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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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

In re Applications of	)	WT DOCKET NO. 96-41	
	)		
LIBERTY CABLE CO., INC.	)	File Numbers:	
	)	708777	WNTT370
For Private Operational Fixed	)	708778, 713296	WNTM210
Microwave Service Authorization	)	708779	WNTM385
and Modifications	)	708780	WNTT555
	)	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  
SUPPLEMENTAL PROPOSED FINDINGS OF FACT AND  
CONCLUSIONS OF LAW REGARDING THE AUDIT REPORT**

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November 19, 1997

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## **SUMMARY**

The Bureau has considered the information presented in the Audit Report that was prepared on behalf of Liberty. Based on a thorough analysis, the Bureau believes that the Audit Report substantially comports with the evidence previously developed in this proceeding. Furthermore, the Bureau believes that the Audit Report does not and should not provide any basis for denying the pending Joint Motion for Summary Decision filed by the Bureau and Liberty.

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SUPPLEMENTAL PROPOSED FINDINGS OF FACT AND  
CONCLUSIONS OF LAW REGARDING THE AUDIT REPORT**

The Chief, Wireless Telecommunications Bureau, by his attorneys, and pursuant to the Presiding Judge's *Order*, FCC 97M-185 (released November 10, 1997), hereby submits his Supplemental Proposed Findings of Fact and Conclusions of Law relating to a certain Audit Report prepared on behalf of Liberty Cable Co., Inc.<sup>1</sup>

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<sup>1</sup> Liberty is now known as Bartholdi Cable Company, Inc. However, for clarity, the applicant for the captioned licenses will be referred to by its former name of Liberty.

## I. PROPOSED FINDINGS OF FACT

### A. Background

1. On August 4, 1995, pursuant to Section 308(b) of the Communications Act of 1934, as amended, the Bureau directed a letter of inquiry to Liberty requesting Liberty to produce a certain internal Audit Report that had previously been prepared on Liberty's behalf. The Audit Report related to the circumstances leading to the unauthorized activation of certain of Liberty's private operational fixed microwave service (OFS) paths. Liberty submitted the Audit Report to the Bureau on August 14, 1995, accompanied by a request for confidentiality.

2. By letter, dated September 13, 1995, the Bureau denied Liberty's request for confidentiality and ordered Liberty to provide a copy of the Audit Report to Time Warner Cable of New York City and Paragon Cable of Manhattan (collectively, Time Warner), which had earlier filed petitions to deny Liberty's applications for certain new OFS paths. The Commission subsequently affirmed the Bureau's decision on January 26, 1996. *Liberty Cable Co., Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 2475 (1996). Thereafter, Liberty appealed the Commission's decision to the United States Court of Appeals for the District of Columbia Circuit.

3. During the pendency of Liberty's appeal before the Court of Appeals, the Commission commenced the instant proceeding against Liberty. *Hearing Designation Order and Notice of Opportunity for Hearing*, 11 FCC Rcd 14133 (1996) (*HDO*). Shortly thereafter, the Court of Appeals stayed the Commission's Order requiring release of the Audit Report. *Liberty Cable Co., Inc. v. FCC*, No. 96-1030 (D.C. Cir. April 24, 1996). The stay prevented any inquiry during

discovery into the substance of the Audit Report. The stay also prevented the Audit Report from being introduced into the evidentiary record in the instant proceeding.

4. On July 15, 1996, while the stay was still in effect, the Bureau and Liberty filed a Joint Motion for Summary Decision (Joint Motion). The Joint Motion requested the Presiding Judge to grant Liberty's captioned applications and to assess a forfeiture penalty in the amount of \$790,000 against Liberty. The evidence upon which the Bureau relied in supporting the Joint Motion was derived from depositions and documentary materials amassed during discovery. Because of the stay, the Bureau did not rely on information contained in the Audit Report.

5. After the Joint Motion was filed, certain additional information pertaining to the designated issues was disclosed by Liberty which necessitated further depositions. Based on the information derived from this additional discovery, the Presiding Judge deferred ruling on the Joint Motion and ordered a limited hearing on the narrow question of when anyone at Liberty first learned that the company was activating microwave paths without Commission authorization. *Order*, FCC 96M-265 (released December 10, 1996). Pursuant to the Presiding Judge's *Order*, FCC 97M-12 (released January 31, 1997), on February 28, 1997, the parties filed their respective Proposed Findings of Fact and Conclusions of Law, relating to this narrow question (February 28 Findings).

6. Thereafter, further depositions were taken because of the disclosure of additional new evidence. The information derived from this further discovery precipitated yet another limited hearing in May 1997. On June 11, 1997, the parties supplemented their Proposed Findings of Fact and Conclusions of Law (June 11 Findings). On September 11, 1997, the Presiding Judge issued a partial ruling on the long pending Joint Motion, resolving in the Bureau and Liberty's

favor, the designated issues relating to hardwire interconnection of buildings. *Order*, FCC 97M-154 (released September 11, 1997). In addition, the Presiding Judge assessed a forfeiture penalty of \$80,000 for Liberty's admitted violations of the Communications Act. *Id.* at 21-22; *see also HDO* ¶¶ 10-13, 30.

7. On June 3, 1997, the Court of Appeals upheld the Commission's decision denying confidential treatment of the Audit Report. *Bartholdi Cable Co., Inc. v. FCC*, 114 F.3d 247 (D.C. Cir. 1997). On June 18, 1997, the Presiding Judge ruled that based on the Court of Appeals' decision, the hearing record in this proceeding shall be held open for consideration of the Audit Report. *Order*, FCC 97M-107 (released June 18, 1997). On September 16, 1997, the Audit Report was made available to all of the parties in the instant proceeding, and on November 5, 1997, the Presiding Judge admitted the Audit Report into the record. (Tr. at 2357)

#### **B. The Audit Report is Substantially in Accord with the Record**

8. An analysis of the Audit Report reveals that the information contained therein is substantially in accord with the evidentiary record that had already been developed in this proceeding. Thus, for example, the record evidence in this proceeding previously had identified 19 buildings to which Liberty activated service before obtaining Commission authorization. *HDO* ¶¶ 7, 15; Joint Motion ¶ 90. This fact is confirmed in the Audit Report, which concludes that "There are currently 19 microwave paths being used . . . without specific FCC authorization." Audit Report at 3.

9. The record evidence also established that during the period in which Liberty's engineering consultant, Joseph Stern of Stern Telecommunications Corp., handled certain aspects of obtaining the necessary licenses, no buildings were activated unless Mr. Stern had obtained prior Commission authorization. Joint Motion ¶¶ 22-23. This fact is confirmed in the Audit Report which states, "Mr. Stern monitored the licensing process closely and specifically reconciled the applications granted with the actual buildings that were to receive service. Moreover, as a matter of operational policy, Mr. Stern did not initiate service on a microwave path until he received specific verification of FCC authorization." Audit Report at 5.

10. The evidentiary record in this proceeding further demonstrated that the primary cause of Liberty's premature activations was the faulty assumptions of Liberty's poorly supervised Director of Engineering, Behrooz Nourain. Specifically, the record evidence established that Mr. Nourain: (a) remained essentially unsupervised; (b) focused on the technical aspects of his position and ignored the legal aspects; (c) mistakenly believed that outside lawyers were handling the legal and administrative aspect of obtaining licenses; (d) assumed that licenses were issued as a matter of course within a particular period of time, and (e) activated service to buildings without first obtaining proper Commission authorization. Joint Motion ¶¶ 30-32; *see also id.*

¶ 92. These facts are confirmed by the Audit Report, which states, at pages 8 through 10:

Mr. Nourain did not wait to receive official documentation or otherwise verify grants for individual microwave paths before instituting service.

Mr. Nourain appears to have received little supervision regarding the licensing process.

According to Mr. Nourain, at his previous job, in-house counsel had taken over the responsibility for licensing once the engineering part of microwave path coordination was complete. Mr. Nourain,

despite his instruction to the contrary by Mr. Stern, assumed the procedure would be the same at Liberty, and he relied on outside counsel to deal with licensing matters.

[Mr. Nourain] assumed that STAs would be granted for the microwave paths within 45 days after he directed Comsearch to issue coordination notification to potentially affected parties (although in some instances he does not appear to have waited even 45 days). This rule of thumb included 30 days for the notification process, about five days for P&C to file for an STA and about 10 days for the FCC to grant an STA. Mr. Nourain could state no credible basis for his assumptions.

Mr. Nourain activated microwave paths within 45 days (and some buildings in less than 45 days) without specific knowledge as to whether the paths had been approved by the FCC.

Audit Report at 8-10.

11. The record evidence further established that Liberty's President, Peter Price, learned of the violations around the last week of April 1995<sup>2</sup> and that he neither directed nor was aware of Liberty's premature activations at the time they occurred. *See* Bureau's February 28 Findings at 9; *see generally* Joint Motion ¶¶ 22-26. These facts are consistent with information provided in the Audit Report. Specifically, the Audit Report states, "While Mr. Nourain believes that he told Mr. Price that the Company was rushing and might not get approvals in time, Mr. Nourain does not state that he specifically informed Mr. Price or other senior management that service was

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<sup>2</sup> Bureau's February 28 Findings at 18. As indicated by the Bureau in its February 28 Findings, however, during various depositions, Mr. Price identified different dates on which he claimed to have first learned of the violations, including January 1995, the first quarter of 1995, April 1995, and May 1995. *Id.* at 15. Mr. Price later appears to change his testimony at the candor hearing, indicating that he first learned of the premature activations during the last week in April 1995. *Id.* at 18, 20; *see also* Joint Motion ¶ 36 ("At the end of April 1995, in the course of ongoing litigation over Time Warner's petitions to deny or condition grant of Liberty's license applications, Liberty discovered that the company had initiated service in some buildings without prior authorization from the Commission").

being instituted on some microwave paths without FCC authorization." Audit Report at 10-11. The Audit Report further states that Mr. Price was unaware that "service was otherwise being activated prematurely." *Id.* at 13.

12. The record that was developed in this case also established that on April 20, 1993, Ms. Richter, in her capacity as Liberty's communications counsel, drafted a letter to Liberty for the purpose of detailing "the parameters within which construction and operation of new paths and new stations is permissible." *See* TW/CV Ex. 51 at 1; *see also* Bureau's June 11 Findings at 4. The record evidence indicated that Ms. Richter believed that Mr. Nourain did not have a full grasp of the Commission's rules and that his confusion could lead to an unauthorized activation of a microwave facility. *Id.* The record evidence further established that at the time she drafted the letter, Ms. Richter did not have any concern that unauthorized activations had already occurred. *Id.* at 5. The Audit Report is consistent with the record evidence developed on this issue, as it characterizes Ms. Richter's correspondence to Liberty as "a letter which indicated generally the importance of complying with FCC procedures." Audit Report at 11.

13. The record evidence demonstrated that, while Time Warner initially revealed to the Commission the premature activation of service to two of the buildings at issue, Liberty informed the Commission of another 17 instances of premature activation. Bureau's February 28 Findings at 4; *see also* Joint Motion ¶¶ 36-39. The Audit Report confirms this fact, stating, "It should be noted that only two of the 19 buildings were discovered as a result of petitions to deny filed by Time-Warner Cable. The remaining 17 buildings were discovered as the result of the Company's internal investigation." Audit Report at 4.

14. The evidence in this proceeding further established that Liberty suspended billing to its subscribers in buildings that were prematurely activated until the status of its licensing was properly resolved with the Commission. Joint Motion ¶ 43. The Audit Report similarly notes that "None of the subscribers in these 19 buildings is now being charged for service, resulting in a revenue loss of more than \$50,000 a month to Liberty." Audit Report at 4. The Audit Report further states that "Liberty stopped charging for service when it was discovered that the paths used to deliver service were not specifically authorized by the Commission." *Id.* at 4, n.6. Mr. Price's affidavit filed with the Audit Report also indicates, "Liberty is not charging subscribers in any of the buildings receiving unauthorized service for the programming services they receive." Audit Report, Affidavit of P. Price, ¶ 4.

15. The record evidence indicated that Liberty established a compliance program which was developed by one of its law firms, to insure that there would be no further non-compliance with applicable laws, rules and regulations. Joint Motion ¶¶ 44-45, Jt. Ex. 12. The Audit Report, too, states that "the investigating firms were asked to prepare a compliance program to ensure Liberty's compliance with FCC licensing rules." Audit Report at 3. The Audit Report further states that "the investigating firms have prepared an FCC Licensing Compliance Program, which is being implemented by the Company." Audit Report at 17. To bolster this claim, one of the exhibits included with Liberty's Audit Report describes the "License Acquisition Procedures to be Followed by Liberty," including "General Rules and Procedures," "Licensing Steps," and "Training Program." Audit Report, Ex. A.

### **C. New Information Set Forth in the Audit Report**

16. The Audit Report identifies 74 additional microwave paths -- in addition to the 19 that are subject to the instant proceeding -- which were activated by Liberty without obtaining prior authorization from the Commission. Audit Report at Ex. B (Chart 3). Unlike the 19 paths at issue here, however, it appears that these additional paths, while initially operated without authorization, were fully authorized by the Commission between 1994 and 1995. Audit Report at 4, Ex. B (Chart 3). The Audit Report suggests that these earlier additional violations occurred for the same reason that led to the nineteen violations at issue in this proceeding, i.e., because of certain faulty assumptions of Liberty's poorly supervised Director of Engineering, Behrooz Nourain. Audit Report at 4.

### **D. Discrepancies Between the Audit Report and the Record**

17. The record evidence indicated that Liberty's Executive Vice President and Chief Operating Officer, Bruce McKinnon, had no knowledge of the violations while he was employed at Liberty. TW/CV Ex. 41 (McKinnon May 14, 1997, Dep. Tr.). At his second deposition, Mr. McKinnon testified as follows:

Q. Were you aware of any instance of Liberty operating a microwave path before it had a license or other authorization to do so during the time you were at Liberty?

A: No.

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*Id.* at 23:20-24. By contrast, the Audit Report states that Mr. McKinnon was aware that some paths were being activated without Commission licenses, but that he understood that such operation was authorized under the "Hughes Aircraft's experimental license."<sup>3</sup> According to the Audit Report, Mr. McKinnon did not relay this information to Liberty management officials, as it states:

[I]t appears that Mr. McKinnon was aware from Mr. Nourain that some buildings were being activated without a specific FCC license or [Special Temporary Authority]. Mr. McKinnon did not inform Mr. Price or other Liberty management officials. Mr. McKinnon stated that he did not believe that the absence of a specific license or STA was a problem because he believed Liberty could operate on the authority of Hughes Aircraft's experimental license until the FCC specifically granted the microwave paths. Mr. McKinnon said that Liberty did not charge subscribers for service on these paths and, therefore, was acting in compliance with Hughes' authority. The investigation disclosed that this was true in only some of the instances of unauthorized service.

Audit Report at 11.

18. The record evidence demonstrated that Ms. Richter did not learn of the premature activations when they occurred. TW/CV Ex. 55 (Richter Dep. Tr.) at 121:14-21. The evidence concerning Ms. Richter's knowledge of the premature activations and when she learned of the violations was obtained on May 28, 1997, in a limited hearing during which the Presiding Judge was able to observe her demeanor and credibility. The probative evidence derived at the hearing

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<sup>3</sup> Audit Report at 11-13. According to the Audit Report, a company named Hughes Microwave provided Liberty with a experimental "Test License" which authorized "'Liberty to operate the 18 GHz equipment at any location, at any azimuth, from any type of antenna, for test purposes, on the condition that transmission would be discontinued if any interference is noted. The other condition[s] of operating are that Liberty keep a log of the 'tests' and not enter into 'commercial service' with transmissions made under the test license.'" *Id.* at 6, Ex. C at 3 (emphasis in original).

on this issue is summarized in the Bureau's June 11 Findings. By contrast, the Audit Report indicates that "[a]t some point in April 1993 during a conversation between Mr. Nourain and the P&C attorney handling Liberty's licensing, the P&C attorney *appears to have become aware* that service had been activated on certain paths without specific authorization. However, P&C never communicated this fact to any Liberty officer." Audit report at 11 (emphasis added). The Audit Report is devoid of information concerning the evidentiary basis for the statement. *Id.*

19. The record evidence also established that Liberty's General Manager, Anthony Ontiveros, learned of the improper activations in late April 1995. Bureau's February 28 Findings at 25. Mr. Ontiveros testified to this fact at the candor hearing, where the Presiding Judge had a full opportunity to assess the credibility of the witness. By contrast, the Audit Report states that "Mr. Ontiveros, the Company's General Manger, learned at some point in late 1994 or early 1995 that one or two buildings had been improperly activated. Mr. Ontiveros indicated that he raised the issue of unrealistic time constraints on the activation of service to a particular building at a meeting in December 1994. However, Mr. Ontiveros said that he did not tell anyone in the management structure of the Company that microwave paths had been activated without specific license or STA." Audit Report at 13-14.

## **II. PROPOSED CONCLUSIONS OF LAW**

20. The Audit Report supports the principal conclusions set forth in the Joint Motion. Thus, both the Audit Report and Joint Motion substantially conclude that (a) Liberty prematurely activated radio service to 19 buildings primarily because of faulty assumptions of its poorly

supervised Director of Engineering; (b) Liberty's violations, albeit repeated, were committed without the knowledge of Liberty's senior principals and officers; (c) upon discovery of the violations, Liberty attempted to promptly address the problems; (d) Liberty voluntarily disclosed to the Commission 17 additional violations not discovered by Time Warner; and (e) Liberty has established a compliance program that was designed to avoid any similar future violations. *See* ¶¶ 8, 10, 13-15, *supra*.

21. The additional evidence contained in, or apparent discrepancies created by, the Audit Report do not raise any new issues of material fact that require denial of the Joint Motion. First, the 74 additional premature activations identified in the Audit Report appear to have occurred for the same reasons that led to the 19 violations at issue in the instant proceeding, i.e., because of certain faulty assumptions of Liberty's poorly supervised Director of Engineering. *See* ¶ 16, *supra*. As set forth fully in the Joint Motion, as well as in other Bureau pleadings, the violations committed under these particular circumstances do not justify a finding that Liberty is unqualified to be a licensee. *See* Bureau's February 28 Findings at 10. Rather the appropriate remedy is for Liberty to pay a substantial forfeiture for its repeated violations. *Id.* The Bureau recommended that a severe penalty in the amount of \$1,090,000<sup>4</sup> is an appropriate forfeiture in this matter. *See* Bureau's February 28 Findings at 40-41. The Bureau believes that the additional violations revealed in the Audit Report may warrant an increase in the forfeiture amount assessed against Liberty.

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<sup>4</sup> In the Joint Motion, the Bureau requested the Presiding Judge to assess a total forfeiture of \$790,000. Joint Motion ¶¶ 88, 110. In its February 28 Findings, the Bureau requested that an additional \$300,000 in forfeiture be assessed against Liberty for its apparent violations of the Commission's disclosure rules. Bureau's February 28 Findings at 40-41.

22. Second, the Audit Report's information relating to Mr. McKinnon does not alter the conclusions reached in the Joint Motion. While the Audit Report seems to suggest that Mr. McKinnon was aware that some paths were being activated without Commission licenses, the Audit Report further states that Mr. McKinnon was under the impression -- albeit an incorrect one -- that such operations were authorized under the Hughes Aircraft experimental license. See ¶ 17, *supra*. As such, the Audit Report does not undermine the Bureau's prior conclusion that no principal or officer of Liberty was aware of, encouraged, or condoned the violations that occurred.

23. Third, the Audit Report's cryptic reference -- that a Pepper and Corazzini attorney "appears to have become aware" that premature activation occurred -- does not contradict any material issue of fact established previously in this proceeding. See ¶ 18, *supra*. Even assuming *arguendo* that this statement were true, the Audit Report makes clear that "P&C [Pepper and Corazzini] never communicated this fact [about the premature activations] to any Liberty officer." *Id.*; Audit Report at 11.

24. Fourth, the Audit Report found that Anthony Ontiveros, Liberty's General Manager, learned that one or two paths were improperly activated in either late 1994, or early 1995. See ¶ 19, *supra*. Even assuming *arguendo* that this information is reflected accurately in the Audit Report,<sup>5</sup> no material issue of fact is created. Mr. Ontiveros is neither a principal nor officer of

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<sup>5</sup> By making this argument the Bureau is not suggesting that Mr. Ontiveros misrepresented facts before the Commission. To the contrary, the Bureau believes that Mr. Ontiveros was a candid and truthful witness.

Liberty. The Commission's *Character Policy Statement*<sup>6</sup> looks primarily to the actions of principals and officers, not employees.<sup>7</sup> There is nothing in the Audit Report which suggests that Liberty's owners (Howard and Edward Milstein) or president (Peter Price) had any knowledge of the premature authorization of service prior to April 1995. To the contrary, the Audit Report provides further support that these individuals did *not* know about the illegal provision of service until that time. Moreover, Audit Report specifically states that Mr. Ontiveros did not disclose the information to Liberty management. *See* ¶ 19, *supra*. Accordingly, regardless of what conclusions are drawn from the Audit Report concerning when Mr. Ontiveros learned of Liberty's violations, because the Audit Report confirms the fact that Liberty's principals and officers were unaware of any violations until April 1995, the relief requested in the Joint Motion is appropriate.

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<sup>6</sup> *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1210 (1985), *recon. denied*, 1 FCC Rcd 421 (1986), *modified*, 5 FCC Rcd 3252 (1990), *recon. granted in part*, 6 FCC Rcd 3448 (1991) (*Character Policy Statement*).

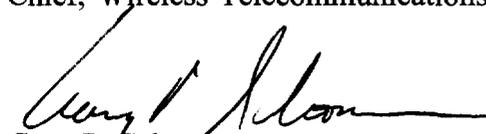
<sup>7</sup> *See, e.g., The Lutheran Church/Missouri Synod*, 12 FCC Rcd 2152 (1997) (misconduct of one individual without the involvement of top management did not warrant renewal denial but instead only a forfeiture).

### III. ULTIMATE CONCLUSIONS

For the foregoing reasons, the Chief, Wireless Telecommunications Bureau, believes that the Audit Report fails to provide any basis for rejection of the Joint Motion for Summary Decision filed by the Bureau and Liberty. Accordingly, the Bureau requests that the Joint Motion be granted.

Respectfully Submitted,

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November 19, 1997

**CERTIFICATE OF SERVICE**

I, Mark L. Keam, of the Wireless Telecommunications Bureau, certify that I have, on this 19th day of November, 1997, caused to be transmitted by facsimile or hand delivery and sent by regular First Class United States mail, copies of the foregoing "WIRELESS TELECOMMUNICATIONS BUREAU'S SUPPLEMENTAL PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING THE AUDIT REPORT," to:

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