completed its investigation before filing the STA requests. TWCNYC Findings, ¶ 163. He did not say that he believed Liberty was not required to tell the FCC what the company knew when the requests were filed. Rather than waiting until the investigation was complete, however, Liberty filed the STA requests on May 4 and deliberately omitted the fact that Liberty was already knowingly operating the paths for which STA was being sought.

The May 4 STAs were signed by Mr. Nourain, and had been reviewed by Mr. Nourain, Mr. Barr, Mr. Price, Mr. Rivera and Mr. Constantine. TWCNYC Findings, ¶ 155. All of these people knew on or about April 27, 1995 that Liberty was already operating the facilities for which STA requests were being filed. TWCNYC Findings, ¶ 155. The record does not contain evidence that Liberty's counsel advised it to file STA requests that omitted the fact that the paths were already operational. Given these facts, Liberty cannot claim that it innocently relied on its counsel's advice to conceal decisionally significant information from the Commission.

In Abacus, a licensee's attorney wrote and filed a misleading pleading without the licensee ever reviewing or approving the filing. In that case, the Review Board held that the licensee should not be found to lack candor when it was his lawyer who simply acted hastily and without deceptive intent, and who assumed full responsibility for his actions. Abacus, 8 FCC Rcd 5110, ¶ 12. In the present case, the STA requests were reviewed by several experienced lawyers, as well as Mr. Nourain and Mr. Price at Liberty before they were filed on May 4. TWCNYC Findings, ¶ 155. All of the persons reviewing the STA requests knew that the paths were already operational. TWCNYC Findings, ¶ 155. Moreover, there is no reason to believe that the STAs were filed hastily; in fact, Mr. Barr specifically stated

that there was no deadline for filing STA requests, and that Liberty could have waited to file them until after it completed its investigation of its unlicensed microwave operations. TWCNYC Findings, ¶ 163.

Liberty claims that, under the holding in Abacus, the fact that, "before April 27, 1995, Liberty's principals were not sufficiently focused on the operations details to know that service was prematurely being provided" shows that there was no collusive, deceptive behavior between Liberty and its counsel. Liberty Conclusions, ¶ 123. While Liberty and its counsel may not have been "sufficiently focused" on the issue of premature operations prior to April 27, 1995, they were certainly focused on this issue after April 27, 1995, and the STA requests that contain the misrepresentations and material omissions were filed *after* April 27, 1995. In fact, Liberty and its lawyers focused on this very significant issue for an entire week before actually filing the deceptive STA requests.

Besides concealing material information from the Commission in its May 4 STA requests, Liberty also violated Section 1.65 of the Commission's rules by failing to update its applications with changed information -- i.e., the fact that it was already operating paths for which applications had been filed. See 47 C.F.R. § 1.65(a); TWCNYC Conclusions, ¶¶ 291, 293-94. In this instance, Liberty cannot attempt to exonerate itself by saying it relied on counsel, who never advised it to amend its applications pursuant to Section 1.65. Section 1.65 clearly "places the responsibility on the *applicant* to come forth with all the information needed to keep its file accurate and complete. . . the Commission has consistently held that the applicant, *not the applicant's counsel*, is responsible for complying with § 1.65." WADECO, 628 F.2d at 128 (emphasis added) (citing Lorain Broadcasting Co., 18 FCC 2d

686, 688 (1969)). The WADECO court held that, while good faith reliance on counsel *may* render too harsh a sanction like disqualification, it does not always. In that case, the record showed that the applicant's reliance on its counsel was not uninformed; rather, the applicant knew of the misrepresentations made by his counsel, and his acquiescence allowed the misrepresentations to remain uncorrected in the applicant's file. Id. at 129. In that situation, disqualification was "justified and [did] not improperly deviate from precedent." Id. at 128. Similarly, Liberty knew it was operating microwave paths illegally when the May 4 STA requests were filed, and it acquiesced in the filing thereof. Additionally, Liberty never filed amendments to reflect that it was already operating the paths for which applications were pending, nor did Liberty file amendments to the applications for the other paths that it later discovered were operating prematurely. See TWCNYC Conclusions, ¶¶ 273, 277, 293-94. The responsibility for filing such amendments lay with Liberty, not with its counsel, and Liberty cannot exculpate itself by claiming its innocent reliance on counsel. See id.

CONCLUSION

For the foregoing reasons, and subject to action on TWCNYC's pending Motion to Enlarge, TWCNYC respectfully urges that Presiding Judge reject the Proposed Findings of Fact and Conclusions of Law of Bartholdi Cable Company, Inc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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