

21, 1995) at 2, 5.

124. On the following day, Liberty sent a letter to the Bureau, "responding briefly to Time Warner's letter dated August 21, 1995." *See* Letter from R. Pettit, Esq. to H. Davenport (dated August 22, 1995) at 1. In it, Liberty asserted that,

the Commission is fully aware [that] the internal investigation was not conducted in response to a Commission request. Likewise, the Commission did not request that Liberty prepare the documents submitted to the Commission in this proceeding. Liberty undertook its internal review voluntarily and has submitted a report and other supporting documents to the Commission voluntarily. Moreover, the documents, in fact, contain attorney's mental impressions.

Id. Accordingly, Liberty argued that Time Warner was not entitled to view the Report.

125. On September 13, 1995, the Bureau denied Liberty's request for confidentiality and ordered that a copy of the Report be made available to Time Warner, which, as a petitioner to deny, is entitled to all materials submitted as a consequence of a Bureau investigation that arises out of issues in a licensing proceeding. *See* Letter from R. Haller to H. Rivera, Esq., R. Pettit, Esq., & L. Constantine, Esq. (dated September 13, 1995) at 2.

126. On September 20, 1995, Liberty filed an Application for Commission Review of the Bureau's decision to deny confidential treatment, and withheld disclosure of the Report pending this appeal. Time Warner filed its Opposition to Liberty's Application for Review on October 5, 1995. On January 24, 1996, the Commission upheld the Bureau's denial of confidentiality and ordered the disclosure of the Report to Time Warner. *In re Liberty Cable Co., Inc.*, Memorandum Opinion and Order, FCC 96-9 (released Jan. 26, 1996). Liberty appealed the Commission ruling to the Court of Appeals for the District of Columbia Circuit, which, on April 24, 1996, stayed the Commission's action. *Liberty Cable Co., Inc. v. FCC*, No. 96-1030 (D.C. Cir. Apr. 24, 1996). This matter is still pending before the Circuit Court and the Report has not

been disclosed to anyone beyond the Commission staff.

B. Argument

127. To start, the Bureau agrees with the Presiding Judge's characterization that the information contained in the Report is "relevant and substantial evidence" for the instant proceeding, because of the very purpose underlying the creation of that document by Liberty. It is beyond cavil that all relevant evidence should be before a finder of fact. *See, e.g.*, Fed. R. Evid. 402 ("all relevant evidence is admissible"). But it is also well established that the trier of fact must decide a case based solely on what is presented in court. In the case of Commission-designated administrative hearings, Section 1.203 of the Commission's Rules states that the "transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision." 47 C.F.R. § 1.203. *See also* 5 U.S.C. § 556(e).

128. Furthermore, the Administrative Procedure Act (APA) has little relevance to this issue. The APA broadly defines operating procedure for federal agencies and contains rules on adjudication. The APA, however, does not detail the intricacies of the judicial process; rather leaving these procedures up to the agency itself. *See generally* 5 U.S.C. § 551 *et seq.* Thus, the Commission's Rule stated above controls the evidentiary procedures of the instant proceeding.

129. On April 24, 1996, the Court of Appeals for the District of Columbia Circuit granted Liberty's emergency motion for a stay of the Commission's Order requiring Liberty to disclose the Report. Because the Court's stay is still in place, the Report is inadmissible as evidence in the instant proceeding before the Presiding Judge.²¹ Thus, pursuant to Section 1.203

²¹ Unless, of course, Liberty voluntarily decided to release the Report.

of the Commission's Rules, the record does not, and cannot include the Report. Accordingly, the Presiding Judge must make his decision based only on the information developed in the record of this proceeding without the Report, just as any finder of fact must decide on a case without the benefit of a critical witness who may be outside the subpoena jurisdiction of a court, or has claimed a privilege which precludes his testimony. *Cf.* Fed. R. Evid. 804(a) (defining "unavailability" to include a witness who is exempt from testifying on the grounds of privilege).

130. However, the Bureau must note that while the *Report itself* is unavailable to the Presiding Judge, the information contained is separate and apart from the physical documentation of the Report, and therefore, the record may or may not necessarily exclude the *information* contained in the Report. One of the issues which the Commission designated in the instant proceeding is to determine the facts and circumstances surrounding Liberty's admitted violation of operating OFS facilities without first obtaining Commission authorizations. HDO ¶ 30. Because the Report was prepared by Liberty's counsel as a result of its internal audit into this very same question, it is undisputable that the information contained in the Report is relevant evidence for the hearing.

131. However, it must be noted that the Report is merely Liberty's *documentation* of the internal audit, prepared for the convenience of providing the requested information to the Bureau. The Report is not the sole source of the information contained therein, and as such, the information itself is, and has been, available through other avenues.

132. During discovery, the Bureau, Time Warner and Cablevision were afforded wide discretion in their requests for interrogatories, documents and depositions from Liberty. While there were some limitations placed on the scope and the relevant timeframe, and the Bureau

acknowledges that motions to compel were necessary, the Bureau believes that Liberty was, for the most part, cooperative in responding to the discovery requests. There were also instances where Liberty submitted to the parties highly significant and relevant documents long after it should have done so, and the Bureau cannot condone Liberty's conduct in this regard. However, viewing the entire course and scope of discovery in this proceeding, the Bureau believes and concludes that each party had adequate opportunity to investigate all the relevant facts surrounding this designated issue.

133. As the party originally initiating the chain of filings that resulted in the instant proceeding, Time Warner was fully aware of, and had access to, every document filed by Liberty with the Commission since January 1995, with the exception of the Report. From a review of some of these documents filed during the licensing proceeding, it is clear that Time Warner well understood the nature and content of the Report. For example, in its letter to the Bureau Chief, Time Warner stated:

The August 4, 1995 letter order from the Chief, Enforcement Division, again ordered Liberty to provide specific information based on the results of what Liberty described in its STA request as its review of its internal licensing procedures and regulatory compliance:

- A list of all unauthorized OFS paths that Liberty constructed and/or operated without authority, indicating which were not disclosed in response to the earlier FCC letter order.
- The date Liberty constructed and placed in operation each unauthorized path.
- The number of subscribers currently served by each unauthorized path.
- Whether Liberty is currently charging the subscribers served by each unauthorized path.

It is impossible for Time Warner to determine whether or not Liberty has finally

provided all of this specific information to the Commission.

See Letter from A. Harding, Esq. to R. Keeney (dated August 21, 1995) at 4 (emphasis in original).

134. While it was impossible in August 1995, and still is today under the Circuit Court's order, for Time Warner to determine whether or not Liberty provided this information to the Commission in the Report, it is apparent from this excerpt that Time Warner knew of at least four specific subject areas on which to propose interrogatories, request documents, or ask questions to Liberty during discovery in the hearing proceeding. Thus, whether or not Time Warner was successful in ultimately obtaining this information from Liberty during discovery, the Bureau believes that Time Warner had adequate opportunity to gain this information, presumably contained in the Report, from Liberty, without having the actual Report in hand.

135. It is also clear from the Commission filings prior to the HDO that Liberty was willing to disclose sufficient information to Time Warner on the nature and scope of the withheld content of the Report. For example, in the Application for Review, Liberty stated:

By letter dated August 4, 1995, the Bureau requested that Liberty provide certain specific information regarding the unauthorized OFS paths. In response, Liberty provided the Bureau not only with the specific information requested, but also details of Liberty's audit, which included extensive proprietary information *not available to Time Warner*, such as a report with lists identifying customers and potential customers, a complete description of the internal operations of Liberty and its personnel, and the operative dated for tall service contracts.

See Application for Review of Liberty Cable Company, Inc. (Sept. 20, 1995) at 5 (emphasis in original) (footnotes omitted). It would appear from this disclosure that Time Warner had ample opportunity in discovery to investigate these issues without having to review the actual contents of the Report.

136. Furthermore, Time Warner and the Bureau were in fact successful in obtaining some

in this category of withheld information contained in the Report. As one illustrative example, in its Application for Review, Liberty stated that

Liberty's submission contains a complete description of the company's internal operating procedures, including the identities and functions of key personnel. This is information that Liberty closely guards for good reason. Time Warner has hired Liberty personnel in violation of contractual confidential employment agreements on past occasions, thereby impeding Liberty's ability to grow and appropriating highly confidential business plans. Given such actions, it is reasonable to believe that Time Warner will attempt [sic] steal Liberty personnel again, especially if the Commission provides them with a roster for doing so.

Id. at 12-13.²² The identity and functions of key personnel involved in Liberty's internal operations were the subject of the Bureau's and Time Warner's first set of interrogatories. *See* Wireless Telecommunications Bureau's First Set of Interrogatories, Interrogatory No. 2. Liberty objected to this type of questions, but nevertheless, provided a list of names responding to the relevant interrogatories. Upon further negotiating and with intervention from the Presiding Judge, Liberty provided more details on the identity and functions of key personnel. In fact, the most important Liberty personnel were not only identified, but deposed and brought to testify in the instant candor hearing as well.

C. Conclusion

137. Therefore, to the extent that the issues related to the focus of this proceeding, the Bureau believes that Time Warner had adequate opportunity to obtain various information presumably contained in the Report, without having to read the actual Report itself. The Bureau thus submits that the record in this proceeding was sufficiently generated with all the parties'

²² Because Liberty itself disclosed in a public filing that the Report contains information relating to the identity and personnel involved in Liberty's internal operations, the Bureau is not breaching any duty by discussing the fact herein.

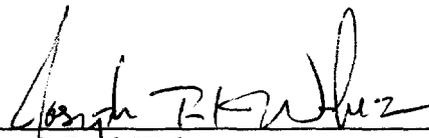
knowledge of the nature of information that may be included in the Report, and accordingly, the record is sufficient for the Presiding Judge to rule on the pending Motion for Summary Decision.

138. Additionally, the Presiding Judge has a record which has been sufficiently developed which documents the facts and circumstances surrounding Liberty's rule violations. There facts and circumstances are fully elaborated in the Joint Motion. The Bureau is confident that the Presiding Judge has a record which is sufficiently complete from which he render a verdict and grant the Joint Motion for Summary Decision.

For the reasons stated above, the Bureau requests the Presiding Judge to grant the Joint Motion By Bartholdi Cable Co., Inc., and Wireless telecommunications Bureau for Summary Decision.

Respectfully Submitted,

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February 28, 1997

CERTIFICATE OF SERVICE

I, Mark L. Keam, of the Enforcement Division, Wireless Telecommunications Bureau, certify that I have, on this 28th day of February, 1997, caused to be served by regular First Class United States mail, copies of the foregoing "**Wireless Telecommunications Bureau's Proposed Findings of Facts and Conclusions of Law,**" to:

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