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

In re Applications of Liberty Cable Co., Inc.	)	WT Docket No. 96-41	
For Private Operational Fixed Microwave Service Authorization and Modifications	)	File Nos.:	
	)	708777	WNTT370
	)	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)

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To: The Honorable Richard L. Sippel
Administrative Law Judge

WIRELESS TELECOMMUNICATIONS BUREAU'S REPLY TO TIME WARNER'S COMMENTS TO PROPOSAL TO DELAY DECISION TO ALLOW STAFF TO MAKE 308(b) INQUIRY ON THE MOTION TO ENLARGE

On June 4, 1996, the Chief, Wireless Telecommunications Bureau (Bureau), through her counsel, in a Reply to the Oppositions to the enlargement of the issues to include real-part-in-interest questions filed by Bartholdi Cable Company, Inc., formerly known as Liberty Cable Co., Inc. (Liberty) and Freedom New York, L.L.C. (Freedom) suggested that the presiding officer delay a decision on the Motion to Enlarge in order to allow the Bureau to conduct an investigation of the question pursuant to Section 308(b) of the Communications Act of 1934, as amended. On June 21, 1996, Time Warner Cable of New York City and Paragon Cable of Manhattan (Time Warner) submitted comments arguing that because the Bureau is a party to the

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instant proceeding, it is effectively estopped from being able to conduct an investigation pursuant to Section 308(b) of the Act. The Bureau hereby respectively submits its Reply to Time Warner's Comments. We believe that neither the Communications Act nor the Commission Rules prohibit the Bureau from conducting such an inquiry.

1. Specifically, Time Warner makes two arguments. First, Time Warner argues that neither the language of § 308(b) of the Communications Act, nor the Commission's discovery and certain other procedural rules, permit the Bureau to conduct a § 308(b) investigation at this stage in the ongoing proceeding, where the Bureau would act as a decisionmaker. Second, Time Warner posits that the two procedures, Commission inquiries under § 308(b), and discovery under the Commission's procedural rules, are normally separate procedures which are used under different circumstances Time Warner advocates proceeding with discovery instead of a § 308(b) investigation.

2. Before discussing these two arguments, the Bureau wants to clarify that the specific issue which it would investigate as a part of a § 308(b) inquiry is whether Liberty is the real-party-in-interest behind its applications and facilities. This issue has not yet been designated against Liberty and is not currently part of an adjudicatory proceeding. Time Warner's arguments ignore that there is more at stake with regard to the real-party-in-interest issue than the 15 applications which have been designated for hearing. Liberty currently holds over 100 Commission licenses and Freedom has also applied for several licenses. If there has been any unauthorized assumption of control by Freedom of Liberty's licenses, then both Liberty's qualifications to continue *to hold* its licenses, and Freedom's qualifications *to be granted* licenses would be called into question.

3. Therefore, the Bureau is justifiably in the position of decision-maker when it comes to Liberty's facilities which are fully licensed, and Freedom's facilities which are not yet licensed. Time Warner's first argument that the Bureau's desire to conduct a § 308(b) investigation is without authority seems to ignore that the Bureau continues to be a decision-maker for matters relating to Liberty and Freedom which are unrelated to the narrowly-defined issues in this proceeding. The Bureau, while a party to the ongoing proceeding, is clearly not estopped from taking any action against Liberty for matters and facilities unrelated to the issues designated in that proceeding [1]

4. Section 308(b) of the Act clearly allows the Bureau to conduct such an investigation as the Bureau has requested. That Section states, "[t]he Commission, at any time after the filing of such original application and *during the term of any such licenses*, may require from an applicant or licensee further written statements of fact . . ." 47 U.S.C. § 308(b) (emphasis added). Therefore, because the Bureau is not prevented from investigating issues not yet designated, the Bureau can conduct an inquiry into the real-party-in-interest issue pursuant to Section 308(b) of the Act.

5. Moreover, because no real-party-in-interest issue has yet been designated against Liberty, Time Warner's arguments concerning the inability of the Bureau to use § 308(b) to

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[1] It cannot be said that the matters the Bureau wishes to investigate are related to the designated issues. The only relation is that the matters were brought to the Bureau's attention by a Time Warner motion during the proceeding. Apart from that, because the designated issues concern premature operation of facilities, hardwiring of non-commonly owned sites without a cable franchise, and apparent contradictory statements by a Liberty official, the issues surrounding a real-party-in-interest issue are not in any way related.

exceed the discovery rules in order to conduct extra-hearing discovery is misplaced. The Commission's discovery rules do not apply until such an issue becomes designated.[2]

6. Likewise, Time Warner's reliance on Section 1.353 of the Commission's Rules is misplaced. Section 1.353 allows the presiding judge to request additional information at any stage of a proceeding "upon *any issue*." 47 C.F.R. § 1.353 (emphasis added). Because there is no real-party-in-interest issue designated in this proceeding, Time Warner's argument that only the presiding judge and not the Bureau can conduct such an inquiry is incorrect.

7. Time Warner further argues that to allow the Bureau to make independent inquiries would frustrate the purpose of discovery rules which give the presiding judge authority to control the adjudicatory proceeding. Again, because there is no issue designated concerning real-party-in-interest, the Commission's discovery rules do not apply and therefore, there is nothing to disrupt. Moreover, the authority cited by Time Warner is clearly inapposite. Time Warner relies heavily on *Federal Trade Commission v. Atlantic Richfield Co.*[3] In *Atlantic Richfield*, the FTC argued that its investigative staff could transfer documents to its prosecutorial staff in an adjudicatory proceeding without the presiding judge's approval and without notice to the other parties. Here, we are *asking* for the judge's authority to instigate an inquiry *and* Time Warner *will* be made a part of the investigation. Therefore, *Atlantic Richfield* does not apply here.

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[2] In a footnote, Time Warner cites to *Gross Telecasting, Inc.*, 48 FCC 2d 128 (1974) for support of its claim that the Bureau cannot use Section 308(b) for extra-hearing discovery. That case, however, is inapposite. In *Gross*, the ACLU sought an *en banc* review of the presiding judge's deposition ruling. The Commission denied review stating essentially that the ALJ has broad discretionary power. However, because the presiding judge's power only extends to the designated issues, *Gross* does not apply here where the Bureau is requesting to investigate questions which have not yet been designated.

[3] 567 F.2d 96 (D.C. Cir 1977).

8. Time Warner's second argument, that § 308(b) inquiries are typically used before an application is designated, and discovery used after a designation, is weak in light of the present case. To repeat, the Bureau believes that a § 308(b) investigation would reveal whether or not there exists substantial and material questions of fact regarding the control of Liberty's facilities. It would not touch on the issues already designated.

9. Finally, Time Warner relies on the U.S. Court of Appeals decision in *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*[4] for the proposition that Section 308(b) is used to avoid a hearing, thereby saving time and expense. The Bureau agrees with this proposition. As the court said in *Bilingual* "[i]f more information is required, the method by which it is to be gathered is, of course, a matter for the Commission. . . . The FCC generally has elected to conduct its own inquiries, and we specifically have approved this course."[5] The Bureau's request is in keeping with this viewpoint.

10. Time Warner, on the other hand, wishes to pursue a different procedural posture - - to enlarge the issues already designated, and reopen discovery immediately. It believes that discovery is more efficient and expeditious. In that vein, it is disturbed by the fact that the Bureau did not set a specific timetable for its proposed § 308(b) investigation.

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[4] 595 F.2d 621 (D.C. Cir. 1978).

[5] *Id.*, at 630.

11. In response, the Bureau proposes that if the presiding judge were to deny Time Warner's Motion To Enlarge, then the Bureau would send out its notice of the investigation within ten days, stating that the parties involved would have thirty days to respond. This should remedy the timeliness concern for all parties involved.

Respectfully submitted,

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July 1, 1996

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CERTIFICATE OF SERVICE

I, Katherine Power, in the Enforcement Division, Wireless Telecommunications Bureau, certify that I have, on this 1st day of July, 1996, transmitted by facsimile and sent by regular First Class United States mail, copies of the foregoing "Wireless Telecommunications Bureau's Reply to Time Warner's Comments to Proposal to Delay Decision to Allow Staff to Make 308(b) Inquiry on the Motion to Enlarge" to:

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