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

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

To: The Honorable Richard L. Sippel
Administrative Law Judge

**WIRELESS TELECOMMUNICATIONS BUREAU'S
CONSOLIDATED REPLY TO
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF
TIME WARNER CABLE OF NEW YORK CITY AND PARAGON
COMMUNICATIONS, AND CABLEVISION OF NEW YORK CITY - PHASE I,
AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF
BARTHOLDI CABLE COMPANY, INC.**

March 10, 1997

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SUMMARY

The Bureau's Proposed Findings of Fact and Conclusions of Law filed on February 28, 1997, concluded that key Liberty's witnesses changed their hearing testimonies from their deposition testimonies. Specifically, Howard Milstein, Peter Price, Edward Milstein, Anthony Ontiveros, and to a lesser degree, Behrooz Nourain, changed their stories about the time they first learned of Liberty's violations from early May 1995 to late April 1995. Time Warner and Cablevision's combined Proposed Findings of Fact and Conclusions of Law also found these witnesses changed their stories as to the first time they learned of Liberty's unauthorized operations. Time Warner and Cablevision argue that because of these changes, Liberty lacks the candor to remain a Commission licensee and thus the pending applications must be denied.

The Bureau disagrees with Time Warner and Cablevision as to the significance of this change in light of the overall decision before the Presiding Judge. While the inconsistent stories are difficult to explain, the Bureau believes the change in testimony does not affect the facts and circumstances surrounding when and how Liberty's unauthorized OFS operations took place. Accordingly, the Bureau stands by the position it took in joining Liberty's Motion for Summary Decision.

The Bureau is nonetheless troubled by the inconsistent testimony because of another reason that was not known when the Bureau filed the Joint Motion for Summary Decision with Liberty. The hearing testimony made clear that Liberty's principals did know of the multiple violations before May 4, 1995, when the company filed the first set of requests for special temporary authority (STA) to operate certain OFS paths. The fourteen filed that day and another filed on May 19, 1995 failed to disclose the fact that those paths for which STAs were being

applied for were already in operation by Liberty, albeit unlawfully. For this separate violation of failing to disclose material facts to the Commission, the Bureau agrees with Time Warner and Cablevision that Liberty deserves to be sanctioned. Therefore, the Bureau seeks an additional forfeiture in the amount of \$300,000 be assessed against Liberty in addition to the forfeiture of \$790,000 sought by the Bureau in the Joint Motion.

Time Warner and Cablevision also argue that Liberty has not met its burden of establishing its character to remain a licensee in light of the Commission's *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1989). Because the Bureau does not believe that Liberty's principals had the requisite intent to mislead the Commission with their various negligent conduct, the Bureau cannot agree with Time Warner and Cablevision that Liberty's license applications should be denied. Furthermore, Liberty's promise of future compliance as evidenced by its remedial steps taken to avoid another disjointed licensing process, provides the Bureau with adequate assurance that Liberty can remain a licensee.

Finally, Time Warner and Cablevision argue that the Presiding Judge cannot reach a decision on the pending Joint Motion without examining the evidence in Liberty's Internal Audit Report (Report) because it contains relevant information which directly impacts the issues to be resolved in the proceeding. The Bureau agrees with Time Warner and Cablevision that the evidence contained in the Report is indeed relevant, but the Bureau repeats its position in its Proposed Findings that the Report is nothing but the documentation of the facts and circumstances surrounding the violations, and not the only source of those same facts.

Because the parties had ample and adequate opportunity to develop the record in this proceeding, the Bureau believes that Time Warner and Cablevision are incorrect in their belief

that a significant gap still exists in the story told by Liberty. Furthermore, because the Court of Appeals for the District of Columbia has ordered the Commission to withhold disclosing the document, the Presiding Judge must proceed with his decision as if the document never existed, just as in any other common trial where a key witness is unavailable. In this regard, the Administrative Procedures Act lends no guidance to the decision.

Regarding Liberty's Proposed Findings of Fact and Conclusions of Law, the Bureau agrees with most of the characterizations as the facts are for the most part, uncontroverted. Specifically, the Bureau agrees with Liberty that it was the company's disjointed licensing process and the lack of proper supervision of personnel that led to Liberty's multiple violations of the Commission's microwave rules. The Bureau also agrees with Liberty that the company did not prematurely activate paths due to any economic or business incentives. The Bureau also agrees that Liberty can be relied upon to comply with the Commission's Rules due to its promise to maintain an internal compliance procedure.

The Bureau cannot, and does not agree with Liberty's assertion that the witnesses gave credible and candid testimony that Liberty openly and forthrightly disclosed the violations to the Commission as soon as it could. As stated in the Bureau's Proposed Findings, the Bureau believes Liberty violated its duty to disclose material facts to the Commission when it filed STA requests on paths already activated. The Bureau also does not agree with Liberty that the witnesses provided credible testimony on the timing of the discovery of premature operations. The testimony of key witnesses at the hearing reflect facts and events which were completely left out in their deposition testimony, and the Bureau is troubled by the absence of explanation for this change. The Bureau is also trouble by the late disclosure of key documents which shed more

light on the timing of discovering the violation than any other documents provided to the parties during discovery. However, because the Bureau cannot conceive of any benefit that Liberty gained by failing to disclose these facts and documents any earlier than they did, the Bureau concludes that Liberty did not intend to corrupt the proceeding. Rather, the problems Liberty encountered in this proceeding are attributable to negligence.

Finally, the Bureau agrees with Liberty that it has proven itself to remain qualified as a Commission licensee. Upon consideration of the complete and exhaustive record developed in this proceeding, the Bureau believes that nothing in the Commission's *Character Policy Statement* requires the pending applications to be denied.

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Pursuant to the Presiding Judge's *Memorandum Opinion and Order*, FCC 96M-265 (released December 10, 1996), *Order*, FCC 97M-12 (released January 31, 1997), and *Order*, FCC 97M-36 (released January 7, 1997),¹ the Chief, Wireless Telecommunications Bureau (Bureau), hereby submits the Bureau's Reply to the combined Proposed Findings of Fact and Conclusions

¹ By this *Order*, the Presiding Judge extended the filing date of Reply Proposed Findings of Fact and Conclusions of Law for all parties from March 7 to March 10, 1997 due to an error in service of the Liberty's Proposed Findings of Fact and Conclusions of Law.

of Law filed by Time Warner Cable of New York City and Paragon Communications (together, Time Warner) and Cablevision of New York City - Phase I (Cablevision), and the Proposed Findings of Fact and Conclusions of Law filed by Bartholdi Cable Company, Inc., formerly known as Liberty Cable Co., Inc. (Liberty) on February 28, 1997.

I. OVERVIEW

1. The Bureau believes that both Time Warner and Cablevision in their Proposed findings, and Liberty in its Proposed Findings, for the most part, correctly state the facts as they are established in the record. The only differences the Bureau has with either party is in the significance of certain events. Strikingly, there is little variance between the facts proposed by the Bureau, Liberty and Time Warner and Cablevision. Therefore, this Reply is not going to make extensive comment on either party's recitation of the facts in their respective Proposed Findings. Instead, this Reply will point out where the Bureau disagrees with the meaning either party has attached to certain events and show that despite Liberty's admitted and repeated rule violations, the record evidence fully supports that the Joint Motion for Summary Decision (Joint Motion) be granted.

II. ARGUMENT

A. REPLY TO TIME WARNER AND CABLEVISION'S COMBINED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Changes in Witnesses' Testimonies Regarding the Date that Liberty First Discovered the Violations are Irrelevant in Determining When and How the Violations Occurred

2. On February 28, 1997, the Bureau filed its Proposed Findings of Fact and Conclusions of Law (Bureau Proposed Findings), which concluded that upon comparing the deposition testimonies of key Liberty witnesses with the hearing testimonies given by the same witnesses

in this limited proceeding, the Bureau found inconsistencies as to the time and manner of how the witnesses initially became aware of Liberty's unauthorized OFS activations. Bureau Proposed Findings ¶ 38. The Bureau found that Howard Milstein, Peter Price, Edward Milstein, Anthony Ontiveros, and to a lesser degree, Behrooz Nourain, changed their stories about the time they first learned of Liberty's violations from early May 1995, as they stated in their depositions, to late April 1995, as they testified in the hearing. Bureau Proposed Findings ¶¶ 79, 81, 89, 90. The Bureau also found that Behrooz Nourain maintained in both his deposition and hearing testimony the same timeframe of late April, Bureau Proposed Findings ¶ 84, although he did initially claim the information was learned from Time Warner. Michael Lehmkuhl maintained in both testimonies that he learned in early May. Bureau Proposed Findings ¶ 87.

3. Time Warner and Cablevision's combined Proposed Findings of Fact and Conclusions of Law (TW/CV Proposed Findings) is consistent with the Bureau's Proposed Findings that these witnesses changed their stories as to the specific time they learned of Liberty's unauthorized operations. TW/CV Proposed Findings ¶¶ 89-90. Time Warner and Cablevision found that the testimony of Howard Milstein, Peter Price and Edward Milstein changed at the hearing compared to their deposition testimonies, as the Bureau stated in its Proposed Findings. TW/CV Proposed Findings ¶¶ 91-112. Regarding Behrooz Nourain, Time Warner and Cablevision, like the Bureau, also concluded that he first became aware of the unauthorized operation in late April 1995. TW/CV Proposed Findings ¶ 113. Like the Bureau, however, Time Warner and Cablevision were also troubled by the lack of explanation concerning the "mystery fax" which prompted Nourain's discovery of the violations. *Cf.* Bureau Proposed Findings ¶¶ 60, 85 with TW/CV Proposed Findings ¶¶ 116-21. According to Time Warner and Cablevision, these changes in the

testimonies reflect lack of candor demonstrated by the witnesses, and their Proposed Findings thus concludes that Liberty attempted to corrupt the hearing process. TW/CV Proposed Findings ¶ 278.

4. The Bureau does not agree with Time Warner and Cablevision that the degree of inconsistency in the testimony demonstrates lack of candor, or Liberty's intention to corrupt the instant proceeding. As stated in its Proposed Findings, the Bureau stops short of concluding that any witness actually lied under oath. Bureau Proposed Findings ¶ 95. Furthermore, the Bureau believes that the witnesses' inconsistent stories do not change in any substantive way the underlying scope of this hearing. In the *Hearing Designation Order and Notice of Opportunity for Hearing*, FCC No. 96-85, WT Docket No. 96-41 (released March 5, 1996) (HDO), the Commission acknowledged the fact that Liberty "admitted violations of Section 301 of the Communications Act and Section 94.23 of the Commission's Rules, 47 U.S.C. § 301, 47 C.F.R. § 94.23, by operating certain private operational fixed microwave facilities without first obtaining Commission authorization." HDO ¶ 30. Thus, the focus of the designated hearing was to investigate the facts and circumstances surrounding how the violations occurred and when they occurred, rather than how or when Liberty discovered its violations. The differences in the time that Liberty's principals discovered the violations, whether it was late April or early May 1995, has nothing to do with how and when the actual violations took place. Accordingly, the Bureau finds the inconsistent testimonies of Liberty's witnesses to be largely irrelevant for the purpose of concluding the law on this particular issue, which the HDO designated as issue number (2)(a). See HDO ¶ 30. On this issue, the Bureau is satisfied that Liberty's violations of unlawfully activating OFS paths prior to obtaining Commission authorization resulted from "a slipshod,

disjointed and inadequately supervised licensing process" employed by Liberty. *See generally* Proposed Findings of Fact and Conclusions of Law of Bartholdi Cable Company, Inc. (Liberty Proposed Findings) ¶¶ 27-46.

2. Liberty's Failure to Disclose Material Facts in the Requests for Special Temporary Authority Filed with the Commission After Discovery of Violations Warrant Additional Sanctions

5. The Bureau, however, is troubled by the inconsistent dates of discovery in regard to the issue designated by the HDO as number (2)(b). The Commission also designated for hearing an issue to "determine whether Liberty Cable Co., Inc. has violated Section 1.65 of the Commission's Rules, 47 C.F.R. 6. § 1.65, by failing to notify the Commission of its premature operation of service in either its underlying applications or its requests for special temporary authority." HDO ¶ 30. As stated in the Bureau's Proposed Findings, the change in the testimony of Liberty's witnesses with respect to the date of discovery is significant in light of this particular issue because the hearing testimony made it clear that Liberty in fact knew of the violations prior to May 4, 1995, the day when Liberty filed fourteen requests for special temporary authority (STA) to operate certain OFS paths. Bureau Proposed Findings ¶ 107. These requests for STAs failed to disclose the fact that those paths for which STAs were being applied for were already in operation. Bureau Proposed Findings ¶ 105.

7. In their Proposed Findings, Time Warner and Cablevision assert that "Liberty made materially false and misleading statements to the Commission in violation of 47 C.F.R. § 1.17" when it "omitted the material fact that paths were prematurely activated in its May 4, 1995 request for STA." TW/CV Proposed Findings ¶¶ 154-64. Time Warner and Cablevision also argue that Liberty knew about the premature activations as early as April 27, 1995, TW/CV

Proposed Findings ¶ 147, but that it did not disclose this fact in its May 4 STA requests. In contrast, the STA requests contained language which "clearly implied that STA was necessary for *future* activation of the microwave paths." TW/CV Proposed Findings ¶ 156-60 (emphasis in original).

8. The Bureau agrees with Time Warner and Cablevision that Liberty made willful misstatements in the STA requests and failed to give full and complete disclosures as to all the relevant facts and circumstances surrounding the paths being applied for. Bureau Proposed Findings ¶ 111. Time Warner and Cablevision couched Liberty's failure to disclose this information as a violation of Section 1.17 of the Commission's Rules, which states that no licensee shall "on any application, pleading, report or any other written statement submitted to the Commission, make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission." 47 C.F.R. § 1.17; *see* TW/CV Proposed Findings ¶¶ 154-64. The Bureau, on the other hand, relied on Sections 1.913(d) and 1.914 of the Commission's Rules to find Liberty liable for failing to disclose this material information. Bureau Proposed Findings ¶¶ 110-11. In addition, as stated above, the HDO designated as an issue the general duty of a licensee to continuously provide to the Commission accurate and complete information in a pending application. *See* 47 C.F.R. § 1.65(a); HDO ¶ 30.

9. Whichever Commission Rule the Presiding Judge relies upon, however, the Bureau believes that Liberty's failure to disclose the relevant information in its STA requests is significant enough to warrant a severe penalty. Accordingly, the Bureau requested in its Proposed Findings that additional forfeiture be assessed against Liberty in the amount of \$300,000 in addition to the forfeiture sought by the Bureau in the Joint Motion by Bartholdi Cable Co., Inc.,

and Wireless Telecommunications Bureau for Summary Decision (Joint Motion). The Bureau, however, does not agree with Time Warner and Cablevision that the proper sanction for this violation is denial of the pending OFS microwave applications, TW/CV Proposed Findings ¶ 316, and the Bureau thus reaffirms its position stated in the Joint Motion against denial of applications. Bureau Proposed Findings ¶ 93.

3. The Commission's Character Policy Statement Does Not Compel Denial of Liberty's Pending Applications Considering Liberty's Negligent Conduct

10. Time Warner and Cablevision argue that Liberty has not met its burden of establishing that it has the requisite character qualifications to be granted the captioned licenses. Time Warner and Cablevision are correct in stating that the Commission is concerned with "whether the licensee will in the future be likely to be forthright in its dealings with the Commission and operate its [facility] consistent with the requirements of the Communications Act and the Commission's Rules and policies." *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1989), *recon. denied*, 1 FCC Rcd 421 (1986) (*Character Policy Statement*). TW/CV Proposed Findings ¶ 243. However, as the Bureau argued in its Proposed Findings, because of the compliance program, Liberty *is* likely to be forthright in the future and operate in manner consistent with the Commission's Rules.

11. Time Warner and Cablevision make an extensive argument concerning the duty of applicants and licensees to be truthful and forthright and to disclose all relevant information to the Commission. *See generally*, TW/CV Proposed Findings ¶¶ 239-62. The Bureau certainly agrees with Time Warner and Cablevision regarding the duty of applicants to be candid and forthright. The Bureau does not agree, however, that Liberty has breached its duty to the degree

argued by Time Warner and Cablevision, and, moreover, the Bureau does not agree that denial of the applications is the only appropriate remedy.

12. The Commission has recognized that omissions or inconsistencies that are unaccompanied by evidence of a subjective intent to deceive are not sufficient to warrant a finding of misrepresentation. *See Intercontinental Radio, Inc.*, 98 FCC 2d 608, 639 (Rev. Bd. 1984); *Character Policy Statement*, 102 FCC 2d at 1209. Negligence, inadvertence, or imprecision on the part of an applicant or licensee does not amount to misrepresentation or lack of candor. *See Swan Creek Communications, Inc. v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994); *Calvary Educational Broadcasting Network, Inc.*, 9 FCC Rcd 6412, 6415 (Rev. Bd. 1994).²

13. Moreover, the Commission will disqualify an application for misrepresentation or lack of candor only where there is "substantial evidence" of an intent to deceive.³ There must be "a clear showing of deceptive intent to support a finding of misrepresentation or lack of candor constituting disqualifying conduct." *Maria M. Ochoa*, 11 FCC Rcd 1, 5 (Rev. Bd. 1995). Further, to find that an applicant or licensee has made misrepresentations or lacked candor, the

² In *Calvary*, the Review Board stated that the provision of inaccurate or ambiguous information to the Commission "resulting from carelessness, exaggeration, faulty recollection, or merely falling short of the punctilio normally required by the Commission . . . falls short" of the deceptive intent required for a lack of candor or misrepresentation. 9 FCC Rcd at 6415. *See also Bluegrass Broadcasting co.*, 43 FCC 2d 990, 993-94 (1973) (misstatements "were 'mere inadvertence' which resulted from 'carelessness or preoccupation with other matters'"); *F.B.C. Inc.*, 3 FCC Rcd 4595, 4597 (M.M.B. 1988) ("Carelessness, exaggeration or slipshoddiness, which lack [the] necessary element [of intent], do not constitute misrepresentation."); *Barry Sidelsky*, 7 FCC Rcd 1, 3 (Rev. Bd. 1989); *George E. Cameron Jr. Communications*, 91 FCC 2d 870, 898-99 (Rev. Bd. 1982).

³ *Swan Creek, supra*, 39 F.3d at 1222; *Garden State Broadcasting Ltd. Partnership v. FCC*, 996 F.2d 386, 394, 396 (D.C. Cir. 1993); *David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253, 1258 (D.C. Cir. 1991); *Armando Garcia*, 3 FCC Rcd 1065, 1067 (Rev. Bd. 1988), *recon. denied*, 3 FCC Rcd 4767 (1988).

Commission must determine "with the 'certainty . . . reasonably called for with respect to a finding of this nature'" that the evidence demonstrates an intent to be less than candid. *Radio New Jersey*, 46 FCC 2d 818, 823 (1974), quoting *Grengo, Inc.*, 39 FCC 2d 732, 737 (1973).

14. Therefore, despite the fact that the Bureau believes that Liberty witnesses changed their testimony with respect to when they learned of the unauthorized activations of service, in order to find that these deviations amount to misrepresentations as Time Warner and Cablevision argue, a finding would have to be made that the witnesses intended to mislead. As the Bureau points out in its Proposed Findings, the evidence does not support such a finding.

15. Where an applicant already has disclosed the information which the applicant is later charged with attempting to conceal, the Commission has found an absence of intent to make misrepresentations or lack candor.⁴ When a party has previously supplied information and placed it into the Commission record, "an intent to categorically misrepresent . . . is difficult to find."⁵ Accordingly, the fact that Lloyd Constantine in September 1995⁶ disclosed to the Commission in a sworn affidavit that Liberty learned of the illegal operations in late April 1995, shows that the Liberty witnesses would have had no reason to intentionally misrepresent about when they learned of the unauthorized provision of service.

⁴ See, e.g., *Calvary*, 9 FCC Rcd at 6420; *Valley Broadcasting*, 4 FCC Rcd at 2614-15; *Intercontinental Radio*, 98 FCC 2d at 639; *Superior Broadcasting of California*, 94 FCC 2d 904, 909 (Rev. Bd. 1983).

⁵ *Intercontinental Radio*, 98 FCC 2d at 639; quoting *Superior Broadcasting of California*, 94 FCC 2d at 909; *Radio New Jersey*, 46 FCC 2d at 823 (1974).

⁶ Application for Review of Liberty Cable Company, Inc. (September 20, 1995) (Affidavit of Lloyd Constantine).

16. Moreover, the fact that an individual witness' own testimony is inconsistent does not mean that the witness intentionally attempted to mislead or deceive the Commission.⁷ Adverse conclusions need not be drawn from such inconsistencies as requested by Time Warner and Cablevision.

17. Similarly, although the Bureau agrees with Time Warner and Cablevision that Liberty knowingly submitted false and incomplete information in the STA requests filed on May 4, 1995, and May 19, 1995, the Bureau does not agree with Time Warner and Cablevision that this infraction requires a finding of misrepresentation and application dismissal. Instead, based on the record as a whole, and taking into account how the admitted unauthorized activations occurred and remedial steps taken by Liberty to ensure that future unauthorized activations do not occur, a monetary forfeiture is the proper sanction.

4. The Presiding Judge Can Render a Decision without Considering the Evidence Presented in the Form of the Internal Audit Report

18. Time Warner and Cablevision argue that the Presiding Judge cannot reach a decision on the pending Joint Motion without examining the evidence in Liberty's Internal Audit Report (Report). TW/CV Proposed Findings ¶ 297. They argue that "the only bits of information all the parties and the Presiding Judge have regarding the contents of the Report" are what is mentioned in Lloyd Constantine's affidavit and the Bureau's and Commission's written denial of Liberty's request for confidentiality, and from this limited information, Time Warner and Cablevision believe that the Report contains relevant information which directly impacts the issues to be resolved in the proceeding. TW/CV Proposed Findings ¶ 297.

⁷ See, e.g., *Vogel-Ellington Corp.*, 41 FCC 2d 1005, 1011 (Rev. Bd. 1973).

19. As explained in its Proposed Findings, the Bureau completely agrees with both the Presiding Judge's, and now Time Warner's and Cablevision's assessment, that the evidence contained in the Report is indeed relevant to the issues in this proceeding. Bureau Proposed Findings ¶¶ 114, 127. But Time Warner and Cablevision sorely miss the important point that the Report is nothing but the documentation of the facts and circumstances surrounding the violations, and not the sole recitation of those facts.

20. For example, Time Warner and Cablevision argue that if the Report contains information about the "errors discovered in Liberty's procedures and the reasons for those mistakes," then this information is "critical to the determination of both the facts and circumstances of Liberty's illegal wiring of interconnected buildings, and its provision of unauthorized microwave service." TW/CV Proposed Findings ¶ 299. The Bureau agrees. However, the Bureau also notes that the parties have expended close to three months last year reviewing documents and responses to interrogatories and deposing numerous witnesses to piece together in painstaking detail the "errors discovered in Liberty's procedures and the reasons for those mistakes." The parties also spent great resources in this limited candor hearing to go over the details once again, concerning these unfortunate incidents in Liberty's operations.

21. Furthermore, the Bureau also notes that Liberty, to its counsel's credit, did not, in any significant manner, withhold responses to questions during these proceedings which may have touched upon information which may be contained in the Report. Thus from reviewing the exhaustive record adequately developed in this proceeding, it is difficult for the Bureau to understand how Time Warner and Cablevision can believe that a gap still exists in the history of

Liberty operations leading up to the violations – a gap which can be filled only by some additional piece(s) of evidence which may be contained in the Report.

22. Time Warner and Cablevision also argue that the Administrative Procedures Act (APA) requires the Presiding Judge to consider the Report as evidence prior to rendering a decision. Specifically, they rely on section 556(d) of the APA, 5 U.S.C. § 556(d), which states a sanction may not be imposed except on consideration of the whole record supported by substantial evidence. TW/CV Proposed Findings ¶¶ 297, 300. Time Warner and Cablevision provide further definition of "substantial evidence" in the context of case precedent, and argue that the Report clearly falls under this definition.

23. The Bureau readily agrees that the information contained in the Report is clearly substantial evidence, and in fact, wish that the document had been introduced into evidence by Liberty in order to have expedited the findings in this proceeding. However, the reality facing all the parties is that the Court of Appeals for the District of Columbia has ordered this agency to withhold disclosing the document. *See* TW/CV Proposed Findings ¶ 298 n.14; Bureau Proposed Findings ¶ 126. As stated in the Bureau's Proposed Findings, this situation is not unlike any other common case where a piece of evidence is simply unavailable to the trier of fact. Bureau Proposed Findings ¶ 129. Thus, the parties must proceed as if this document never existed, and the Presiding Judge must rule on information available in the extensive record which has been closed before him without the Report's inclusion.

B. REPLY TO LIBERTY'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Liberty's Disjointed Licensing Process was the Cause of its OFS Violations

24. Regarding Liberty's Proposed Findings and Conclusions of Law (Liberty's Proposed Findings), the Bureau agrees with the bulk of them. As the Bureau stated in its own Proposed Findings

Although the Bureau is very troubled and puzzled by the deviations in testimony [of Liberty employees and attorneys at the candor hearing], we do not believe that it necessitates a departure from the position taken by the Bureau in the Joint Motion [for Summary Decision].

Bureau Proposed Findings at ¶ 93. Liberty's and the Bureau's position is that Liberty did not intend to violate the Commission's Rules when it activated the captioned 19 microwave paths without Commission approval between November 1994 and April 1995. Also, Liberty took immediate steps to inform the Commission and to install an internal compliance program to ensure that future violations not occur. Liberty supports this position by retelling the events in great detail, not only during that relevant time period, but it also sets the stage for those events by telling what conditions were like at Liberty before then. What went on before were contributing factors for what happened next, Liberty points out.

25. Liberty's first argument in its Proposed Findings is that prior to the compliance program it set up in mid-1995, it had a "disjointed licensing process without proper checks and balances to ensure against violation of the Commission's rules and regulations." There was, in effect, no real continuity between those who started the Commission license applications and compliance work at Liberty with the ones who continued it after a change in personnel. The record in this proceeding fully supports this argument.

26. From May 1993, Liberty admits that Mr. Nourain, the engineer in charge of the microwave department, worked alone, that no one helped him with his administrative work at Liberty, no one supervised him, and no one asked him about the timing of activations on a regular basis. Further, early in 1994, he coordinated the application process with a new attorney at Pepper & Corazzini who was unaware of any tracking or compliance responsibilities on his part, although at least two of Liberty's officials -- Peter Price and Howard Milstein -- believed that such a compliance or monitoring system was in place with Pepper & Corazzini. Liberty Proposed Findings at ¶ 46.

27. The Bureau agrees with Liberty's characterization of this situation as a "disjointed" process, lacking in an informed transition from one set of employees knowledgeable about Commission procedures to a new set of employees who were either uninformed or did not see Liberty's coordination of microwave activation as their responsibility. As stated above, the Bureau accepts these findings of fact as the primary causes for Liberty's OFS violations.

2. Liberty's Principals Did Not Encourage Activation of Microwave Paths Without Authorization

28. Liberty's second argument in its Proposed Findings, that its "principals neither approved nor encouraged the activation of any paths without Commission authorization," refutes Time Warner and Cablevision's efforts to indicate that Liberty had incentives to rush activation before obtaining Commission authorization. These incentives for meeting contractual obligations and for building up the business potential during the time it was negotiating a sale of the company, were certainly issues facing Liberty. The Bureau agrees with Liberty that its witnesses' testimony showed that these incentives did not drive the company to unauthorized activations (Tr.

at 540-41, 594, 1582, 1587), and the Bureau believes the incentives, even if they did exist, are irrelevant to the issues in the limited hearing.

3. Liberty's Assertion that it Disclosed the Facts to the Commission Immediately Upon learning of the Unauthorized Service

29. Liberty's third argument, that Liberty intended to disclose the facts and circumstances surrounding its premature activations as soon as it had command of the necessary information, is one that the Bureau cannot endorse unconditionally. While this may be what Howard and Edward Milstein and Peter Price testified, the Bureau agrees with Time Warner and Cablevision, that their actions belie their position. TW/CV Proposed Findings at ¶ 146. The uncontroverted fact is that some twenty days elapsed between the time Liberty discovered it was operating microwave paths without Commission authorization, and the time it fully informed the Commission of the violations.⁸ The Bureau is not as concerned about the precise number of days, because the Bureau understands and appreciates that Liberty needed this time to conduct an internal investigation into the problem. What concerns the Bureau is the fact that Liberty filed its STA requests during that time, without informing the Commission that those paths for which the STAs were being requested, were already in operation. As the Bureau stated in its Proposed Findings, Liberty did not have to file the STA requests on May 4, 1995; it could have requested them at any later date. What should have been more important to Liberty was to maintain candor with the Commission by informing it of their premature activation of the very paths for which

⁸ Liberty principals have testified that they first learned of their premature activations between April 26th and 28th, 1995. They first informed the Commission of this fact when Liberty filed its Surreply on May 17, 1995.

they were requesting STAs. Liberty failed to do so, and therefore, Liberty deserves a sanction for this failure.

4. Liberty Can Be Relied Upon to Comply With Commission Rules in the Future

30. In its Proposed Findings, Liberty next maintains that it can be relied upon in the future to be in compliance with the Commission's Rules and policies. The Bureau has no reason to doubt this promise. Liberty has admitted its mistakes and has agreed to pay a substantial forfeiture should the Joint Motion be adopted. Also, it has hurt its own business operations. Its Co-Chairman, Howard Milstein, admitted that Liberty inflicted more harm on itself than Time Warner and Cablevision could have ever done. (Tr. at 600). Significantly, the Bureau believes that Liberty can be trusted to fully comply with the Commission's Rules in the future because of the compliance program Liberty established. Under this program, no microwave path may be activated until the compliance officer has a copy of the license for that path. Therefore, in reliance upon its promise of future compliance, the Bureau agrees that the proper sanction is a stiff monetary forfeiture.

31. Liberty also emphasizes in its Proposed Findings that its witnesses' testimony was credible and candid concerning four specific topics: its disjointed license process prior to April, 1995; the lack of intent to violate the Commission's Rules; that the discovery was not earlier than late April; and that it disclosed the premature activations as soon as it had gathered the relevant information.

32. The Bureau has commented, above, on the disjointed license process Liberty carried on prior to its discovery of unauthorized operations. The Bureau agrees that the testimony of the witnesses to this effect is certainly credible.

33. In contrast to that testimony, which was simply, "tell what happened and what went wrong," is the testimony by Liberty's principals that they did not intend to violate the Commission's rules. Intent is subjective, and is usually inferred from actions. On one hand, it is totally self-serving for the witnesses to testify as they did. On the other hand, the question of intent is certainly testimony which the Commission seeks, must weigh and cannot disregard. On balance, the Bureau is persuaded that the principals did not set out to disregard the Commission's Rules. As the Milsteins pointed out, their other businesses are heavily regulated. Their actions in setting up a rigorous compliance program after they discovered their mistakes verify their lack of intent. However, their failing to inform the Commission in their May 4, 1995 submission, the first one after they discovered their mistakes, is a serious shortcoming, which has been addressed above.

5. The Bureau Cannot Agree with Liberty's Argument that the Witnesses Presented Credible Testimony Concerning when they Discovered the Unauthorized Activation of Service

34. The Bureau fails to fully agree and support Liberty's next argument concerning whether the witnesses presented credible testimony on the timing of their discovery of the premature operations, which is the crux of the candor hearing. The Bureau is still troubled by the renditions by all but two of the witnesses which changed rather starkly from their depositions to the hearing. However, the Bureau again states that the changes in the testimony do not rise to a level for the Bureau to abandon its position in the Joint Motion. The Bureau is troubled that Peter Price changed his version of events from his having heard from Liberty counsel about the premature activations through Time Warner's May 5, 1995 Petition to Deny, to having heard from his own staff and then *he* told counsel. The Bureau is also troubled that neither Milstein

brother recalls precisely how and when he was told of the premature activations that last week in April, but they do acknowledge it was earlier than what they had stated in their depositions. Additionally, the Bureau is troubled that none of the principals or Nourain remembered at their depositions the meetings and conference calls that transpired that last week in April. These events surrounding the violations are unique in Liberty's short life, and thus, should have been highly memorable. Furthermore, these events were all triggered by two memoranda⁹ which were not discovered until the eve of the hearing, and the Bureau is troubled by the late disclosure. However, because these documents confirm and corroborate the date that Lloyd Constantine, counsel for Liberty, gave in his September 20, 1995, affidavit (TW/CV Ex. 29) of when Liberty first discovered its mistakes, it is apparent that Liberty was not trying to conceal these two documents. The Bureau thus believes that their late discovery is attributable to negligence rather than any surreptitious activity.

6. Liberty's Conclusions of Law

35. The legal standard on which Liberty bases its Conclusions of Law is found in the *Character Policy Statement*, 102 FCC 2d 1179 (1986). Liberty's statements in its Conclusions go to the ultimate question of whether or not Liberty should be found fit to be a licensee in light of its premature activations, and of the testimony of its witnesses in the instant proceeding. The *Character Policy Statement* emphasizes the two main characteristics expected of Commission licensees -- truthfulness and reliability. Liberty discusses the testimony and actions of its

⁹ April 26, 1995 memorandum from Mr. Nourain to Mr. Edward Milstein (TW/CV Ex. 35) and April 28, 1995, memorandum from Mr. Lehmkuhl to Mr. Nourain (TW/CV Ex. 34).