 19 locations of unauthorized activations to make timely disclosure to the Commission. Mr. Price, in consultation with Liberty's attorneys who were on the conference call of April 28, 1995, made a decision to withhold prompt disclosure to the Commission of those 12 activations. Liberty deliberately failed to disclose the activations in a timely manner in filings made with the Commission after Mr. Price admittedly knew of the violations and made no disclosures of the activations "as promptly as possible" under §1.65.

### **Liberty's Irresolute Management**

46. It was learned through the Audit Report that the 19 unauthorized activations in Table I were the tip of the iceberg. Since 1992, when Liberty first began using the OFS spectrum, Liberty prematurely activated an additional 74 paths. (TWCV Exh. 67, Chart 3 and Table II below. ) The aggregated 93 illegal activations account for about 75% of Liberty's total activations which means that Liberty operated illegally in three out of every four of its OFS activations. Even worse, Liberty initiated service on 36 of the prematurely operated paths, approximately 40%, prior to filing an application. (TWCV Exh. 67, Exh. B [Charts 2 and 3]). And during all that time until late April 1995, Liberty asserts that not one of its principals knew that any of the activations were made without Commission authorization notwithstanding the influx of inventories from Pepper & Corazzini

47. Liberty's managerial method of licensing compliance involved sending memoranda but stopped short of active involvement. This total vacuum of concern for licensing permeated despite a Memorandum dated February 26, 1992, from Mr. Price to Mr. McKinnon which recognized a need for establishing some systematized accounting for the licensing of microwave paths. Mr. Price wrote to Mr. McKinnon:

In order to accurately audit what licenses Liberty has requested and which have been provided, I have asked Joe Stern to analyze the procedure. ---. Once Joe [Stern] has audited our list of applications against the licenses received and set up a maintenance procedure going forward, we can bring the function into Liberty as an Engineering Department responsibility. We are clearly not ready for that step, so in the meantime I will ask Stern Communications to coordinate the function with Todd Parriott and advise us on a weekly basis in the form of a standardized report. [Emphasis added.]

(L/B Exh. 3.) A copy of the Memorandum was directed to Mr. Parriott, an associate at Pepper & Corazzini who preceded Ms. Richter and Mr. Lehmkuhl. Mr. McKinnon was asked whether he had requested "Pepper & Corazzini to set up a procedure for Liberty for the handling of applications." He answered: "I do not remember having any type of procedure like that with Pepper & Corazzini." (McKinnon Depo. at Tr. 23.) Mr. Price's Memorandum of February 26, 1992, either went unnoticed or, as is more likely to be the case, was simply not implemented because no one cared. In eight days of hearings there was no explanation offered.

48. On April 20, 1993, less than one year after Mr. Stern turned over licensing responsibilities to Mr. Nourain, Ms. Jennifer Richter, who succeeded Mr. Todd Parriott as Liberty's licensing attorney, provided Liberty with very specific legal advice in a letter entitled "Construction and Operation of New Microwave Paths." (TWCV Exh. 5.) As to what prompted the letter, Ms. Richter testified that in conversations with Mr. Nourain she had become concerned about his lack of understanding of OFS licensing procedures. (Richter Tr. 2035-36, 2042.) She wrote in a letter to Mr. McKinnon (that ultimately reached Mr. Price) that the purpose of the letter was "to detail the parameters within which construction and operation of new paths and new stations is permissible." (TWCV Exh. 51.) Ms. Richter advised that equipment can be erected on a building prior to a grant but that new paths could not be activated until an authorization is granted. (*Id.*) Mr. Price acknowledges that he received the letter and that he read it (Price

Tr. 2167.) But Mr. Price did nothing to counsel Mr. Nourain on Ms. Richter's advice. (Price Tr. 2168-69.) The Richter letter of April 1993 received the same treatment as the earlier Price memorandum of February 1992, i.e., no follow-up to assure authorized activations.

49. Rather than implementing Mr. Price's 1992 memorandum, Liberty's executives recklessly disassociated themselves entirely from any concern with whether or not microwave activations had been authorized. Executive offices were physically located in another part of Manhattan. Mr. Nourain was left to his own devices to construct Liberty's microwave network and was made to work long hours with little support. (Nourain, Tr. 612, 616-617, 681; Ontiveros, Tr. 1691.) Mr. Nourain merely assumed that either licenses or STAs were in place at the time of activation. (Nourain Depo. Tr. 74, 90.) Liberty was most anxious to activate paths as quickly as possible. Weekly meetings that were held in the executives' offices on Thursdays where only marketing results and new activations were reported. (Price, Tr. 1386, 1413, 1575; Ontiveros, Tr. 1691.) Mr. Nourain was never invited, never attended and licensing issues were never a topic of discussion. (Nourain Depo. 54, Price, Tr. 1361-62.)

#### **Misrepresentations In The Joint Motion Uncovered By The Audit Report**

50. In his previous employment, Mr. Nourain had relied on in-house counsel for the legal filings with the Commission while he was concerned only with the technical engineering work. His duties expanded considerably at Liberty from his prior employment. While the timing and lack of Nourain's instruction at hiring was a constant refrain in this case, Liberty had misrepresented in the Joint Motion:

Stern did not give Nourain a written memorandum detailing the application process. (Stern Depo/TWCV Exh. at 73.)

(Joint Motion at 13.) But Mr. Stern had sent a memorandum to Mr. Nourain dated June 16, 1992, entitled "FCC Licensing - Transfer Of Information." (TWCV Exh 67, Exh. E.) Mr. Stern reported in the memorandum that he had reviewed the history of Liberty's licensing activities with Mr. Nourain and exchanged files so that Mr. Nourain had copies of all FCC licenses. The memorandum also warned that FCC licenses had been "lost at Liberty at least three times" and Mr. Stern urged that copies of licenses be consolidated. Mr. Stern gave very specific advice:

As you are aware, coordination is not required for minor changes, but is required for adding frequencies. Similarly, modification filings for minor changes can be done by letter. Details should be checked with your attorney in each case.

Mr. Stern reviewed with Mr. Nourain the "process of coordination and license applications," including the use of Comsearch for frequency interference/clearance and a recommendation to use a Washington based attorney for submittal and follow-up. Mr. Stern directed copies of his memorandum to Messrs. Price, McKinnon and Ontiveros. (TWCV Exh. 67, Exh. E.) Because of the lateness of Liberty's document production in this case, Mr. Stern was unable to be questioned on the memorandum.

51. By contrast, Liberty willingly disclosed early in the case the self-serving memorandum of Mr. Price that was written in the same time frame, February 26, 1992, instructing Mr. McKinnon on an internal licensing system to be implemented and coordinated with outside counsel. (L/B Exh. 2.) There was absolutely no justification for Liberty, the party advancing summary decision, to have withheld Mr. Stern's memorandum of June 1992, which contains the terms under which he passed the licensing duties to Mr. Nourain and which contradicts the unqualified factual representation that "Stern did not give Nourain a written memorandum detailing the application process." Notwithstanding Stern's written instructions, from 1992 to 1995, Liberty was engaged in a pattern of activating paths without awaiting Commission authorizations and in nearly one half of such instances, the paths were activated before licenses were filed. (TWCV Exh. 67, Exh. B (Charts 2, 3).) That did not happen merely because of an oversight in providing Nourain with instructions when he was hired.

### **Mr. McKinnon's Role In Activations**

52. Time Warner offered into evidence the McKinnon deposition of June 5, 1996 as TWCV Exh. 41 and his deposition of May 14, 1997 as TWCV Exh. 53. Mr. McKinnon was employed by Liberty from 1991 to May 1993 as Executive Vice President and Chief Executive Officer. (TWCV Exh. 41 at 5.) He was responsible for the company's day-to-day operations that included installation of cable and the activation of cable video in new buildings. (*Id.*) Mr. McKinnon and those who were involved in activations knew that they must wait until licenses were actually received from the Commission before activation. (TWCV Exh. 41 at 9.) Mr. McKinnon testified that during his tenure there was never a path activated without a

Commission license. (TWCV Exh. 41 at 13.) He also testified that he had no knowledge of any unauthorized activations. (TWCV Exh 53 at 23.) However, the Audit Report reflects that during Mr. McKinnon's tenure at Liberty there were 23 paths illegally activated and 19 of those were activated before applications were filed. (TWCV Exh. 67, Exh. B at Chart 3.) Contrary to Mr. McKinnon's testimony, the Audit Report also concludes that "Mr. McKinnon was aware from Mr. Nourain that some buildings were being activated without a specific FCC license or STA." (TWCV Exh. 67 at 11-12.) Mr. McKinnon was held out by Liberty as a CEO which is equivalent to the position of "principal" in a corporate organization.

53. On February 26, 1992, Mr. McKinnon received Mr. Price's memorandum which was used by Liberty as evidence in this case and was included as an attachment to the Audit Report. (L/B Exh. 2; TWCV Exh. 67, Exh. D.) Mr. Price instructed Mr. McKinnon to focus on planning, installation and operation of the microwave system while leaving licensing to Mr. Stern and Mr. Parriott. (*Id.*) The Price memorandum is relied on by Liberty as evidence that Mr. Price had established a policy of accounting for licenses or STAs before activations. But Mr. McKinnon testified that he saw the "thrust of the memo" to be only an instruction to leave the expertise on engineering and FCC licensing to Mr. Stern. (TWCV Exh. 41 at 20.) There was no procedure established for Pepper & Corazzini to monitor licenses and the timing of activations. (TWCV Exh. 41 at 23-24.) Mr. McKinnon signed all FCC applications which he received in completed form from the law firms. (TWCV Exh. 41 at 27-28.) Mr. McKinnon testified that taking into account the lag times resulting from preinstallation sales and construction, "getting the FCC licenses --- wasn't a major issue for us." (TWCV Exh. 41 at 26.) But the actual receipt of licenses from the FCC was a "big deal" and the subject of much discussion at regular weekly meetings. (TWCV Exh. 41 at Tr. 29-30.) And there never were any assumptions made during Mr. McKinnon's tenure that after the passage of an estimated period of time there would automatically be authorizations. (TWCV Exh. 41 at Tr. 30-31.) The Audit Report concluded that "Mr. McKinnon was aware from Mr. Nourain that some buildings were being activated without a specific FCC license or STA." (TWCV Exh. 67, Audit Report at 11.) The Audit Report also found that Mr. McKinnon believed that until FCC applications were granted, Liberty's activations were covered by a Hughes Aircraft experimental authorization. (*Id.*, Audit Report at 12.) Liberty's assertion that no principal of Liberty knew of a premature activation is rejected in light of the scope of activations while McKinnon was with Liberty and the admission as to Mr. McKinnon in the Audit Report.

**Management's Probable Knowledge  
Or Suspicion Of Unlawful Activations**

54. Based on his faulty time-line assumptions, Mr. Nourain activated microwave services for Liberty without first obtaining Commission authorization. (Joint Motion at 15.) The Joint Movants describe a totally ineffective, noncompliant and disassociated protocol that was used by Liberty with disastrous results: (1) Mr. Nourain informed no one within Liberty when the Comsearch clearance process had been completed; (2) Pepper & Corazzini was not receiving copies of the grants from the Commission;<sup>26</sup> (3) Mr. Nourain did not advise Pepper & Corazzini when he was activating a building; (4) Pepper & Corazzini never confirmed with Liberty that there were no unauthorized activations; and (5) no one knew at any given time the progress of the licensing procedure from frequency coordination through application to Liberty's commencement of service. (Joint Motion at 14-15.) Until April 26-27, 1995, when the unauthorized activations were acknowledged by Mr. Price, there was a reckless disregard on the part of Mr. Price by insulating himself from all available information about premature activations and by ducking the written warning of Ms. Richter. This environment of denial created by Mr. Price further solidified Mr. Nourain's belief that he was doing the company's work by activating paths without the actual receipt of authorizations. He testified that "we decided" to activate customers before licensing was completed and with FCC licenses pending and the customer contracts in place "[t]he business has to go up [but] I didn't decide it." (Nourain Depo. Tr. 75-76.) These conclusions of Mr. Nourain, the person who was closest to the activations, are corroborated by information provided by Mr. Nourain to the auditing attorneys that he "believes that he told Mr. Price that the Company was rushing and might not get approvals on time." (TWCV Exh. 67, Audit Report at 10) and supported by the evidence of systematic activation since 1992 of 93 paths without authorization. See Table II below.

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<sup>26</sup> But Liberty would as a matter of course send Ms. Richter and Mr. Lehmkuhl copies of licenses and STAs as Liberty received them from the Commission.

**Activations Were Highly Labor Intensive  
And Were Not Made In A Vacuum**

55. The activations required receiving approval from management. There were three engineers involved: microwave engineer (Nourain); structural engineer (Rosenwasser & Grossman); and construction engineer (National Microwave). Mr. Nourain designed the system to assure that energy was not drained from one path to another as new paths were added to a transmitter. Drawings were prepared by Mr. Nourain and furnished to the structural and construction engineers who then prepared their own designs. (Nourain, Tr. 672-677.) From the date that Mr. Nourain calculated that he would have an approval, it would take from one month to three months to complete all external engineering needed for activation. (Nourain, Tr. 677.) All engineering was to have been completed by Nourain's estimated authorization date. (Nourain, Tr. 678.) The engineering cost of an activation was estimated at \$25,000 per path. (Nourain, Tr. 680.) This process was extremely labor intensive for Mr. Nourain who considered himself to have been overworked, without help, up to 60 hours per week. (Nourain, Tr. 681.) Mr. Nourain did not activate buildings in a vacuum without receiving direction from Liberty's principals. Coordination of activations with marketing was paramount. (Nourain, Tr. 684.) Activation decisions were made at weekly meetings of Liberty's marketing executives. These executives told Mr. Nourain when to activate. Someone at the executive level (Price would be a prime candidate) must have known of Mr. Nourain's licensing methodology because Nourain provided essential input to the activation decisions that were being made at the executive level. Otherwise, Liberty was acting in total denial of licensing and was treating the Commission as a regulatory myth.

**Nourain's Disassociated Modus Operandi**

56. Mr. Nourain was encouraged by senior management to activate paths as customers were aggressively signed up for Liberty's video services. (Nourain Depo. Tr. 75-76; Price, Tr. 1397-99; and TWCV Exh. 67, Audit Report at 12.) By his own estimate, Mr. Nourain spent only 3% of his time on licensing. (Nourain, Tr. 613.) This left 97% of his time to plot new paths and activate them. In such a work environment that was created, permitted and unsupervised by senior management, Mr. Nourain was relying on his own seat-of-the-pants time estimates with disastrous results. Outside counsel saw the risks at an early stage. Shortly after Mr. Nourain was hired, Ms. Richter foresaw problems based on contemporaneous licensing

experiences and conversations with Mr. Nourain.<sup>27</sup> She wrote in April 1993 to alert Liberty's senior management in the clearest terms of potential licensing concerns while simultaneously preparing a carefully prepared letter that was intended to protect Pepper & Corazzini. (TWCV Exh 51 and Richter, Tr. 2041, 1051.)

57. Notwithstanding Ms. Richter's categorical advice and warning, Mr. Nourain rationalized an unreal time line based on how long he estimated it would take Mr. Lehmkuhl to apply for and act on license and STA applications. The application process began with Mr. Nourain contacting Comsearch with location coordinates. Comsearch would research the data for interference with existing stations and forward a prior coordination notice to Mr. Lehmkuhl. (Nourain, Tr. 621; Lehmkuhl, Tr. 1028, 1030.) There was a thirty day notification period to allow existing licensees to object to any interferences. (Lehmkuhl, Tr. 1031.) When Comsearch alerted Mr. Lehmkuhl through a supplemental showing that it had completed its interference study and that there were no objections, Mr. Lehmkuhl would prepare a license application. (Nourain, Tr. 621, 628, 694-95; Lehmkuhl, Tr. 1032, 1077.) Mr. Nourain expected that the application would be filed as soon as possible after the Comsearch clearance was obtained. (Nourain, Tr. 630.) Mr. Lehmkuhl coordinated with Mr. Nourain as he prepared the application but only to assure accuracy of the technical data. (Lehmkuhl, Tr. 1030-31, 1074-75.) To further expedite the process, Pepper & Corazzini arranged to receive from time to time presigned blank application forms from Mr. Nourain. (Lehmkuhl, Tr. 1033-34, 1080, 1099; Barr, Tr. 1821; Nourain, 629, 631-632.) Mr. Lehmkuhl would file anytime up to two weeks of receipt of the final Comsearch clearance report. (Lehmkuhl, Tr. 1067.) In 1995, Mr. Nourain assumed, without any verification, that Mr. Lehmkuhl simultaneously filed STA requests with license applications. (Nourain, Tr. 645.) Mr. Nourain also assumed (without stating the basis for the assumption) that the Bureau would act on the applications for STA and license "within a few days, a week -- a week or so."

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<sup>27</sup> The Presiding Judge observed Mr. Nourain on the stand for three days. Mr. Nourain is an intense, energetic, fast thinking and fast talking person who is more inclined to quickly rationalize his answers than to listen and answer questions asked of him based on a careful recalling of fact. It is possible that Ms. Richter and Mr. Lehmkuhl had difficulties in convincing Mr. Nourain to follow their advice if Mr. Nourain saw his own logic to be superior or his own methods to be more efficient. These demeanor observations support the conclusion that the licensing attorneys at Pepper & Corazzini were not always in control of the situation in their dealings with Mr. Nourain. That may explain in some part how Mr. Nourain was for so long able to activate unlicensed paths without any coordination with outside counsel. There certainly was no complicity found on the part of these attorneys. The situation was further exacerbated by an atmosphere of encouragement from senior management to activate as rapidly as possible.

(Nourain, Tr. 645.)<sup>28</sup> Mr. Nourain testified that he acted "under the assumption that all these STAs were granted." (*Id.*) (Nourain, Tr. 641.) Mr. Barr, Mr. Lehmkuhl and Ms. Richter have testified that not one of them knew (and evidently never asked) about Mr. Nourain's compliance methodology. (Barr, Tr. 1888; Lehmkuhl, Tr. 1331-32; Richter, Tr. 2077-78.)

58. Mr. Nourain testified that never would a path be activated without a Commission authorization. (Tr. 2282.) But he admitted that he never actually knew whether he had an authorization in hand prior to activating a path. (Nourain, Tr. 2242-43; 2324-28.) Ms. Richter advised Mr. Nourain in her letter that it takes about 30 days for Mr. Nourain, Comsearch and Ms. Richter to prepare an application and it was taking from 60 to 120 days to process the applications at the Commission. (TWCV Exh. 51.) Mr. Price also was made aware of those time estimates when he received and read his copy of the Richter letter. Yet despite the clarification of the preparation and processing times and the warning in Ms. Richter's letter about a concern she had for Mr. Nourain's compliance, there was never any monitoring of Mr. Nourain's activations by Liberty's management. The fact of the highly significant Richter letter and the advice that she had imparted to Mr. Price well before April 1995 was never disclosed in initial discovery or explained in the Joint Motion, a particularly damaging omission by the side that was assigned the burden of going forward and the burden of proof.<sup>29</sup>

59. The evidence of record shows that before and since Ms. Richter's 1993 warning, Mr. Nourain had been illegally activating microwave paths. Shortly after Mr. Nourain's discussions with Ms. Richter that prompted Richter's letter (TWCV Exh. 51), Liberty activated four microwave facilities prior to or concurrent with the filing of applications. As an illustration, Liberty's records show that it began to install customers at 33 W. 67th Street in June 1993, with installation completed by June 30, 1993. (TWCV Exh. 14.) The application to add 33 W. 67th

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<sup>28</sup> As uncertain as that testimony is, Mr. Nourain was even more oblique in other testimony. For example, when asked if he was looking for a date on the STA application as a reference point, Mr. Nourain offered the following explanation: "I was looking for the --the date that I completed the Comsearch study until the date that I activated the path. There was a certain time that I was waiting for that. And that was the time that my associate [ Mr. Lehmkuhl] was going through that process of filing and obtaining STAs." (Nourain, Tr. 640.)

<sup>29</sup> Mr. Barr testified that in June 1995, Mr. Constantine asked for and was given the Richter letter. (Order FCC 97M-19; Barr, Tr. 2110-12.) The investigation which culminated in the Audit Report was undertaken by the Constantine law firm and others in June 1995. (Joint Motion at 19.) The Audit Report was submitted to the Bureau in August 1995. (*Id.*) Mr. Constantine and his law firm had knowledge of the Richter letter when the Joint Motion was filed by his law firm in this proceeding one year later. There was never a time in the hearing of this case when the Presiding Judge could be assured of a complete record.

Street as a new path from One Lincoln Plaza was signed on June 11, 1993. (TWCV Exh. 66.) The application reflects a filing stamp of June 16, 1993. (TWCV Exh. 66.) Therefore, given the thirty day notice requirement, an application filed on June 16, 1993, could not have been granted in June 1993 when the path was activated.<sup>30</sup> Similarly, installation of customers at 69th Street began in May 1993 and application to add a path to that address was filed on May 21, 1993. (TWCV Exh. 14 Att. E.) Installation of customers at 55th Street commenced in May 1993, and the application to add paths was filed on May 21, 1993. (TWCV Exh. 14 Att. F.) An installation of customers at the Sutton Place address began in June 1993 and the application to add a path was filed on June 16, 1993. (TWCV Exh. 14 Att. G.) Mr. Nourain never verified that he had an authorization in hand at the time of the activations. (Nourain, Tr. 2242-43; 2324-28.) Yet at that time, Ms. Richter was advising Mr. Nourain that he needed a Commission authorizations in hand before activating. (Richter, Tr. 2078.) Mr. Nourain never told Ms. Richter that he was assuming authorizations based on his estimated time line and Ms. Richter never advised using assumptions in lieu of in-hand authorizations. (Richter, Tr. 2077-78.) But it is evident from the tenor of her letter of April 1993 that she saw a serious risk of premature activating of paths.

60. Mr. Nourain activated without authorizations even after he had read Ms. Richter's letter and brought it to Mr. Price's attention. (TWCV Exh. 51: "Peter: pls. review and advise. BN 4/28/93.") Mr. Nourain testified that he had brought the letter to his attention because he wanted Mr. Price to know about the licensing process. (Nourain, Tr. 2272.) Mr. Nourain also wanted Mr. Price to be aware of the Commission's application timelines and wanted to inform Mr. Price that STAs would be filed. (Nourain, Tr. 2273-74; 2331-32.) Clearly, Mr. Nourain wanted Mr. Price to know about all of the concerns of counsel and he wanted advice on how he should proceed. Mr. Price received and read the letter. He called Ms. Richter but they only talked about STAs and, incredibly, nothing was said about activation compliance; that subject simply was not discussed. (Richter, Tr. 2062; Price, Tr. 2170, 2191, 2193-94, 2199; TWCV Exh. 61.) Mr. Price told Ms. Richter in that conversation to file STAs as a matter of course when applications for licenses were filed. (Richter, Tr. 2062.) Ms. Richter followed Mr. Price's instruction and confirmed her utilization of STAs in a letter to Mr. Price dated May 25, 1993. (TWCV Exh. 62; Richter, Tr. 2062-63.) According to Ms. Richter, no one at Liberty expressed any concern about inadvertent activation. (Richter, Tr. 2047.) The evidence of activations in Table I and Table II establish that even after receipt of the Richter letter, Mr. Nourain steadfastly continued his unauthorized activations.

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<sup>30</sup> Official notice is taken of the applications for 33 W. 67th Street; 150 E. 69th Street (Imperial House); 333 E. 55th Street and 25 Sutton Place. (Presiding Judge, Tr. 2157.) See Fed. Rev. 201 and 47 C.F.R. §.351 (Rules of evidence).

### Price Was Ignoring The Obvious

61. Mr. Price knew full well the duty of a licensee to comply fully with the Act and Commission regulations and the concomitant duty to be at all times truthful, candid and forthcoming in dealing with the Commission. He had meaningful information at his fingertips since 1993 which he either ignored or avoided. He received data through weekly internal Installation Progress Reports to compare with Mr. Lehmkuhl's Memorandum of February 1995. Mr. Price called for Installation Progress Reports on February 23, 1995 (Joint Oppositions Supplemental Exh. 1) and again on March 2, 1995 (Joint Opposition Supplemental Exh. 2). In both Reports six buildings that are identified in the HDO as having unauthorized paths reflect their "status" as "complete."<sup>31</sup> There was no separate line on the Report that identified the status of Commission applications or license grants. On August 1, 1996, Mr. Price was deposed on the contents of his two Reports. He testified that the word "complete" meant the completion of whatever phase of installation the building happened to be and it did not mean that full installation had been completed. (Price, Tr. 168-169.)<sup>32</sup> When presented with the self-evident contradiction between Mr. Lehmkuhl's memorandum of February 24, 1995, which showed that an application for 433 E. 56th was "pending," and the Installation Progress Report of February 23, 1995, which reported the status of that project to be "complete," Mr. Price testified that he never made that comparison and that it was unlikely that anyone at Liberty would have made such a comparison before May 1995 (Price, Tr. 174-178.) Such evidence establishes that Mr. Price was wilfully and recklessly failing to utilize available information that would readily detect premature activations as early as April 1993.<sup>33</sup>

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<sup>31</sup> The six buildings are 25 W. 54th Street; 114 E. 72d Street; 524 E. 72d Street; 433 E. 56th Street; 639 W. End Avenue; and 441 E. 92nd Street.

<sup>32</sup> The Installation Progress Reports were testified to by Mr. Price as deposition Exhs. 21 and 22.

<sup>33</sup> Mr. Price's credibility remains suspect. Before the hearing, the Bureau reported that it had "some concerns that Mr. Price may not have been fully candid in his deposition." See Wireless Telecommunications Bureau's Supplemental Comments On Discovery After the February Or The Joint Motion For Summary Decision filed on October 22, 1996. After the hearing, the Bureau further commented: "it could be argued that Mr. Price's testimony was self-serving or that Mr. Price would have reason to be less than fully candid." See Bureau's Reply To Time Warner's Supplemental Proposed Findings of Fact and Conclusions of Law dated June 23, 1997, at 7 n.3. Candor with the Commission by principals is the crux of this case.

**A Pattern Of Premature Activations That Existed Well Before April 1995  
Put Price On Notice Of Nourain's Methodology**

62. The full scope of the unauthorized activations was not known in this proceeding until September 1997, when Liberty finally produced its long awaited Audit Report. (TWCV Exh. 67.) On August 14, 1995, the Commission had been advised:

As previously disclosed to the Commission, 19 paths are currently unlicensed but have all received prior coordination. In addition, Liberty's counsel's investigation revealed that, at various times, transmission over other paths was commenced prior to receiving specific FCC authorization; all these paths now have all necessary licenses.

(TWCV Exh. 67 - Audit Report's forwarding letter of Liberty's counsel.) The investigation was a review of "documentation related to the initiation and operation of service to each of the 126 buildings served by 18 GHz connection." (TWCV Exh. 67 at 3.) Based on path activation information on related charts, the Report concludes that "numerous instances occurred in which microwave path service was initiated before receiving specific FCC authorization [and it] appears that this occurred numerous times from 1992 through the fall of 1994 although each of those paths is now authorized by the Commission." (*Id.* at 4.)

63. The data show that from June 1992 to August 1995, there were 93 paths activated without authorization. (TWCV Exh. 67, Exh. B [Charts 2 and 3].) Table II set forth below was derived from Charts 2 and 3 of the Audit Report to show that out of the 74 unauthorized activations that were not specified in the HDO, there were 32 activations before an application even was filed with the Commission. The sheer weight of this data show that on May 17, 1995, Liberty misrepresented itself to the Commission:

[i]t has been Liberty's pattern and practice to await a grant of either a pending application or request for STA prior to making a microwave path operational.

(TWCV Exh. 18 at 3.) Liberty's compiled transactional data show a pattern of just the opposite.

TABLE II

<u>Address</u>	<u>Activation Date</u>	<u>Application Filed</u>	<u>Months/Days Hiatus</u>
35 East 85th Street	7/18/94	7/17/95	12
Liberty Terrace/380 Rector Place	10/12/94	7/17/95	9
Andover/1675 York Avenue	6/2/92	7/16/92	1.5
345 East 52nd Street	7/28/92	11/6/92	4
420 East 51st Street	6/25/92	10/30/92	4
Random House/201 East 50th Street	10/1/92	10/30/92	29 days
Phoenix/160 East 65th Street	9/10/92	10/30/92	1
125 West 55th Street	9/1/92	10/30/92	1.5
45 East 72nd Street	9/25/92	10/30/92	1
Parker Meridien Hotel	9/1/92	10/30/92	1.5
Henderson House/535 East 86th St.	10/5/92	1/7/93	3
Lincoln Plaza/44 West 62nd Street	10/14/92	10/30/92	16 days
19 East 88th Street	12/21/92	1/8/93	18 days
111 East 30th Street	12/21/92	1/8/93	18 days
175 East 74th Street	3/9/93	4/1/93	1
812 Fifth Avenue	3/9/93	4/1/93	1
400 East 59th Street	2/11/93	4/1/93	2
510 East 86th Street	2/1/93	4/1/93	2
90 Riverside Drive	3/16/93	4/1/93	16 days
108 East 82nd Street	6/20/94	7/15/94	1
302 East 88th Street	4/28/93	5/13/93	15 days
911 Park Avenue	4/7/93	5/13/93	1
200 East 89 Street	8/23/93	11/22/93	3
333 East 57th Street	12/27/93	1/12/94	16
1001 Fifth Avenue	1/4/94	1/12/94	8 days
140 East 72nd Street	3/14/94	3/22/94	8 days
211 East 51st Street	5/3/94	7/15/94	2
860 U.N. Plaza	4/18/94	7/15/94	3
Riva Pointe/600 Harbor Boulevard	8/10/94	8/24/94	14 days
142 East 71st Street	8/3/94	8/25/94	22 days
71 East 77th Street	8/10/94	8/25/94	15 days
Park Central Hotel/870 Seventh Ave.	7/1/94	8/24/94	1.5

(Compiled from Audit Report, Exh. B, Charts 2-3, TWCV Exh. 67.)

64. An analysis of Liberty's pattern and practices in Table II concludes that from June 1992 to October 1994, there was an average hiatus between activations and applications of approximately 2.43 months.<sup>34</sup> (See Table II above.) These are significant time lags between activations and filings that were occurring over two years. It cannot be accepted that all of these time lags could have been missed, particularly during the one year period (April 1992 - May 1993) when Mr. Nourain was being supervised by Mr. McKinnon, Liberty's Executive Vice-President and Chief Operating Officer.<sup>35</sup> (McKinnon Depo. 6/5/96 at 27-30.) The inference that some principal at Liberty must have known or suspected before April 1995 is amply supported by the weekly Thursday meetings held to discuss planned installations and activations that were attended by Messrs. Howard and Edward Milstein, Mr. Price, and, until May 1993, Mr. McKinnon. (TWCV Exh. 14, E. Milstein, Tr. 1618; Price, Tr. 1441-42.) The inferences of knowledge is further supported by the intensity and costs incident to path activation as described above. The information also was ascertainable through the periodic licensing inventories that listed the status of the applications and the activations. (TWCV Exhs. 34, 58, 59; L/B Exh. 1.) The only evidence offered to negate knowledge are self-serving denials of Liberty's principals, agents and employees. In view of the pattern of premature activations detailed in the Audit Report and the doubt expressed by the Bureau about Mr. Price's credibility, Mr. Price's testimony is not sufficiently persuasive to carry the motion. His testimony that he knew or suspected no illegal activations notwithstanding the warning of Ms. Richter, the flow of inventory information that was sent to him and the weekly activation meetings will not be accepted as reliable evidence. It cannot be found as a fact on this record that Mr. Price never knew of or suspected any of the 93 unauthorized activations before late April 1995.

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<sup>34</sup> There were also five additional pre-filing activations among the 19 charged in the HDO. See highlighted dates in Table I above.

<sup>35</sup> The 32 charted activations occurred in 18 monthly instances. The related applications were filed on 9 monthly occasions with bunched applications filed October 30, 1992, January 7-8, April 1, 1993, and August 24-25, 1994. The filing of bunched applications on more than one occasion should have prompted a determination of premature activations by persons of responsibility. There were a plethora of red flags that could not have been missed by Mr. McKinnon, Mr. Nourain, and legal counsel who were responsible for the filings. The only reasonable conclusion is that Liberty's principals were totally indifferent to or in total avoidance of licensing procedures.

**Business Records Provided Sufficient Warnings  
And Notice Of Nourain's Activations**

65. In March 1993, Ms. Richter began to compile an inventory of Liberty's microwave licenses. Mr. Nourain knew of her work. (Richter, Tr. 2014-15; Nourain, Tr. 2216.) A billing entry for Ms. Richter's services for Liberty on March 16, 1993, reflected "work on license inventory." (TWCV Exh. 60.) Ms. Richter identified a telecopier message to Mr. Nourain of even date that recorded the forwarding of a draft inventory of licenses. (TWCV Exh. 58.) The inventory listed paths which were already licensed or for which an application was pending. (Richter, Tr. 2016-17; TWCV Exh. 58.) On March 16, 1993, Ms. Richter and Mr. Nourain were discussing which paths to delete as inactive and Ms. Richter wanted Mr. Nourain to review the inventory for accuracy. (Richter, Tr. 2017-19.) Mr. Nourain was able to ascertain which paths were no longer necessary by reviewing the licenses. (Nourain, Tr. 2221-22; 2224-26.) Therefore, as early as 1993, Mr. Nourain was receiving detailed reports from Ms. Richter from which it easily could be determined that activations were being made prematurely.

66. By a simple comparison of Liberty business records with Ms. Richter's draft inventory of March 16, 1993, which she asked Mr. Nourain to review, it is evident that addresses for customer installation at several locations (TWCV Exh. 14) were not identified as licensed paths (TWCV Exh. 58). For example, business records show installation/ activation "complete" in March - April 1993 for paths at 175 E 74th St., 812 5th Avenue and 400 E 59th Street. (TWCV Exh. 14 at 5.) The Audit Report shows that these paths were activated one month before applications were filed. (TWCV Exh. 67, Exh. B, Chart 3 and Table II above.) Two years before the Report, Ms. Richter's draft inventory of licensed activations that was sent to Mr. Nourain on March 16, 1993 identified these addresses as "future paths." (TWCV Exh. 58 at 16.) Ms. Richter testified that these paths were identified in her finalized inventory of April 6, 1993, as non-licensed paths which had applications pending. (TWCV Exh. 3 at 13; Richter, Tr. 2073-75.) It is apparent from the findings of the Audit Report and by reference to Liberty's business records that these three paths were activated in March 1993, before applications were filed. (TWCV Exh. 67, Exh. B, Chart 3; TWCV Exh. 3 at 13.) There even was a "system diagram" attached to the Richter draft inventory that graphically identified the paths as "future" paths. (TWCV Exh. 58 at 16.) Anyone at Liberty concerned with activating paths who looked reasonably close at these records would have been warned of premature activations or, at least would have suspected that there were questions that required inquiry at the source.

**Data That Was Furnished To McKinnon  
That Could Have Exposed Unlawful Activations**

67. On April 6, 1993, Ms. Richter forwarded to Mr. McKinnon, Mr. Nourain and Mr. Michael Roth of Comsearch a finalized "inventory of 18 GHz authorizations currently licensed to Liberty Cable Co." (TWCV Exh. 3.) In a companion letter to Mr. McKinnon, with copies to Mr. Nourain and Mr. Roth, Ms. Richter advised:

The new inventory was prepared in consultation with Behrooz [Nourain] and Michael Roth of Comsearch. I have already found that the inventory greatly increases the efficiency with which I prepare Liberty's applications, and I trust it will have the same effect on Behrooz and Mr. Roth. Indeed, the mere act of preparing the inventory opened up a dialogue among the three of us that brought about a distinctly greater understanding of the Liberty system. Behrooz and I were able to scrutinize the licenses as originally authorized, as opposed to how they have developed, and determine which paths need to be moved and which should be deleted.

The inventory will be updated with each new application filed on Liberty's behalf, and I will periodically provide updated copies to Behrooz, Mr. Roth and yourself. In this way we can ensure that everyone has a full understanding of what Liberty is trying to accomplish, which should increase efficiency and eliminate guesswork.

(TWCV Exh. 59.) Mr. McKinnon testified on May 14, 1997, that he had never received Ms. Richter's inventory. (TWCV Exh. 53 at Tr. 14-15.) Mr. McKinnon recalls receiving the cover letter to the inventory (TWCV Exh.59) which he assumed to be merely a commendation of Mr. Nourain's work. (TWCV Exh. 53 at Tr. 17-18.) The cover letter of April 6, 1993, did not refresh his recollection of having received the inventory which was an enclosure. (*Id.*) Mr. McKinnon's inability or unwillingness to recall a key document that was directed to him by counsel and in which he should have been extremely interested raises doubt about his credibility and reliability as a source of evidence.

68. In addition to avoiding significant data, the Audit Report concluded that Mr. McKinnon mistakenly believed that until FCC applications were granted, Liberty's operations were covered by an experimental authorization of Hughes Aircraft. Mr. Price shared that belief. (TWCV Exh. 67 at 12.) On April 20, 1993, Ms. Richter had confirmed that there was a history of activations under that test authority but warned against its use for commercial service:

If you have constructed a new station or new path and want to test the equipment, you can request the use of Hughes' experimental License. I believe Liberty has used the Experimental License in the past. As you may know, some private cable operators were using Hughes' Experimental License to serve subscribers while their station applications were pending. Hughes feels this behavior is in contravention of its authority under the license, and for this reason, Hughes is reluctant to permit operators the use of the Experimental License except in rare circumstances. If you would like to obtain the use of Hughes' Experimental License for specific paths, we should discuss it further.

(TWCV Exh. 51.) But neither Mr. McKinnon nor Mr. Price knew whether any preauthorization activations were made under the Hughes testing authority. Both understood that no fees could be charged for programming under testing authority. (TWCV Exh. 67 at 12-13.) Mr. Stern had earlier advised Messrs. Price and McKinnon in January 1992, that Liberty could not provide service to customers under the test authority. (TWCV Exh. 67, Exh. 3 at 3-4.) There has been no claim asserted by Liberty that any of the 19 paths had been activated in reliance on the testing authority. However, when Mr. McKinnon was in charge of operations there were 23 paths illegally activated. (TWCV Exh. 67, Exh. B, Chart 3.) None of those 23 activations were shown to be related to the Hughes testing authority and there is no evidence of premature activations that were erroneously made as testing services provided without charge.

**Price Ignored Data And Rejected  
Ms. Richter's Prescient Warning**

69. On April 3 and April 13, 1993, Ms. Richter had telephone discussions with Mr. Nourain on the subject of the "construction and operation of paths that [had] not been granted" (TWCV Exh. 61; Richter, Tr. 2037-39.) These conversations prompted Ms. Richter to write her letter of April 20, 1993, to Mr. McKinnon in which she advised that the

conversations between her and Mr. Nourain on "when it is permissible for Liberty to construct and operate new microwave paths and stations, and when it is not" gave both persons "pause." (TWCV Exh. 51.)<sup>36</sup> The letter reflects a need felt by Ms. Richter to advise in writing that the operation of microwave paths is "only permissible when the FCC has granted [Liberty] authorization to do so." (*Id.*) Mr. McKinnon testified in his deposition that he had never received the April 20 letter because he was preparing to leave Liberty at that time. (TWCV Exh. 53 at Tr. 21-22.) Mr. Nourain sent a copy of the letter to Mr. Price with a notation on the copy: "Peter: Pls. review and advise. B.N. 4/28/93." (*Id.*) The "pause" experienced by Ms. Richter can be discerned readily from the above analysis of her contemporaneous inventory that she had just completed and forwarded to Liberty of which an elemental review would show the probability, if not the certainty, that those paths installed at 175 E. 74th Street, 812 Fifth Avenue and 400 E. 59th Street had been activated before applications were filed and before authorizations were granted. Ms. Richter testified that she had hoped that her letter "would concern somebody" and that she wanted to receive a reaction from a responsible person at Liberty. (Richter, Tr. 2046.) That would be expected since Ms. Richter was expressing clearly her concern that Mr. Nourain's confusion could lead to activation of an unauthorized path. (Richter, Tr. 2035, 2048.) She further testified that no one at Liberty expressed a reciprocal concern to her about inadvertent activation. (Richter, Tr. 2047.) Mr. Nourain testified that he knew that Mr. McKinnon was about to leave the company in May 1993 and he [Mr. Nourain] wanted Mr. Price to know about the licensing situation. Mr. Nourain also wanted Mr. Price to be informed about the timeliness spelled out by Ms. Richter in her letter and to be aware that STAs would be filed by Liberty in order to overcome the delay that Liberty believed it was experiencing in receiving authorizations. (Nourain, Tr. 2273-74; 2331-32.) An officer of a corporate licensee in Mr. Price's position would reasonably conclude that there was a serious potential problem on premature activations to be investigated, corrected and monitored. (Nourain, Tr. 2272.)

70. Ms. Richter had used indirect (but perfectly clear) language in her letter which Mr. Price believes provides cover for his strategy of denial and avoidance. Mr. Price was asked to recount his conversations with Ms. Richter about her "pause" as communicated in her April

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<sup>36</sup> This letter was not disclosed in the course of discovery. It was ordered to be produced when its existence was discovered fortuitously during the testimony of Mr. Howard Barr on January 28, 1997. See Order FCC 97M-13, released February 3, 1997, and Order FCC 97 M-14, released February 5, 1997. After Liberty lost its appeal in the Court of Appeals, the April 20 letter was produced again as an attachment to the Audit Report which emphasizes the significance that Liberty principals and its counsel attached to that letter since before August 14, 1995. (TWCV Exh. 67, Exh. F.) The Richter letter was not overlooked. It had been deliberately withheld from discovery in this proceeding.

20 letter. Mr. Price's testimony in open court was vague and at times evasive. He began by stating that due to recent events (assumedly this proceeding) the letter "probably crossed my desk." (Price, Tr. 2167.) He testified that it was rare for him to receive documents from Mr. Nourain. (Price, Tr. 2168-69.) But he did have a recollection of having read the letter. (Price, Tr. 2187.) On April 28, 1993, the same date that Mr. Nourain forwarded a copy, Mr. Price spoke on the telephone with Ms. Richter. (Price, Tr. 2170; TWCV Exh. 61.) Mr. Price said that his focus was on that portion of the letter which advised on using STAs and that he concluded from reading the letter that it was concerned with timeliness in filing STAs. (Price, Tr. 2171.) Mr. Price testified in the impersonal third person that "operations would deal with counsel," the timeliness of STA applications and authorizations. (Price, Tr. 2172.) It was not a practice or procedure for the up-town operations group (Messrs. Nourain and Ontiveros) to report to Mr. Price as the STA authorizations were obtained for the effected paths. (Price, Tr. 2172.) In the absence of such reporting, Mr. Price tried to avoid responsibility by keeping himself out of the authorization/activation loop. He testified that Ms. Richter's "pause" which was communicated in her letter did not give him any concern that Mr. Nourain might have acted or might later act in a manner that was inconsistent with Commission rules. (Price, Tr. 2173.) Mr. Price testified that in view of Mr. McKinnon's imminent departure in May 1993, he understood or believed that in forwarding the letter with a notation to please advise, Mr. Nourain was merely seeking approval of the STA procedures that were outlined in the letter. (Price, Tr. 2179.) Yet Mr. Price did not even recall speaking with Mr. Nourain in April-May 1993 about STAs. (Price, Tr. 2180.) Nor does he recall sending a copy of the April 20 letter to Messrs. Howard or Edward Milstein because Mr. Price "didn't think it was anything exceptional that required yet another step." (Price, Tr. 2188.) The explanation of Mr. Price is a response to only half of the Richter letter. Mr. Price testified on behalf of Liberty that even though he was a senior corporate executive, he was merely routinely approving counsel's procedures for filing STA requests and nothing more. (Price, Tr. 2190.) Mr. Price never gave Mr. Nourain advice on any aspect of the letter. He believed that by speaking with Ms. Richter and approving the filing of STAs he had fulfilled all that was required of him as Liberty's President and that he was being responsive to Mr. Nourain without acknowledging and addressing the request for advice. (Price, Tr. 2191-92.) Mr. Price's rationale, if believed, was not a mere act of simple negligence. From his testimony it must be concluded that Mr. Price intentionally or recklessly avoided the obvious meaning and the dire implications of Ms. Richter's "pause" and Mr. Nourain's "please advise".

71. In addition to offering an explanation that was lacking credibility, Mr. Price was evasive in answering questions about the "pause" experienced by Ms. Richter. When specifically directed to that portion of the letter, Mr. Price answered that it was the detailed information contained in the letter's several paragraphs that gave the pause: " --- the timeliness of getting the licenses and how we would ensure that we would not cause any delay to the buildings we had made commitments to." He was exclusively focused on business results and not concerned with licensing compliance:

I presumed that the whole letter was explaining what gave her pause and what she thought we should do to give her more confidence that we should get what we needed on a timely basis.

[Emphasis added.] (Price, Tr. 2193.) When asked what he said in his conversation with Ms. Richter to get clarification on the "pause" paragraph of the letter (a paragraph which makes no mention of STAs) Mr. Price answered: "she didn't say in this letter, nor do I gather anything in here that talks about unauthorized activation." (Price, Tr. 2194.) Mr. Price's presumption was that if Ms. Richter had unauthorized activations in mind she would have come right out and stated that or that she would have specifically confronted Mr. Price about it. (Price, Tr. 2194.) Mr. Price was adamant on the subject:

I did not know at that time, in April 1993, that we were operating paths or activating paths in an unauthorized manner. I did not have conversations with Behrooz Nourain on the subject. I didn't gather from this letter at all that I should have conversations with him that, even hinted at it, after writing to me and talking to me I would have done something about it. But, your Honor, I did not know.

(Price, Tr. 2195.) [Emphasis added.]<sup>37</sup> Counsel for Liberty vigorously objected to the line of questioning and in fairness to the witness, the Presiding Judge left the subject with Mr. Price's unsatisfactory answer. (Tr. 2196-98.) It is unsatisfactory because that answer overlooks the fact that the subject of Mr. Nourain's understanding of the timeliness for obtaining authorization before activations had been questioned by Ms. Richter in the first paragraph of her letter and that Mr. Nourain had specifically asked -- not just "hinted" -- for, "advice" on the subject from Mr. Price, Liberty's President. With a deliberate or reckless abandonment of any concern for licensing, Mr. Price left Mr. Nourain without any feedback or inquiry about his (Mr. Nourain's) concerns or procedures.

72. Mr. Price was asked to focus on the meaningful first paragraph of Ms. Richter's letter which stated:

In order to ensure that everything Liberty does is in strict accordance with the rules, and to ensure that your competitors are given no ammunition against you, I am writing this letter to detail the parameters within which construction and operation of new paths and new stations is permissible.

(TWCV Exh. 51.) Mr. Price could not recall discussing with Ms. Richter what it was that would give ammunition to competitors. (Price, Tr. 2201.) Mr. Price concluded that the April 20 letter did not provide him with any new information that he did not already possess and that the first paragraph of the letter did not set off any mental alarms. (Price, Tr. 2206.) Ms. Richter's dire message was warning Mr. Price that there would be illegal activations under the system of checks and balances used at Liberty. It was not until April 1995, two years after Ms. Richter's warning and following a pattern of multiple premature activations, that Mr. Price admitted to having acquired an actual knowledge of unauthorized activations.

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<sup>37</sup> Ms. Richter was being careful not to overstep her role as legal counsel and assume an executive function. She was equally careful to avoid an admission of wrongdoing on the part of her client. Her letter of legal advice stopped short of putting in print the factual bases or conclusions of her knowledge or suspicions that there were premature activations occurring or likely to occur imminently under Mr. Nourain's unsupervised procedures. Ms. Richter admitted that as a "byproduct" she was trying to cover herself and the law firm in the event it turned out that Mr. Nourain had activated unlicensed facilities. (Richter, Tr. 2045.) Mr. Price is a business executive who is educated in the law. He could not reasonably be found to have missed the cautionary message that Ms. Richter was providing.

**Liberty's Damage Control:  
Avoid Fully Informing And Stonewall This Proceeding**

73. Mr. Nourain testified that before April 26, 1995, he became informed by an internal communication, believed to be a fax message, that there had been unauthorized activations.<sup>38</sup> (Nourain, Tr. 645.) Mr. Nourain then prepared his April 26 memorandum after he had spoken with Mr. E. Milstein and Mr. Price. (Nourain, Tr. 819, 821; TWCV Exh. 35.) Mr. Price testified on direct that when he saw Mr. Nourain's memorandum he concluded that "there was a gap there between the turning on of service and the obtaining of authority." (Price, Tr. 1363-64.) "[I]t didn't take great genius" to determine from Mr. Nourain's memorandum that there had been unauthorized service. (Price, Tr. 1373, 1374-75.) This information was so important that Mr. Price discussed it with multiple outside counsel in a conference call that had earlier been scheduled by Mr. Price for the late afternoon of April 27, 1995, allegedly to discuss a Time Warner petition to deny.<sup>39</sup> (Price, Tr. 1365; 1372; 1376.) But at that time Time Warner had not yet focused on or specified unauthorized activations and so the reason for the call was more likely to discuss a strategy of disclosure with multiple counsel. By the time Mr. Price made his conference call to the attorneys, Mr. Barr had received a copy of Mr. Nourain's memorandum. (Barr, Tr. 1847-48, 1858, 1860, 1943.) It was disclosed in the hearing for the first time that there had been a decision made in that conference call to not immediately inform the Commission of the activations. The reason given was an acknowledged fear of Time Warner's reaction to what Liberty would disclose, and embarrassment to the company for not being able

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<sup>38</sup> There was never a fax document produced by Liberty and it has not been unequivocally established that there was such a fax. However, Mr. Nourain never changed his testimony. In view of the history of Liberty's incomplete and bifurcated document production and its strategic decision of withholding the Richter letter and the Audit Report, the testimony of Mr. Nourain with respect to an internal communication from midtown the executive offices of Liberty cannot be rejected. But the question of the existence vel non of a fax document could not be determined on this record.

<sup>39</sup> As of April 27, 1995, Time Warner had not filed a petition to deny based on any identified or alleged unauthorized premature activations. Mr. Price was non-specific about the subject of Time Warner's petition that prompted the call to Washington, D.C. counsel. (Price, Tr. 1372, 1376.) Mr. Price only testified that he first learned of unauthorized activations through Mr. Nourain's memorandum of April 26 which Mr. Price first saw in the morning of April 27, 1995. (Price, Tr. 1362-63.) Inexplicably, Mr. Price had turned a blind eye to Ms. Richter's warning in her April 1993 letter that she had detected a lingering danger of premature activations. Equally inexplicable, Mr. Price extrapolated from Mr. Nourain's memorandum of April 26, 1995, but for no apparent reason failed to similarly extrapolate from Mr. Lehmkuhl's data in February 1995 or Ms. Richter's data in May 1993.

to explain how the illegal activations had occurred. (Price, Tr. 1368-69; 1383.)<sup>40</sup> Evidently, it was not considered an option to report immediately to the Commission what was known at the time, with a promise to update details as they were learned. Facts or justification about the decision of April 27 to defer notification to the Commission was not mentioned anywhere in the Joint Motion.<sup>41</sup> The Joint Motion asserts, inaccurately and misleadingly, that discovery of the unauthorized activations was due to "ongoing litigation over Time Warner's petition to deny." (Joint Motion at 17.) But based on the record after hearing the testimony, it must be concluded that the first discovery of the activations by Liberty's executives officers was due to the Nourain memorandum of April 26 which, among other decisionally significant documents, was inexplicably and unjustifiably omitted from the Joint Motion.<sup>42</sup>

74. On April 27, 1995, when he was deciding to defer informing the Commission of the known unauthorized activations, Mr. Price also was seeking legal advice in the conference call, on when and how he should contact subordinate employees to determine facts. (Price, Tr. 1372-73.) While considering the next steps to take, on the following Monday, Mr. Price received Mr. Lehmkuhl's inventory dated April 28, 1995, that had been requested by Mr. Nourain and which was addressed to Mr. Price and Mr. Nourain. (TWCV Exh. 34.) This was another key document that was neither produced in the initial round of discovery nor discussed in the Joint Motion. The significance of Mr. Lehmkuhl's information was recognized by Mr. Price as being on a par with Mr. Nourain's earlier memorandum. Mr. Price noted that by placing Mr. Lehmkuhl's analysis of April 28 together with Mr. Nourain's report of April 26 confirmed not only that Time Warner's petitions were holding up the grants of the licenses<sup>43</sup> but

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<sup>40</sup> This reaction of all those assembled on April 26, 1995, was virtually predicted by Ms. Richter two years earlier. (TWCV Exh. 51.)

<sup>41</sup> There was no mention in the Joint Motion of the Nourain memorandum, the Lehmkuhl memorandum, or the conference telephone call of April 27. (*Id.*) The Presiding Judge was expected to find, without seeing it, that a complete and timely report to have been made on August 14, 1995, in the "comprehensive" Audit Report. (TWCV Exh. 4.)

<sup>42</sup> After the fortuitous discovery of the Richter letter and the recent disclosure of the Audit Report, there are substantial facts from which to infer that Liberty had reason to know and could have actually known at least one or more of unauthorized activations as early as April 1993, two years earlier than knowledge was admitted by Liberty.

<sup>43</sup> Any delays in licensing that were caused by Time Warner's petitions do not excuse or mitigate the duty for Liberty to comply with Commission licensing procedures, particularly compliance with the prohibition against premature activations. Nor does it excuse the duty to make timely disclosure under Section 1.65.

also that paths had been activated without authorization. (Price, Tr. 1363, 1386.) Yet despite such clear understanding of the facts by Mr. Price in late April, none of the information about the unlawful activations that were known to Mr. Price, to Mr. Lehmkuhl and to Mr. Barr were disclosed in the multiple May 4 STA applications which were represented to be in "technical order." (TWCV Exh. 17.)

75. On May 4, 1995, Liberty filed 14 applications for STAs that related to the paths that were operating without authorization. (See Appendix A to HDO.) There was no disclosure in the applications of the fact that the activations of the paths were unauthorized. (TWCV Exh. 17.) On May 5, 1995, Time Warner reported two more unauthorized activation sites. On May 17, 1995, Liberty admitted to activating the additional paths. (TWCV Exh. 18.) But an STA request filed two days later on May 19, 1995, relating to a path at 2727 Palisades Avenue, also failed to disclose the unauthorized activations that were known to Liberty at that time. (TWCV Exh. 18 at 2.) An internal investigation was not commenced by Liberty until June 1995. (L/B Exh. 4.) On July 13, 1995, Mr. Price ordered a further status report and discovered four more instances of premature activations.<sup>44</sup> (TWCV Exh. 23.) On July 17, 1995, Liberty filed applications for licenses for the errant paths. (TWCV Exh. 25.) On July 25, 1995, Liberty followed up by filing requests for STAs in which the premature activations were disclosed. (TWCV Exh. 27.) Joint Motion at 20. Liberty suspended billings for the paths that were prematurely activated until the licensing matter was resolved by the Commission. Messrs. Price, Ontiveros and Nourain were reprimanded (no bonuses) and an after-the-fact compliance program promising to observe and verify was adopted. Liberty designated Mr. Andrew Berkman ("Berkman"), its in-house counsel, as Compliance Officer to certify to an FCC license check list. Mr. Berkman is to carry out the written procedures of not approving commencement of a service until he has verified that the Commission has stamped "granted" on a pending application. (TWCV Exh. 67.) Mr. Price, as Bartholdi's President, no longer supervises Mr. Nourain who now is Freedom's employee.

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<sup>44</sup> The Joint Motion offers the following explanation. Liberty's records indicate that frequency coordination for the four buildings had been requested by Liberty from Comsearch in 1994, at a time long before their activation. Liberty contends that an internal record of payment would indicate that the work was probably performed in the normal course of Comsearch's business. (Jt. Exh. 8.) The invoice might have given Mr. Nourain cause to assume, albeit admittedly erroneously, that the application and licensing procedures for the four paths had been followed and concluded before activation. (Joint Motion at 14-15.) This is highly speculative and cannot be accepted as reliable evidence.

**Delayed And Misleading Disclosures**  
**"Owing To The Seriousness Of The Situation"**

76. On April 28, 1995, Mr. Lehmkuhl advised Liberty that a Time Warner petition that appeared in the public notice of January 9, 1995, was directed against all OFS applications of Liberty but did not apply to those most recently filed on March 23, 1995.<sup>45</sup> (TWCV Exh. 34.) However, there had been incorrect emission designators assigned by Comsearch to license applications filed on March 21, 1995, and these would need to be corrected and be subjected to a second public notice. (*Id.*) There was a resulting delay in obtaining licenses because of the need to change incorrect designators and to republish the public notices. But rather than mitigate premature activations any such delays should have increased Liberty's diligence. Those delays went unnoticed because of a lack of communication between Mr. Lehmkuhl and Mr. Nourain. Awareness of the licensing gap was so pronounced that Mr. Barr and Mr. Lehmkuhl inquired of the Bureau staff about the availability of STAs for "all pending applications that have been filed more than two months ago," i.e., February 1995 and before. The Bureau advised that because those earlier applications were subject to a petition to deny, they would not qualify for STAs. Nevertheless, Mr. Barr and Mr. Lehmkuhl felt that "such a request should be made owing to the seriousness of the situation." (TWCV Exh. 34.) Since Mr. Lehmkuhl and Mr. Barr knew that the threat of economic loss would not serve as a basis for STA relief, the "serious situation" could only have been the unlicensed microwave activations. Messrs. Lehmkuhl and Barr knew that if the premature activation of paths were disclosed on May 4, there would be no chance for STA clearance and therefore candid disclosure presented a quandary for counsel and for Liberty. Mr. Barr and Mr. Lehmkuhl followed through on their advice by filing on May 4, 1995, the 14 STA applications to cover unauthorized activations that existed at One Lincoln Plaza, Normandie Court, Windsor Court, Bristol Plaza, 767 Fifth Avenue, 99 battery park, and 335 Madison Avenue. (TWCV Exh. 17.) The unauthorized activations intentionally were not disclosed.

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<sup>45</sup> Mr. Lehmkuhl explained in his memorandum of April 28, 1995, addressed to Mr. Price and Mr. Nourain that Time Warner intended to petition all Liberty applications and that strategy would slow the processing of STAs. Mr. Lehmkuhl also noted that since the allegations were repetitive, resolution of one petition should be dispositive of the remainder. (TWCV Exh. 34.) There had been no allegations of unauthorized microwave activations in Time Warner's pre-May 1995 petitions. So the ongoing litigation over the Time Warner petitions to deny that were on file on April 28, 1995, had no relevance as to when Liberty first learned that it was prematurely activating paths. There was no apparent basis in fact supporting Liberty's effort to convince that discovery of the unauthorized activations in late April 1995 was due to "ongoing litigation over Time Warner's petition to deny." (Joint Motion at 17.)