

administrative agency must act “upon the record presented and such matters as properly may receive its attention through ‘official notice.’”<sup>286</sup>

133. In this regard, the instant case stands in a similar procedural posture as any other case in which a document has been held protected by privilege. The only distinction is that here the D.C. Circuit, rather than the Commission or the Presiding Judge, has rendered a decision regarding the likelihood that the attorney-client and work product privileges apply to the confidential submission.<sup>287</sup> As with all claims of privilege, only the document itself has been protected. Federal courts have long recognized the potential that “privilege [will have] the effect of withholding relevant information from the factfinder.”<sup>288</sup> Every time the

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<sup>286</sup> *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 529-30 (1946), *see also* *Butz v. Economou*, 438 U.S. 478, 513 (1978) (“[T]he transcript of testimony and exhibits together with the pleadings constitute the exclusive record for decision”); *Rhone-Poulenc of Wyoming Co. v. Federal Mine Safety and Health Review Com’n*, 57 F.3d 982, 985 (10<sup>th</sup> Cir. 1995) (except for administratively noticeable facts, “the Commission’s review is limited [by its regulations and § 556(e)] to specific materials within the administrative record”); *Ramirez v. Oklahoma Dept. of Mental Health*, 41 F.3d 584, 590 (10<sup>th</sup> Cir. 1994) (“[T]he transcript of testimony and exhibits together with the pleadings constitute the exclusive record for decision”); *Old Republic Ins. Co. v. Federal Crop Ins. Corp.*, 947 F.2d 269, 277 (7<sup>th</sup> Cir. 1991) (in on-the-record proceedings “the agency’s decision is based solely upon the papers filed in the proceeding and evidence adduced at the hearing and thereby made part of the record”); *Caroline T. v. Hudson School Dist.*, 915 F.2d 752, 756 (1<sup>st</sup> Cir. 1990) (“[t]he transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision,” quoting § 556(e)); *Dotson v. Peabody Coal Co.*, 846 F.2d 1134, 1138 (7<sup>th</sup> Cir. 1988) (“[I]t is unfair and irrational for the trier of fact to rely on evidence outside the record”); *Brennan v. Department of Health and Human Services*, 787 F.2d 1559, 1563 (Fed. Cir. 1986) (“[T]he transcript of testimony, exhibits, and pleadings constitute the exclusive record for decision”), *cert. denied*, 479 U.S. 985 (1986).

<sup>287</sup> *Liberty Cable Company, Inc. v. FCC*, Order, Case No. 96-1030 (D.C. Cir. Apr. 24, 1996) (“This case presents a serious question regarding the applicability of the attorney-client and work product privileges. . .”).

<sup>288</sup> *Fisher v. U.S.* 425 U.S. 391, 403 (1976).

Commission and the federal courts resolve disputes where potentially relevant, but privileged or otherwise restricted materials are absent from the record, they implicitly recognize that a decision must be made based on the record as developed by the parties.<sup>289</sup> And, indeed, the existence of such privileged information has not kept fact finders from rendering a decision on the basis of the existing record.<sup>290</sup>

134. Discovery in this case, as with all proceedings before the Presiding Judge, has been limited only by relevance and claims of privilege. The other parties have not been denied access to a single drop of information as a result of the confidential treatment afforded the Report. Nor have the parties been prevented from discovery of any documents as a result of the confidential treatment. In short, discovery has proceeded as it would have had the Report never existed, limited only by relevance and claims of privilege. Even more compelling, the Bureau has had the Report throughout this proceeding. With this document in hand, the Bureau had a full opportunity for discovery, once again limited only by relevance and claims of privilege. No facts, documents or witnesses have been withheld as a result of

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<sup>289</sup> *Fisher*, 425 U.S. at 403; *Six Grand Jury Witnesses*, 979 F.2d 939, 943 (2d Cir. 1992) (“[T]he attorney-client privilege remains an exception that may withhold relevant information at the pretrial or the trial stage of a criminal prosecution or a civil proceeding”), *cert. denied*, 509 U.S. 905 (1993); *Berkley and Co.*, 629 F.2d 548, 554-55 (8<sup>th</sup> Cir. 1980) (“[T]he privilege operates to withhold relevant information from the fact finder”); *U.S. v. Osborn*, 561 F.2d 1334, 1339 (9<sup>th</sup> Cir. 1977) (“[T]he effect of the assertion of the attorney-client privilege is to withhold relevant information from the finder of fact”); *Fischel*, 557 F.2d 209, 212 (9<sup>th</sup> Cir. 1977) (“[T]he privilege has the effect of withholding relevant information from the fact-finder”); *William F. Peel, Jr.*, 6 FCC Rcd 5388 (1991) (granting attorney-client privilege for certain materials and removing them from the ALJ’s consideration); *Raveesh K. Kumra*, 5 FCC Rcd 5607 (1990) (granting attorney-client privilege for certain materials and removing them from the ALJ’s consideration).

<sup>290</sup> Delay of a decision in this case cannot be used as a backdoor means to obtain a document that is privileged. *See* 5 U.S.C. § 554(d).

the confidential treatment afforded the Report. Thus the record is complete and the Presiding Judge can reach a determination.

135. The scope of the record in this case is immense and exhaustive. In all, fifteen individuals have been deposed, many of them multiple times. Eleven of these people were made available by Liberty. In addition, Liberty produced in excess of 16,000 pages of documents and answered numerous interrogatories. For almost a year, this proceeding has occupied the valuable resources of the Commission. The parties have spent hundreds of thousands of dollars to resolve these issues. There is simply no reason to further delay a decision based on the D.C. Circuit's conclusion that one document "presents a serious question . . . regarding the attorney-client work product privileges."

136. Finally, Liberty has not relied on the Internal Audit Report in asserting that the licenses at issue should be granted. The record as it stands fully supports the proposition that Liberty acted diligently and thoroughly to uncover the facts and circumstances of the admitted premature activations and that the facts and circumstances were fully and accurately reported to the Commission. Liberty and the Bureau do assert that "Liberty moved swiftly to investigate the extent of the premature activations . . . [and] openly and fully disclosed the premature activations of nineteen buildings to the Commission."<sup>291</sup> But these assertions are based on the prompt initiation of an investigation, the institution of a compliance program to prevent the recurrence of future violations, and Liberty's cooperation with the Commission –

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<sup>291</sup> Joint Motion by Bartholdi Cable Co., Inc., and Wireless Telecommunications Bureau for Summary Decision, WT Docket No. 96-41, ¶ 98 (July 15, 1996).

not in any way on the contents of the report.<sup>292</sup> Similarly, while the Joint Motion states that “Liberty engaged the firm of Constantine & Partners to conduct an internal investigation into Liberty’s premature activation of service and to issue a report of the firm’s findings,”<sup>293</sup> and that “Liberty voluntarily submitted a copy of the internal investigative report to the Wireless Telecommunications Bureau,”<sup>294</sup> these statements only discuss the fact that an investigation was undertaken and that a copy of the report was sent to the Bureau; these facts are undisputed and reveal no reliance on the substance of the content of the report. The presiding officer can determine whether Liberty acted diligently and thoroughly by merely reviewing testimony on the occurrence of these events -- the report itself is irrelevant to Liberty’s assertions.

137. Thus, the parties to this proceeding have had the same opportunity for full discovery that is available to parties in any proceeding limited only by relevance and privilege. With the record closed and discovery complete, the Presiding Judge should rule on the Joint Motion on the record before him.

## VI. CONCLUSION

Liberty has consistently recognized the seriousness of the violations at issue and expressed its sincere regret for those actions. Moreover, it has agreed with the Wireless Telecommunications Bureau to propose a substantial forfeiture as a consequence of those actions.

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<sup>292</sup> *Id.* at ¶¶ 40 n.7, 98, 103, 114, 120.

<sup>293</sup> *Id.* at ¶ 40.

<sup>294</sup> *Id.* at ¶ 40, n. 7.

However, Liberty has at all times sought to be forthright and candid with the Commission by fully disclosing the violations and by developing a program to insure that licensing violations will not occur in the future. As such, Liberty has demonstrated the candor to be a Commission licensee and that it can be trusted in the future to operate the subject licenses. Accordingly, Liberty respectfully requests grant of applications at issue under the terms of the Joint Motion.

Respectfully submitted,

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Dated: February 28, 1997

CERTIFICATE OF SERVICE

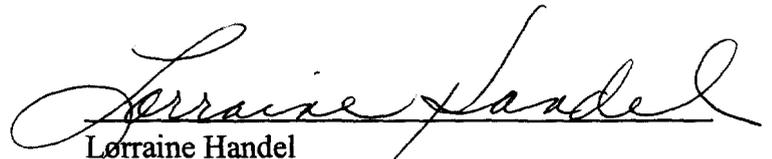
I hereby certify that on this 28th day of February, 1997, I caused copies of the foregoing  
"Proposed Findings of Fact and Conclusions of Law of Bartholdi Cable Co., Inc." to be hand  
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