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

'JUL 1 1996

In Re Applications of	)	WT DOCKET NO. 96-41	FEDERAL COMMUNICATIONS COMMISSION
	)		OFFICE OF SECRETARY
	)	File Nos.:	
LIBERTY CABLE CO., INC.	)	708777	WNTT370
	)	708778, 713296	WNTM210
For Private Operational Fixed	)	708779	WNTM385
Microwave Service Authorization	)	708780	WNTM555
and Modifications	)	708781, 709426, 711937	WNTM212
	)	709332	NEW
New York, New York	)	712203	WNTW782
	)	712218	WNTY584
	)	712219	WNTY605
)	713295	WNTX889
)	713300	NEW
)	717325	NEW

To: Administrative Law Judge Richard L. Sippel

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**REPLY OF BARTHOLDI CABLE COMPANY, INC.
TO COMMENT OF TIME WARNER ON COMMISSION'S AUTHORITY
UNDER 47 U.S.C. § 308(B)**

Bartholdi Cable Company, Inc., formerly known as Liberty Cable Company, Inc. ("Bartholdi"), hereby submits this reply to the "Comment of Time Warner Cable of New York City and Paragon Cable Manhattan" filed June 21, 1996 on the Commission's authority under 47 U.S.C. § 308(b) to investigate certain factual questions related to real-party-in-interest allegations.¹ Time Warner implausibly argues that because the Bureau is a party to this

¹ Bartholdi notes that Time Warner's *ad hoc* filing is neither specifically permitted by FCC rules nor invited by the Presiding Officer, and should therefore be stricken, consistent with a prior ruling by the Presiding Officer. See *Memorandum Opinion and Order* (Administrative Law Judge Richard L. Sippel, rel. June 27, 1996) (disallowing Bartholdi filing of explanatory memorandum related to *in camera* inspection of documents because filing was not permitted by FCC rules).

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hearing, the Bureau has ceded its authority to request information from Bartholdi (and from Freedom New York, L.L.C. ("Freedom")) concerning issues that have not been designated. Time Warner cites no precedent for its extraordinary request. The Presiding Officer should reject Time Warner's argument because it is contrary to the plain language of 47 U.S.C. § 308(b) and based on the patently flawed notion that designation of three discrete issues against Bartholdi somehow annuls the Commission's plenary power to investigate unrelated matters concerning Bartholdi and Freedom.

I. THE PLAIN LANGUAGE OF SECTION 308(B) PERMITS THE BUREAU TO REQUEST INFORMATION FROM APPLICANTS AND LICENSEES AT ANY TIME.

Time Warner ignores the express terms of Section 308(b), which afford the Commission broad authority to elicit information from applicants and licensees necessary for the FCC to discharge its public interest mandate. In pertinent part, Section 308(b) provides that

[t]he Commission, at any time after the filing of [an] original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked.²

This language indicates unambiguously that the Commission may request information (1) from both applicants and licensees (2) "at any time" after the filing of an application or during the term of a license. Notably, the statute contains no time or procedural limitation. Time Warner's argument fails to account for both of these elements of the statute.

² 47 U.S.C. § 308(b) (emphasis added).

First, Time Warner overlooks the fact that the real-party-in-interest allegations implicate not only Bartholdi's pending applications, but also Bartholdi's many licenses, as well as Freedom's unopposed applications. Notwithstanding the pendency of this proceeding on Bartholdi's 15 applications, Section 308(b) explicitly provides the Bureau authority to request information concerning Bartholdi licenses not subject to this proceeding. Time Warner's interpretation of the statute would require the Commission to renounce its residual authority over a licensee whenever it designated one of the licensee's applications for hearing. In any event, Time Warner's argument has no bearing on the Bureau's ability to request information from Freedom because Freedom's applications have not been designated for hearing, and the Bureau therefore is, in all respects, a decisionmaker rather than a party.

Second, Time Warner's argument reads out of the statute the language permitting the Commission to request information "at any time." Section 308(b) contains no language of limitation on the circumstances under which the Commission may invoke this authority. As discussed below, Time Warner's attempt to construct such a limitation is unavailing.

II. TIME WARNER FAILS TO RECOGNIZE THAT THE BUREAU SEEKS INFORMATION REGARDING AN ISSUE THAT HAS NOT BEEN DESIGNATED, IS NOT WITHIN THE SCOPE OF THE HDO, AND THEREFORE IS NOT BEFORE THE PRESIDING OFFICER.

Time Warner's opposition to the Bureau's use of Section 308(b) is founded on its fatally flawed assumption that the real-party-in-interest issue already has been designated. Time Warner argues that the Bureau cannot resort to Section 308(b) because (1) it is a party to the instant adjudicatory proceeding (which involves only the three issues designated) and (2)

Section 308(b) inquiries and the FCC's discovery rules "are normally employed under different circumstances."³ Both of these arguments fail to recognize that until an issue has been designated, it is not part of a hearing proceeding. Indeed, with respect to all matters not specifically subject to hearing in the HDO, the Communications Act reserves to the Bureau its status as a decisionmaker. Time Warner's contrary interpretation would subvert the Act and undermine the Commission's regulatory authority.

As Bartholdi discussed at length in its Opposition Pursuant to Order Issued May 16, 1996 (filed May 22, 1996), Section 309(d) of the Communications Act requires the party requesting the Presiding Judge to designate an issue for hearing to carry the burden of satisfying a two-step test.⁴ This statutory test must be satisfied with respect to each individual issue for which designation is requested. *See, e.g., Silver Star Communications-Albany, Inc.*, 3 FCC Rcd 6342 ¶¶ 26-34 (Rev. Bd. 1988) (each discrete issue must be expressly designated before consideration of facts and allegations related to that issue is proper in a hearing concerning other issues).

Here, the Bureau has informed the Presiding Officer that it cannot, on the basis of the pleadings alone, meet the two-part test with respect to the real-party-in-interest question.

³ Time Warner Comments at 5.

⁴ 47 U.S.C. § 309(d)(1) & (2). *See, e.g., Astroline Communications Co. L.P. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

Accordingly, the Bureau intends to use its Section 308(b) authority. This course of action is fully consistent with the Communications Act and related court rulings.⁵

Oddly, while Time Warner argues at length that the discovery rules -- rather than Section 308(b) -- should govern the gathering of information after a "matter" has been designated for hearing,⁶ it concedes that the information the Bureau seeks is beyond the scope of discovery permitted by the HDO.⁷ Time Warner thus acknowledges that the Bureau, if stripped of its Section 308(b) authority as Time Warner advocates, would be powerless to ensure compliance with FCC rules by an entity with an application subject to hearing.⁸

Finally, Bartholdi agrees with Time Warner that the Commission's Section 308(b) procedures are designed to avoid the cost and delay of an adjudicatory hearing.⁹ These

⁵ In *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, the court made clear that where, as here, the Commission cannot make the requisite findings to support designation of an issue by resorting to pleadings, it may request further information from the regulated entity pursuant to Section 308(b). 595 F.2d 621, 630 n.34; *see also* Fox Television Stations, Inc., 10 FCC Rcd 2954, 2955 (1995).

⁶ Time Warner Comment at 6.

⁷ *Id.* at 5.

⁸ In support of the proposition that a presiding judge retains exclusive jurisdiction to control an adjudicatory proceeding, Time Warner cites *FTC v. Atlantic Richfield Co.*, 567 F.2d 96, 102 (D.C. Cir. 1977). Time Warner Comment at 4. But Time Warner's reliance on *Atlantic Richfield* is misplaced. In *Atlantic Richfield*, FTC investigative staff sought to transfer documents to the prosecutorial staff for use in a pending adjudicatory proceeding. Here, however, the Bureau is seeking simply to collect information, pursuant to statutory authority, to make a threshold determination as to whether a separate issue should be the subject of an adjudicatory proceeding. Because the Bureau does not seek to use Section 308(b) to gather information regarding the issues designated or to otherwise improperly supplement the record of an adjudicatory proceeding, *Atlantic Richfield* is irrelevant.

⁹ *Id.* at 6.

considerations counsel in favor of the Bureau's proposed Section 308(b) approach. Indeed, the fact that a hearing is pending on issues unrelated to the real-party-in-interest question does not lessen the cost and time concerns identified by the *Bilingual II* as justifying a Section 308(b) inquiry.

III. CONCLUSION

For the foregoing reasons, Bartholdi respectfully requests the Presiding Officer to dismiss Time Warner's procedurally defective and baseless "Comment."

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July 1, 1996

Certificate of Service

I hereby certify that on this 1st day of July, 1996, I caused copies of the foregoing "Reply of Bartholdi Cable Company, Inc. to Comment of Time Warner on Commission's Authority Under 47 U.S.C. § 308(B)" to be sent via facsimile and first class, postage prepaid mail to the following:

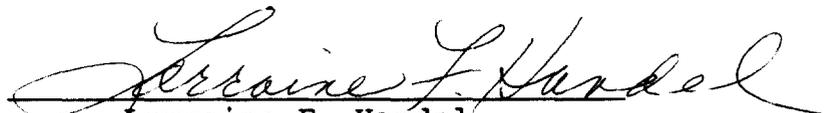
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