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

DEC - 2 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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 REPLY TO  
TIME WARNER CABLE OF NEW YORK CITY AND PARAGON  
COMMUNICATIONS' SECOND SUPPLEMENTAL PROPOSED  
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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 Reply to the Second Supplemental Proposed Findings of Fact and Conclusions of Law (Time Warner's 2nd Supp. Findings) filed by Time Warner Cable of New York City and Paragon Communications (collectively, Time Warner) on November 19, 1997.<sup>1</sup>

<sup>1</sup> On the same day, Bartholdi Cable Company, Inc., formerly known as Liberty Cable Co., Inc. (Liberty), also filed its Supplemental Proposed Findings of Fact and Conclusions of Law based on the evidence provided in an internal Audit Report (TW/CV Ex. 67). Because the Bureau, for the most part, agrees with Liberty's pleading, this pleading is captioned the Bureau's reply to Time Warner's arguments. However, the Bureau will indicate those instances where it disagrees with arguments raised in Liberty's Supplemental Proposed Findings.

*DSG*

### **A. The Audit Report Is Not Decisionally Significant**

1. In its Second Supplemental Proposed Findings, Time Warner argues that the Audit Report is decisionally significant because it demonstrates Liberty's history of non-compliance with the Commission's rules, and lack of credibility of Liberty's case presented in the instant proceeding. *See generally* Time Warner's 2nd Supp. Findings. Based on the facts detailed in the Audit Report concerning the extent of Liberty's previous unauthorized activation of microwave paths, Time Warner concludes that "Liberty has engaged in a pattern and practice of *disregarding* FCC regulations since 1992." *Id.* at 4 (emphasis in original).

2. While the Bureau certainly agrees that the number of paths which the Audit Report indicates were commenced without prior authorization is considerable, the addition of these new facts to the record in this proceeding does not support disqualification of Liberty. The issue before the Presiding Judge remains the decision to grant the Bureau's and Liberty's Joint Motion for Summary Decision (Joint Motion) filed on July 15, 1996. Furthermore, as set forth in the Bureau's Supplemental Proposed Findings of Facts and Conclusions of Law Regarding the Audit Report (Bureau's Supp. Findings), the facts and circumstances surrounding Liberty's unauthorized activation of these previous paths are the same as what caused Liberty to activate the pending 19 microwave paths which are the subject of this proceeding. Bureau's Supp. Findings at 5-6, 11-12. As the Bureau and Liberty argued in the Joint Motion and again in each's supplemental proposed findings, the microwave paths were activated because of faulty assumptions of Liberty's poorly supervised Director of Engineering, Behrooz Nourain. Joint Motion ¶¶ 30-32, Bureau Supp. Findings at 5-6. This explanation is fully supported by the Audit Report. Audit Report

at 8-10. Therefore, the Bureau does not believe the Audit Report adds significantly to the decision before the Presiding Judge.

3. Time Warner also argues that because Liberty ignored clear instructions from its engineering consultant and from its communications counsel on licensing procedures in the past, it cannot be relied upon to comply with the Commission's Rules in the future. Time Warner points out that Joseph Stern, Liberty's microwave consultant, described the licensing process to Mr. Nourain, when Liberty's engineering responsibilities were passed from Mr. Stern to Mr. Nourain. Time Warner's 2nd Supp. Findings at 6-7. Time Warner additionally states that Jennifer Richter, Liberty's communications counsel, detailed the parameters within which activation of microwave paths is permitted in a letter to Bruce McKinnon, Liberty's Executive Vice President. *See* TW/CV Ex. 51; Time Warner's 2nd Supp. Findings at 7-8.

4. The Bureau does not dispute the fact that Mr. Stern discussed licensing procedures with Mr. Nourain or that Ms. Richter outlined licensing procedures in a letter which Mr. Nourain received. However, nothing in either of those events refutes the basic underlying argument of the Joint Motion and the Bureau's Supplemental Proposed Findings 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; Bureau's Supp. Findings at 5. The two circumstances referred to by Time Warner certainly indicate that Mr. Nourain *should*

*have* known better; but the facts in the record in no way demonstrate that Mr. Nourain, or anyone else at Liberty, was aware of the unauthorized activations when they occurred.

5. Moreover, as fully detailed in the Audit Report, Liberty has initiated a Compliance Program to ensure that no additional Commission rule violations occur again. The Compliance Program requires that no path may be activated until the Chief Engineer receives an FCC Path Checklist from the FCC Compliance Officer indicating that an authorization has been received. Audit Report Ex. A; Joint Motion ¶¶ 44-45. The Path Checklist, which must be signed by a person other than the one activating the path, ensures that no violations can occur because of faulty assumptions made by a single person. Because of Liberty's Compliance Program, Liberty *can* be relied upon to comply with the Commission's rules in the future.

6. Time Warner also asserts that the Audit Report contains findings that contradict the testimony gained in this proceeding. Time Warner argues that the Audit Report states that Anthony Ontiveros, Liberty's General Manager, Bruce McKinnon, Liberty's Executive Vice President, as well as Liberty's communications counsel, all learned of the illegal operations prior to April 1995 as Liberty has asserted in the instant proceeding. Time Warner's 2nd Supp. Findings at 9-11. The Bureau acknowledges that there are indeed minor discrepancies between the testimony of individuals in this proceeding and the conclusions detailed in the Audit Report. However, the discrepancies listed by Time Warner and the Bureau's positions thereto were already discussed in the Bureau's Supplemental Proposed Findings. *See* Bureau's Supp. Findings at 9-11, 12-15. Here, the Bureau will only emphasize that neither Mr. Ontiveros, nor Ms. Richter

are officers or principals of Liberty.<sup>2</sup> While Liberty is responsible for the actions of its employees, this case would be more serious if officers or principals knew of the misconduct. The Commission's *Character Policy Statement*<sup>3</sup> does not as closely scrutinize their actions as it does the actions of officers and principals.

7. Additionally regarding Mr. McKinnon, as the Bureau already detailed in Supplemental Proposed Findings, although the Audit Report does state that it appears Mr. McKinnon was aware that some microwave paths were activated without a license, the Audit Report does *not* state that Mr. McKinnon was ever aware of any violation of the Communications Act or the Commission's Rules. To the contrary, the Audit Report states that Mr. McKinnon believed that Liberty "was acting in compliance with [the] Hughes' [experimental] authority." Audit Report at 11. Therefore, Time Warner's argument that the Audit Report contains a discrepancy with the record evidence regarding Mr. McKinnon's knowledge is incorrect because the Audit Report does not conclude that Mr. McKinnon knew of any illegal activities taking place at Liberty. The Audit Report simply provides fundamental details about the facts and circumstances of the violations, and it is consistent with the Bureau's and Liberty's position in the Joint Motion.

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<sup>2</sup> In its Supplemental Proposed Findings, Liberty argues that Mr. McKinnon is not an officer of Liberty. Liberty's Supp. Findings at 12-13. The Bureau does not accept this proposition because Mr. McKinnon was clearly the "executive vice president" of Liberty, to whom Mr. Nourain, the Director of Engineering, reported to. Liberty is not a large company with a plethora of vice presidents, and as one of only two executives with management responsibilities at that time (the other being Peter Price, the President), the Bureau believes Mr. McKinnon is correctly deemed to have been an officer of Liberty.

<sup>3</sup> *Policy Regarding Character Qualifications in Broadcast Licenses*, 102 FCC 2d 1179 (1986), *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*).

**B. The Audit Report Does Not Shed any Light on whether Liberty Made  
Material Misrepresentations to the Commission**

8. In its Second Supplemental Proposed Findings, Time Warner argues that Liberty has made material misrepresentations to the Commission. Specifically, Time Warner argues that Liberty's statement that it "has been Liberty's pattern and practice to await a grant of either a pending application or request for STA prior to making a microwave path operational" is false. Time Warner Supp. Proposed Findings and Conclusions quoting from Liberty's May 17, 1995, Surreply. Based upon the information in the Audit Report, the Bureau agrees that this statement is false. However, that does not mean that Liberty has made material misrepresentations.

9. The statement referenced by Time Warner was made by Liberty in its May 17, 1995, Surreply. Therefore, Liberty made this statement three months prior to the completion of the Audit Report. The May 17, 1995, Surreply filed by Liberty was filed in part to disclose to the Commission sites in which Liberty commenced service without authorization. The Surreply, therefore, revealed the extent of Liberty's violations as Liberty knew at that time. It was not until the investigation leading to the Audit Report did Liberty establish the number of violations that had occurred. Accordingly, at the time Liberty made the statement that it had been its practice to obtain a license prior to activating a path, it was making a statement that it believed at the time to be true. An "essential element" of misrepresentation is an "intent to deceive."<sup>4</sup>

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<sup>4</sup> *Fox Television Stations, Inc.*, 10 FCC Rcd 8452, 8478 (1995); *Weyburn Broadcasting Ltd. Partnership v. FCC*, 984 F.2d 1220, 1232 (D.C. Cir. 1993); *Calvary Educational Broadcasting Network, Inc.*, 9 FCC Rcd 6412, 6415 (Rev. Bd. 1994).

Without any intent upon Liberty to convey false information, the Commission cannot find that Liberty has made any material misrepresentation in its Surreply.<sup>5</sup>

10. While it is true that Liberty failed to submit a retraction or correction of the statement regarding its pattern and practice after it learned that the statement was not technically correct, Liberty did submit the Audit Report which clearly demonstrated to the Commission Liberty's history of activating paths without prior authorization. Therefore, it cannot be said that Liberty intended to mislead the Commission into believing that the paths at issue here are isolated events in the company's long history of compliance. Moreover, the voluntary disclosure of facts to the Commission is evidence that a party did not intend to deceive the Commission.<sup>6</sup> Based on these facts, the Bureau does not support a finding that Liberty made material misrepresentations.

11. In its Second Supplemental Proposed Findings, Time Warner also incorrectly speculates that because the Audit Report concludes that Mr. McKinnon knew about premature operations, circumstantial evidence exists that Mr. Price knew of the illegal operations as well. Time Warner's 2nd Supp. Findings at 15. This argument ignores both the nature of Mr. McKinnon's purported knowledge and other specific findings of the Audit Report concerning Mr. Price. As stated above, the Audit Report does not find that Mr. McKinnon knew of illegal operations, but instead, indicates only that it appears he knew some paths were not licensed, but

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<sup>5</sup> The Commission has defined misrepresentation as "an intentional misrepresentation of fact intended to deceive." *Swan Creek Communications, Inc. v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994), quoting *Silver Star Communications-Albany, Inc.*, 3 FCC Rcd 6342, 6349 (Rev. Bd. 1988).

<sup>6</sup> See, *Superior Broadcasting of California*, 94 FCC 2d 914 (Rev. Bd. 1983).

were nonetheless authorized pursuant to the Hughes' experimental license.<sup>7</sup> Therefore, it is not necessarily true that it was likely for Mr. McKinnon to have discussed this issue with Mr. Price. Because Mr. McKinnon assumed, although incorrectly, that Liberty was operating legally within the parameters of an experimental authorization, there was probably nothing for Mr. McKinnon to discuss with Mr. Price.

12. Moreover, the Audit Report specifically concludes that Mr. Price did not know about the premature activations when they were occurring, and the Report specifically states that Mr. McKinnon did in fact inform Mr. Price about his beliefs concerning Commission authorizations. Audit Report at 11, 12.

**C. The Documents Attached to the Audit Report Should Have Been Disclosed Earlier**

13. Time Warner, in its Second Supplemental Proposed Findings and Conclusions asserts that the documents attached to the Audit Report should have been disclosed earlier, and that their disclosure at this time is further evidence of Liberty's abuse of the discovery process. Although the Bureau believes that Liberty's compliance with discovery requests and orders in this proceeding is far from exemplary, the documents attached to the Audit Report were not within the scope of any prior document request. The Request for the Production of Documents submitted by the Bureau upon Liberty on April 3, 1996, specifically limited in time and scope the documents relating to the captioned paths and to documents created between January 1, 1993, and the date of the request. None of the attachments to the Audit Report fall within these

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<sup>7</sup> The fact that Mr. McKinnon's assumption regarding the Hughes' experimental authority is ultimately incorrect is not relevant to the Bureau's argument. The issue here is whether the witness was truthful in his testimony in this proceeding.

limitations. Therefore, Liberty was not required to have produced the documents pursuant to initial document requests.

**D. Liberty's Principal's Knew in 1993 that Liberty Activating Paths Without Authorization**

14. Time Warner additionally argues that because Mr. McKinnon was a principal of Liberty and because the Audit Report concluded that Mr. McKinnon was aware of the unauthorized activation of service, Liberty cannot claim that none of its principals were aware prior to April 1995 of the violations. As the Bureau argues in Section B, above, the Audit Report does *not* conclude that Mr. McKinnon was aware of any violations. Therefore, although the Bureau agrees that Mr. McKinnon was a principal of Liberty, Time Warner's argument that a principal knew of violations in 1993 is flawed. The record in this proceeding, including the Audit Report, establishes that no Liberty principal was aware of unauthorized provision of microwave service prior to April 1995.

For the foregoing reasons, the Chief, Wireless Telecommunications Bureau, respectfully requests that the Joint Motion for Summary Decision be granted.

Respectfully Submitted,

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December 2, 1997

**CERTIFICATE OF SERVICE**

I, Mark L. Keam, of the Wireless Telecommunications Bureau, certify that I have, on this 2nd day of December, 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 REPLY TO TIME WARNER CABLE OF NEW YORK CITY AND PARAGON COMMUNICATIONS' SECOND SUPPLEMENTAL PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW," to:

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