

DOCKET FILE COPY ORIGINAL

ORIGINAL
RECEIVED

DEC 2 - 1997

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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In Re Applications Of	)	WT DOCKET No. 96-41	
)		
	)	File Nos.:	
LIBERTY CABLE CO., INC.	)	708777	WNTT370
	)	708788, 713296	WNTM210
For Private Operational Fixed	)	708779	WNTM385
Microwave Service Authorization	)	708780	WNTM555
and Modifications	)	708781, 709426, 711937	WNTM212
	)	709332	NEW
New York, New York	)	712203	WNTW782
	)	712218	WNTY584
	)	712219	WNTY605
	)	713295	WNTX889
	)	713300	NEW
	)	711325	NEW

To: Administrative Law Judge Richard L. Sippel

**SUPPLEMENTAL PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW OF BARTHOLDI CABLE COMPANY, INC.
REGARDING THE INTERNAL AUDIT REPORT IN REPLY**

CONSTANTINE & PARTNERS
Robert L. Begleiter
Eliot Spitzer
Yang Chen
909 Third Avenue
New York, New York 10022

WILEY, REIN & FIELDING
Robert L. Pettit
Bryan N. Tramont
R. Paul Margie
1776 K Street, N.W.
Washington, D.C. 20006

December 2, 1997

Number of Pages: 14
Date: 12/2/97

OLG

TABLE OF CONTENTS

	<u>Page</u>
SUMMARY.....	i
I. THE REPORT DOES NOT ALTER LIBERTY'S PROPOSED FINDINGS.....	2
II. THE REPORT DOES NOT AFFECT LIBERTY'S SUPPLEMENTAL CONCLUSIONS OF LAW.....	5
III. TIME WARNER'S OTHER ARGUMENTS LACK MERIT.....	8
IV. CONCLUSION.....	10

SUMMARY

As set forth by both Liberty and the Wireless Bureau, the Report's admission into evidence adds nothing of decisional significance to the extensive record that has been developed by the parties over the past nineteen months. The Report does not alter the decisionally significant facts of this case: (1) Liberty had a disjointed licensing process prior to mid-1995, (2) Liberty's principals neither knew of, approved nor encouraged the premature activation of any paths, (3) premature activations became known to Liberty's principals no earlier than April 27, 1995, (4) Liberty has always intended to disclose the facts and circumstances of premature activations to the Commission and (5) Liberty can be relied upon to remain compliant with Commission rules. The internal audit report is consistent with these conclusions. Time Warner, despite the vast record to the contrary, attempts to manufacture discrepancies between the fact-finding in this case and the Report. In effect, Time Warner attempts to ignore the record to reach its desired result; such a strategy should not be indulged. In short, it is clear that the record taken as a whole – including the Report – continues to support granting the Joint Motion.

Similarly, the Report does not alter Liberty's proposed conclusions of law. It remains true that Liberty has never intended to deceive the commission and therefore is not liable for disqualification for misrepresentation or lack of candor. It also remains true that none of Liberty's principals were aware of the premature activations prior to April 27, 1995. Further, in analogous cases, the Commission has determined that forfeiture rather than disqualification is the appropriate sanction. Therefore the Presiding Judge should grant the Joint Motion and adopt Liberty's Proposed Findings of Fact and Conclusions of Law as supplemented.

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

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

To: Administrative Law Judge Richard L. Sippel

**SUPPLEMENTAL PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW OF BARTHOLDI CABLE COMPANY, INC.
REGARDING THE INTERNAL AUDIT REPORT IN REPLY**

Pursuant to 47 C.F.R. § 1.263 and Order, FCC 97M-185 (rel. Nov. 10, 1997), Bartholdi Cable Company, Inc., formerly known as Liberty Cable Company, Inc. ("Liberty"), hereby submits its supplemental proposed findings of fact and conclusions of law regarding Liberty's Internal Audit Report (the "Report") in reply. As set forth by Liberty and the Wireless Telecommunications Bureau (the "Bureau"), the Report's admission into evidence adds nothing of decisional significance to an extensive record that has been developed over the last nineteen months by Liberty, the Bureau, Time Warner Cable of New York City and Paragon Communications ("Time Warner"), and Cablevision of New York City - Phase I ("Cablevision"). Accordingly, Liberty respectfully requests that the Presiding Judge adopt in full Liberty's

Proposed Findings of Fact and Conclusions of Law, as supplemented, and also grant the pending Joint Motion by the Bureau and Liberty for Summary Decision.

I. THE REPORT DOES NOT ALTER LIBERTY'S PROPOSED FINDINGS

In its initial proposed findings of fact, Liberty presented five basic facts which supported granting the joint motion:

- (1) Prior to mid-1995, Liberty had a disjointed licensing process without proper supervisory structure to ensure against violation of the Commission's rules and regulations;
- (2) Liberty's principals neither knew of, approved nor encouraged the activation of any paths without Commission authorization;
- (3) The fact of premature activation became known among Liberty's principals and outside counsel no earlier than April 27, 1995;
- (4) Liberty has always intended to disclose the facts and circumstances of the premature activations as soon as it had all the facts to present to the Commission;
- (5) Liberty can be relied upon to remain compliant with FCC laws and regulations in the future.

The vast record in this proceeding fully supports these findings. Despite Time Warner's fulminations, nothing in the Internal Audit Report diminishes the substantial record support for these five facts. Indeed, as the Bureau found, the majority of the conclusions reached by that Report two years ago -- after a comparatively brief investigation -- have been affirmed by the exhaustive discovery in this case.¹ Accordingly, Liberty, in conjunction with the Bureau,

¹ Wireless Telecommunications Bureau's Supplemental Proposed Findings of Fact and Conclusions of Law Regarding the Audit Report, File Nos. 708777, 708778, 713296, 708779, et al. (November 19, 1997) at ¶ 8 ("Bureau Second Supplemental"). Similarly Liberty's and Time Warner's proposed findings filed on November 19, 1997 will be referred to as "Liberty's Second (Continued...)"

submits that the Report does “not raise any new issues of material fact that require denial of the Joint Motion.”²

Even if the findings of the Report conflicted with the material facts developed in this proceeding – which they do not – any reasonable balancing of the record taken as a whole continues to support granting of the Joint Motion. Rather than examining the record as a whole, Time Warner essentially argues that the entire record in this case should be disregarded. Time Warner makes this position explicit by conceding that its Second Supplemental Proposed Findings considers the Report “authoritative and unambiguous”³ despite what the extensive balance of the record may reveal. Time Warner’s position cannot withstand scrutiny. This extremely adversarial proceeding has consumed tremendous time and resources. Thousands of documents have been produced and a large number of witnesses examined, cross-examined and re-examined – including examination before the Presiding Judge – to determine precise issues such as when Liberty first learned of the premature activations. In contrast, the Report was a snapshot taken by Liberty’s attorneys for the limited purpose of determining the scope and causes of the premature activations and to develop a compliance program.⁴ Time Warner, apparently lacking confidence in its own ability to discover the key facts surrounding the designated issues in this proceeding, now argues that the Report, due to its timing and “non-

(...Continued)

Supplemental” and “Time Warner Second Supplemental” respectively.

² Bureau Second Supplemental at ¶ 21; *See* Liberty Second Supplemental at 2.

³ Time Warner Second Supplemental at n.3.

⁴ Liberty Second Supplemental at ¶ 1.

threatening” environment, should be given greater weight than the balance of the record.⁵ Yet it is clearly the adversarial and extensive nature of the fact-finding in this proceeding that deserves deference.

In elevating the Report to such prominence, Time Warner predictably focuses on certain imagined⁶ and actual inconsistencies between the Report and deposition testimony. However, none of the purported inconsistencies affects the conclusions consistently propounded by Liberty and the Bureau. In its frustration, Time Warner ultimately asks the court to make a tremendous leap – that Liberty’s principals somehow must have known that wrongdoing occurred because purportedly one or more of their employees or agents knew of the wrongdoing. Time Warner has had the full tools of discovery at its disposal for the past year and a half to prove this unfounded proposition. It has found nothing. The findings in this case must be based on the facts adduced in this now-exhaustive hearing, rather than the imagination of Time Warner’s counsel, and there is simply no record support for Time Warner’s suppositions. Indeed, those suppositions are directly and consistently contradicted by both documentary evidence and the testimony of numerous persons under oath.

⁵ Time Warner Second Supplemental at ¶ 23.

⁶ As stated in both the Bureau’s and Liberty’s supplemental findings, neither Mr. McKinnon’s, Mr. Ontiveros’ nor Ms. Richter’s testimony is necessarily inconsistent with the Report on any decisionally significant point. Bureau Second Supplemental at ¶¶ 17-19; Liberty Second Supplemental at ¶¶ 12-20.

II. THE REPORT DOES NOT AFFECT LIBERTY'S SUPPLEMENTAL CONCLUSIONS OF LAW

The Report simply does not contain legal conclusions, so any impact on the proposed conclusions of law must be derived from new facts. Since there has been no change in the material facts of this case, Liberty's Proposed Conclusions of Law remain intact.

Licensees have a fundamental duty to be truthful and candid with the Commission.⁷ In order to disqualify a licensee, both misrepresentation and lack of candor require the presence of an intent to deceive.⁸

The ultimate sanction of disqualification requires "substantial evidence of an intent to deceive" and is not "triggered unless substantial evidence clearly reveals serious and deliberate falsehoods."⁹ In evaluating claims of misrepresentation and lack of candor, the Commission will examine whether the principals and owners (as opposed to other employees) engaged in the conduct.¹⁰

There is no evidence that any of Liberty's principals knew about the unauthorized use of paths prior to April 27, 1995.¹¹ Although the term "principal" has been used somewhat inconsistently in Commission decisions, one 40-year old permutation defines the term as "the

⁷ Proposed Findings of Fact and Conclusions of Law of Bartholdi Cable Company, Inc., File Nos. 708777, 708778, 713296, 708779, et al. (February 28, 1997) at ¶ 99 ("Liberty Proposed Findings").

⁸ Liberty Proposed Findings at ¶ 100.

⁹ Liberty Proposed Findings at ¶ 101.

¹⁰ Liberty Proposed Findings at ¶ 102.

¹¹ Liberty Proposed Findings at ¶¶ 79-80, 91-95.

individuals who control or own and will take part in making policies and conducting operations of the proposed station.”¹² Thus the term “principal” requires both ownership or control as well as some element of management over the corporation’s policies and direction. This definition is consistent with Liberty’s general use of the term “principal” as including Peter Price, Howard Milstein, and Edward Milstein.

Similarly, there is substantial evidence in the record that other Liberty employees and agents, including Mr. Ontiveros, Ms. Richter, and Mr. McKinnon,¹³ did not learn of the premature activations prior to that time.¹⁴

Even if one were to accept Time Warner’s stilted view of the facts, disqualification is not appropriate. For example, in evaluating lack of candor claims in *Lutheran Church/Missouri Synod*, the Commission held that although the misconduct was serious, willful and repeated, the conduct did not warrant disqualification. Instead, forfeiture was appropriate because the conduct

¹² See *WLOX Broadcasting Co. v. FCC*, 260 F.2d 712, 715 (D.C. Cir. 1958)(citations omitted)(emphasis added)(holding that a lender was a principal for purposes of integration analysis because the terms of the credit arrangement empowered him both to manage the applicant’s business and to acquire a majority of the shares of voting stock within two years).

¹³ Time Warner goes to great lengths to show that Mr. McKinnon was a principal of Liberty. Yet, Mr. McKinnon had no ownership interest in the company and – despite his title – had no role in setting corporate policy for the company. Instead, Mr. McKinnon served as a day-to-day administrator, a role that should not rise to the level of principal. Supplemental Proposed Findings of Fact and Conclusions of Law of Bartholdi Cable Company, Inc., File Nos. 708777, 708778, 713296, 708779, et al. (June 11, 1997) ¶¶ at 49-54 (“Liberty Supplemental”). Bartholdi Cable Company, Inc.’s Reply to Supplemental Proposed Findings of Fact and Conclusions of Law of Time Warner Cable of New York City and Paragon Communications, File Nos. 708777, 708778, 713296, 708779, et al. (June 23, 1997) at ¶ 8 (“Liberty Reply Findings”).

¹⁴ Ontiveros Tr. 1701-1708; Supplemental Proposed Findings and Conclusions of Law of Bartholdi Cable Company, File Nos. 708777, 708778, 713296, 708779, et al. (June 11, 1997) at ¶¶ 11-21 (Richter), (“Liberty Supplemental Proposed Findings”); McKinnon I Dep. at 13:3-8 (TW/CV 41).

involved the actions of one individual (who had served as Operations Manager, General Manager, and EEO Compliance Officer for the station), there was no evidence of involvement of higher station officials, and the current management was found to be “contrite” and “embarrassed” by the misconduct.¹⁵ Moreover, the Commission has found that forfeiture is the suitable sanction where a licensee has acted inappropriately, but where the principals relied on counsel or engineers in good faith.¹⁶ Therefore, even if the Presiding Judge were to adopt Time Warner’s unsupportable view of the facts, disqualification is unwarranted.¹⁷

¹⁵ *The Lutheran Church/Missouri Synod*, 12 FCC Rcd 2152, 2166-2167 (1997). In fact, the Commission has found disqualification inappropriate even in cases where principals were involved in the wrongdoing. *The Petroleum V. Nasby Corp.*, 10 FCC Rcd 6029 (Rev. Bd. 1995), *recon. granted in part*, 10 FCC Rcd 9964, *remanded on other grounds*, 11 FCC Rcd 3494 (1996); *See also Mid-Florida Television Corp.*, 69 FCC 2d 607, 653 (Rev. Bd. 1978), set aside on settlement, 87 FCC 2d 203 (1981)(only imposing a comparative demerit because the principal who engaged in the misconduct did not have a controlling stock interest and the misconduct was apparently unknown to the other principals); *Chapman Radio and Television Co.*, 70 FCC 2d 2082, 2106 (ALJ 1977), *aff’d.*, 70 FCC 2d 2063 (1979) (denying disqualification in part because no other corporate stockholder was aware of or participated in the criminal wrongdoing of the principal in question).

¹⁶ *Triad Broadcasting Co.*, 96 FCC 2d 1235, 1243(1984).

¹⁷ The WTB in their Supplemental Proposed Findings of Fact and Conclusions of Law Regarding the Audit Report suggests that additional OFS violations, which are not the subject of this proceeding, may be considered by the ALJ in determining the forfeiture amount to be assessed against Liberty. The Bureau did not propose any specific additional forfeiture or indicate how such a forfeiture would be calculated. However, the Commission in its *Hearing Designation Order and Notice of Opportunity for Hearing*, 11 FCC Rcd 14133 (1996) (“HDO”), expressly limited this proceeding to the subject applications. *HDO*, 11 FCC at 14141. Because this proceeding is limited to specific applications, only those 19 instances of unauthorized OFS operations directly related to the subject applications are to be considered by the ALJ. Other violations not related to the subject applications are outside of the scope of this proceeding and should not independently form the basis for additional forfeitures.

III. TIME WARNER'S OTHER ARGUMENTS LACK MERIT

The balance of Time Warner's pleading similarly misses the mark.

- Time Warner devotes significant attention to the notion that the Report shows that Liberty's premature activations were something other than "inadvertent" and an "embarrassing and devastating episode in the company's history."¹⁸ Yet nothing in the Report indicates that the premature activations were in any way purposeful. Instead, the Report supports Liberty's proposed finding that its licensing program was disjointed and poorly supervised.
- Time Warner also argues that the Report shows that Liberty misled the Commission when it stated 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."¹⁹ Yet, in its rush to judgment, Time Warner overlooks the timing of this statement. The Surreply that contains the purported misrepresentation was filed on May 17, 1995 – only weeks after Liberty first discovered the possibility of premature activations and, thus, only shortly after the internal investigation had begun. Liberty believed this statement to be true when it drafted the Surreply; however, any lack of candor requires an intent to deceive. In addition, the Surreply on its face makes clear the nature of Mr. Nourain's assumptions and miscalculations that led to the premature operations – the same assumptions and miscalculations that led to many of the premature activations discussed in the Report.²⁰ Thus the Surreply does not contain any intentional misrepresentations and, in fact, is largely consistent with the ultimate facts developed in this proceeding.²¹
- Time Warner repeatedly strays from the record in an effort to manufacture a cognizable issue from the Report. For example, Time Warner notes that the Report, citing the Richter letter, states that Pepper & Corazzini never communicated possible knowledge regarding unauthorized operations to

¹⁸ Time Warner Second Supplemental at ¶ 7.

¹⁹ Time Warner/Cablevision Hearing Exhibits, Volume I, Exhibit 18, at 3.

²⁰ Time Warner also argues that Liberty's Section 308(b) response that it "unwittingly commenced unauthorized service" was "false". Time Warner Second Supplemental at ¶ 24. Yet Time Warner has failed to adduce any evidence and the Report did not contain any evidence that the premature activations were, in any way, intentional.

²¹ All of these facts and the timing of the pleadings, of course, were known to the Commission at the time it issued the *HDO*.

Liberty.²² Yet Time Warner then attempts to turn the Report's conclusion on its head. Time Warner argues that Liberty's attorneys must have based their conclusions regarding Pepper & Corazzini's knowledge on more than just the letter and, therefore, that there must be other documents or witness interviews available that would lead to decisionally significant facts.²³ Time Warner reaches this conclusion despite the fact that the exhaustive discovery efforts in this case lends no support to this theory. Even today, nineteen months after it began, Time Warner's case continues to ride on hypotheticals.

- Time Warner also asserts that the four documents attached to the Report are "further evidence of Liberty's blatant and repeated abuse of discovery."²⁴ However, an objective review of the facts shows that Time Warner is once again just tossing about incendiary language. To the extent that there were inadvertent delays in production of any document, it was always Liberty who brought the inadequacies of any prior production to the Court's attention and remedied such inadequacies promptly. Indeed, two of the four documents that Time Warner points to, including the Richter letter, were produced. The remaining two attached documents were generated on January 7, 1992²⁵ and June 16, 1992,²⁶ respectively. Yet, the document demands in this case had a cut-off date of January 1, 1993 – making these documents unresponsive. Failure to produce non-responsive documents surely does not amount to a "blatant and repeated abuse of [the] discovery" process. In short, despite Time Warner's refrain, the Report has never been used to limit Time Warner's ability to discover relevant non-privileged documents.²⁷

²² Time Warner Second Supplemental ¶ 22.

²³ Even assuming Time Warner's theory to be correct, it is not clear how this possibility even approaches decisional significance.

²⁴ Time Warner Second Supplemental at ¶ 38.

²⁵ Memo from Stern to Price.

²⁶ Memo from Stern to Nourain.

²⁷ Wireless Telecommunications Bureau's Proposed Findings of Facts and Conclusions of Law, File Nos. 708777, 708778, 713296, 708779, et al. (February 28, 1997) at ¶¶ 132-36; Bureau Proposed Findings at ¶¶ 132-36; Liberty Proposed Findings at ¶¶ 134-35; 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., File Nos. 708777, 708778, 713296, 708779, et al. (March 10, 1997) at ¶ 21 ("[f]urthermore, 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

(Continued...)

IV. CONCLUSION

For the foregoing reasons, Liberty respectfully requests that the Presiding Judge adopt in full Liberty's Proposed Findings of Fact and Conclusions of Law, as supplemented, and grant the Joint Motion for Summary Decision, in its entirety, in favor of Liberty and the Bureau.

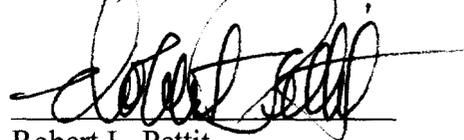
Respectfully submitted,
BARTHOLDI CABLE COMPANY, INC.

CONSTANTINE & PARTNERS



Robert L. Begleiter
Eliot Spitzer
Yang Chen
909 Third Avenue
New York, New York 10022

WILEY, REIN & FIELDING



Robert L. Pettit
Bryan N. Tramont
R. Paul Margie
1776 K Street, N.W.
Washington, D.C. 20006

Dated: December 2, 1997

(...Continued)
have touched on information which may be contained in the Report”).

CERTIFICATE OF SERVICE

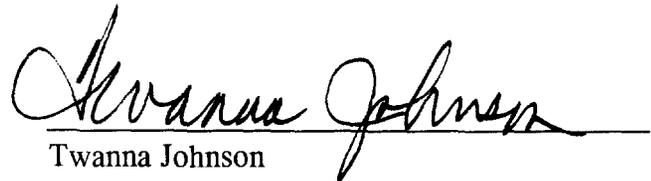
I hereby certify that on this 2nd day of December 1997, I caused copies of the foregoing
“Supplemental Proposed Findings of Fact and Conclusions of Law In Reply” to be hand-
delivered to the following:

The Honorable Richard L. Sippel
Administrative Law Judge
2000 L Street, N.W.
Washington, D.C. 20554

Joseph P. Weber, Esq.
Katherine C. Power, Esq.
Mark L. Keam, Esq.
Wireless Telecommunications Division
2025 M Street, N.W., Room 8308
Washington, D.C. 20554

R. Bruce Beckner, Esq.
Fleischman & Walsh, L.L.P.
1400 Sixteenth Street, N.W., Suite 600
Washington, D.C. 20036

Christopher A. Holt, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.
701 Pennsylvania Avenue, N.W., Suite 900
Washington, D.C. 20004


Twanna Johnson