

detail the parameters within which construction and operation of new paths and new stations is permissible.

TWCV Ex. 67, Exhibit F. Handwritten notes on the letter indicate that Messrs. Nourain and Price reviewed the letter. *Id.* (“Peter: Pls. Review and advise, B.N. 4/28/93”).

The existence of the Richter letter fortuitously was discovered during cross-examination of Howard Barr (another one of Liberty’s FCC attorneys) in the January 1997 hearing. After an *in camera* inspection, the Presiding Judge determined that any attorney-client privilege had been waived, and ordered Liberty to produce the letter. Order, WT Docket No. 96-41, FCC 97M-14 (rel. Feb. 5, 1997). Liberty produced the letter on February 4, 1997, and the letter prompted additional depositions and hearing testimony. The Report, which was finally produced in September 1997, also concluded that Ms. Richter likely learned that microwave paths had been activated without authorization in 1993, which is a reasonable interpretation of the letter.

TWCV Ex. 67, at 11.

3. Liberty witnesses changed their testimony regarding when they first learned of the unauthorized activation of microwave paths after significant documents were belatedly produced at the hearing.

In their depositions, Liberty witnesses uniformly provided inaccurate testimony regarding when they first learned that Liberty had unlicensed operating microwave facilities. Messrs. H. Milstein, E. Milstein, and Price (all principals of Liberty), all testified that they first learned that Liberty had unlawfully and prematurely activated microwave paths from a May 5, 1995 pleading filed by TWCNYC. L/B Ex. 4 (H. Milstein Deposition, 5/30/96, at 28); TWCV Ex. 46 (E. Milstein Deposition, 5/30/96, at 41-42, 44-45); L/B Ex. 9 (Price Deposition, 5/28/96, at 95-97). The belatedly-produced February 24 and April 28 inventories, together with Mr. Nourain’s April 26 memorandum, conclusively impeach this testimony. Thus, at the January 1997 hearing,

Messrs. H. Milstein, E. Milstein, and Price all changed their testimony to say that they first obtained knowledge of Liberty's premature activations in late April 1995. H. Milstein, Tr. 517-18; E. Milstein, Tr. 1623-24; Price, Tr. 1362-64. This, of course, revealed that the omissions and misstatements in the May 4 STA requests were knowingly made.

**II. The Record Demonstrates That Liberty Either Knew That It Was Operating Unlicensed Microwave Facilities Prior To Late April 1995, Or That Its Failure To Know Was The Result Of A Willful And Reckless Disregard Of Available Information And Of The Commission's Rules.**

The I.D. is peppered with references to the fact that it is simply "too incredible to accept as a finding" that no one at Liberty who had responsibility for microwave activations knew prior to late April 1995 that Liberty was operating unauthorized facilities. See, e.g., I.D., ¶¶ 39-40, 46, 52-53, 55, 64-65, 69-70, 105-06 & n.37. Since 1992, Liberty activated 93 microwave paths, about 75 percent of its total activations, without authorization. See TWCV Ex. 67, Exhibit B. Liberty's assertion that none of its principals knew of any of these activations until April 1995 is not credible. See I.D., ¶ 46.

There is evidence that Liberty knew of its unlicensed activities as early as the spring of 1993. In March 1993, Ms. Richter began compiling an inventory of Liberty's microwave licenses and pending applications in consultation with Mr. Nourain. Richter, Tr. 2014-17; Nourain, Tr. 2216-19; TWCV Exs. 58, 60. Part of the exercise involved comparing Mr. Nourain's records as to which facilities were actually in use with Ms. Richter's determination of which facilities were licensed. They discussed which facilities were active and which were not (Richter, Tr. 2018-21; TWCV Ex. 60), and Mr. Nourain reviewed a draft of Ms. Richter's inventory. TWCV Ex. 58; Richter, Tr. 2017-19, 2022; Nourain, Tr. 2224-26. On April 6, 1993,

Ms. Richter sent a final inventory to Messrs. McKinnon and Nourain. Richter, Tr. 2068; TWCV Exs. 3, 59.

The April 6, 1993 inventory, as well as the draft inventory, put Liberty on notice that it had several operational, unlicensed microwave paths. In February and March 1993, Liberty installed customers in several buildings. TWCV Ex. 14. Typically, this was done only after the microwave link to a building had been activated, which was Mr. Nourain's personal responsibility. Nourain, Tr. 676, 2317-19; Price, Tr. 2166. The March 16, 1993 draft inventory, which Mr. Nourain reviewed, did not list licenses for facilities serving any of the addresses activated in February and March 1993 (TWCV Ex. 58); and the April 6, 1993 inventory (directed to Mr. Nourain) lists these addresses as the subject of pending license applications. TWCV Ex. 3. Thus, not only was Mr. Nourain told that facilities to serve certain addresses were unlicensed immediately after he had activated them, but the circumstances of his work with Ms. Richter in preparing the inventory -- comparing licenses with active facilities -- strongly suggest that he knew these facilities were operating illegally. That is the only explanation for Ms. Richter's April 20, 1993 letter, especially in light of the conversations that preceded it. On April 2 and April 13, Mr. Nourain and Ms. Richter discussed whether Mr. Nourain could construct and operate a microwave path that was not licensed. Richter, Tr. 2037; TWCV Ex. 61. Seven days later, Ms. Richter wrote to Mr. Nourain's boss, telling him that the conversations between her and Mr. Nourain about "when it is permissible for Liberty to construct and operate new microwave paths and stations, and when it is not" gave her and Mr. Nourain "pause." TWCV Ex. 67, Exhibit F.

Mr. Price, to whom Mr. Nourain routed a copy of the Richter letter, claims not to have been aware of any unlicensed operations before “late April” 1995. Price, Tr. 1362-64, 1374, 2167-68, 2173, 2193-95. Mr. Price called Ms. Richter to talk about a portion of the letter that dealt with STAs. Remarkably, Mr. Price did not discuss compliance with licensing requirements, which was the letter’s principal subject. TWCV Exs. 61, 67, Exhibit F; Richter, Tr. 2062; Price, Tr. 2170, 2191, 2193-94, 2199. Mr. Price never provided any advice to Mr. Nourain, and did nothing to ensure that Mr. Nourain understood or complied with the FCC’s licensing requirements. See Price, Tr. 2168-69. Nor was there any change in Liberty’s behavior as a result of Ms. Richter’s warning. Mr. Nourain persisted in activating microwave facilities before they were licensed. See, e.g., TWCV Exs. 14, 66 (33 W. 67<sup>th</sup> Street); see also LD., ¶ 59.

Liberty’s blatant disregard for the Commission’s licensing requirements is further exhibited by the circumstances surrounding weekly Thursday meetings at which planned installations and activations were discussed. These meetings were attended by Messrs. Howard and Edward Milstein, Mr. Price, and until he left in May 1993, Mr. McKinnon. TWCV Ex. 14; E. Milstein, Tr. 1618; Price, Tr. 1441-42. All the attendees knew that a license was required prior to activation. Price, Tr. 1352; E. Milstein, Tr. 1615-16; L/B Ex. 4 (H. Milstein Deposition, 5/30/96, at 47); TWCV Ex. 41 (McKinnon Deposition, 6/5/96, at 8-9, 12). Notably, Mr. Nourain, who had responsibility for licensing, was not invited to these meetings. Price, Tr. 1361-62; L/B Ex. 8 (Nourain Deposition, 8/1/96, at 54). Mr. Ontiveros prepared a “Weekly Operations Report” that listed the status of every building served, or that was under contract to be served, by Liberty. TWCV Ex. 14; Ontiveros, Tr. 1698-1700, 1719-24. The Operations Report reflects both historical and projected dates, so that one can determine, for example, when

customers have been “installed” in a particular building or when they are planned to be installed. TWCV Ex. 14; Ontiveros, Tr. 1719-24. Significantly, there is nothing in the Operations Report that tracks any aspect of the FCC licensing process. Ontiveros, Tr. 1700.

Finally, the absence of certain activity at these weekly meetings in early 1995, in light of information provided to Mr. Price by Liberty’s legal counsel in January and February of 1995, establishes knowledge by Liberty’s principals that unlicensed operations were ongoing. On January 11, 1995, Mr. Price was advised by Liberty’s FCC counsel that processing of Liberty’s applications would be delayed as a result of TWCNYC’s having filed petitions to deny those applications. Barr, Tr. 1814-16, 1795-96; Price, Tr. 1435-36, 1514-15; TWCV Ex. 44. Mr. Price’s knowledge of this certain delay means that Liberty knew that, for the immediate future, it would be unable to meet its contractual obligations to new customers, whom it promised to install within 90 days. Mr. Price knew from the Weekly Operations Reports that Liberty was continuing to activate new microwave facilities throughout the first four months of 1995. See Ontiveros, Tr. 1699, 1714-16, 1719, 1723. Moreover, Liberty’s FCC counsel delivered to Mr. Price on February 24, 1995, a license inventory from Mr. Lehmkuhl that identified Liberty’s microwave applications as “pending” or “granted.” L/B Ex. 1. Although he admitted that a comparison of Liberty’s Weekly Operations Reports with the inventory would have revealed the presence of unauthorized operations, Mr. Price said he failed to make such a comparison. L/B Ex. 11 (Price Deposition, 8/1/96, at 174-78). Yet despite being told by his lawyers that no new microwave paths would be licensed, Mr. Price took no steps to deal with customers whose contractual expectations were bound to be disappointed, or to instruct his sales people to modify their form contract to allow Liberty more time to install new customers. Nor did the fact that his

subordinates continued reporting installation of new customers, which required activation of new microwave facilities, strike him as unusual or anomalous.

In short, the best that can be said of Liberty's management is that, for years, they operated with a complete disregard of their obligations as a Commission licensee, despite the explicit instructions and warnings they received from Mr. Stern in 1992 and Ms. Richter in 1993. A preponderance of evidence shows -- as the Report concluded -- that Liberty's management knew of its unlicensed operations well before 1995.

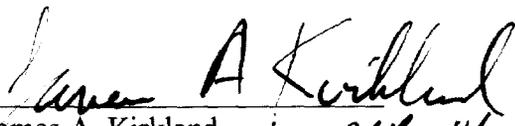
### **III. The Presiding Judge Correctly Determined That Denial Of Liberty's Pending Applications Was Warranted In This Case.**

The Presiding Judge found that, "Liberty has consistently been misleading in its applications and deliberately dilatory in its disclosure to the Commission" and that "Liberty's statistics [of unlicensed activations going back to 1993] represent a far higher pattern of unlicensed use of the spectrum than was found in Hartman or in Mebane Home making this one of the worst cases of a pattern of unlicensed spectrum operations since 1934." LD, ¶¶ 124, 123. Based on these findings, the Presiding Judge concluded that "Liberty [does] not possess the basic character qualifications that are required to receive OFS authorizations." Id. at n.63. The conduct revealed in this record is several orders of magnitude more egregious than the conduct in such cases as David A. Bayer, 7 FCC Rcd 5054 (1992), MCI Telecommunications Corp., 3 FCC Rcd 509 (1988), and Abacus Broadcasting Corp., 8 FCC Rcd 5110 (Rev Bd. 1993) -- cases where only a forfeiture was imposed.

In fact, Liberty's conduct, as revealed in this record, greatly exceeds the misconduct that led the Commission to revoke licenses, deny renewals, and deny applications in such cases as: KOED, Inc., 3 FCC Rcd 2821 (Rev. Bd. 1988), aff'd, 5 FCC Rcd 1784 (1990), 6 FCC Rcd 625

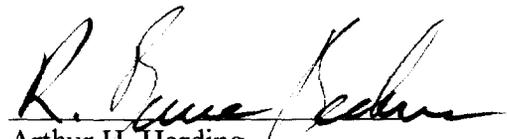
(1991); WWOR-TV, Inc., 7 FCC Rcd 636 (1992); Tri-State Broadcasting, 5 FCC Rcd 1156 (Rev. Bd. 1990), aff'd, 6 FCC Rcd 2604 (1991); Mid-Ohio Communications, Inc., 5 FCC Rcd 940 (1990); Capitol City Broadcasting, 8 FCC Rcd 1726 (Rev. Bd. 1993); Catoctin Broadcasting Corp. of New York, 4 FCC Rcd 2553 (1989); Standard Broadcasting, Inc., 7 FCC Rcd 8571 (Rev. Bd. 1992); and Nick J. Chaconas, 28 FCC 2d 231 (1971). The Presiding Judge properly rejected Liberty's suggestion that a very substantial forfeiture was an adequate sanction for its misconduct. Given the consistent line of authority in the Commission's prior decisions and the kind of misconduct evident in this record, these applications had to be -- and properly were -- denied.

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

I, Debra A. McGuire, hereby certify that a copy of the foregoing Time Warner Cable of New York City and Paragon Communications, and Cablevision of New York City - Phase I's Joint Brief in Support of the Initial Decision, was served, via facsimile or hand delivery, this 7<sup>th</sup> day of April, 1998 upon the following:

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