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

MAR - 3 1998

U.S. DEPARTMENT OF JUSTICE  
 FEDERAL BUREAU OF INVESTIGATION

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 Commission

**WIRELESS TELECOMMUNICATIONS BUREAU'S  
 OPPOSITION TO REQUEST FOR ORAL ARGUMENT**

The Chief, Wireless Telecommunications Bureau ("Bureau"), pursuant to Section 1.294(a) of the Commission's Rules,<sup>1</sup> hereby files his opposition to the Request for Oral Argument ("Request") filed by Bartholdi Cable Company, Inc. (formerly known as Liberty Cable Co., Inc.) ("Liberty"), on April 29, 1998. Liberty offers three arguments in support of its Request. First, Liberty vaguely suggests that due to the "complex and voluminous record in this proceeding . . . [o]ral argument will enable the Commission to evaluate the parties' claims regarding particular elements of the record and to flesh out the issues of decisional significance."<sup>2</sup> Second, Liberty argues that oral argument is needed in order to clarify this

<sup>1</sup> 47 C.F.R. § 1.294(a).

<sup>2</sup> Request at 1.

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Bureau's position in this proceeding.<sup>3</sup> Third, Liberty argues that "[o]ral argument will enable the Commission to assess the impact on competition" in the video programming market in New York City.<sup>4</sup> As discussed below, Liberty's Request should be denied because: (1) it does not satisfy the requirements of Section 1.277 of the Commission's Rules which provides that oral arguments will be granted "only in cases where such oral presentations will assist in the resolution of the issues presented;"<sup>5</sup> (2) in its Exceptions to the *Initial Decision ("I.D.")*,<sup>6</sup> Liberty failed to demonstrate sufficient legal basis for the Commission to overturn the *I.D.*; and (3) in this Request, Liberty now attempts to raise irrelevant issues -- such as the Bureau's comportment and impact on competition -- to inappropriately argue that the *I.D.* should be reversed.

1. Liberty's first argument that the nature of this proceeding calls for oral argument concludes that the *I.D.* "is replete with reversible error," and that the "Commission is bound to correct these errors." It is well established that the Commission will grant oral argument "only in cases where such oral presentations will assist in the resolution of the issues presented."<sup>7</sup> Liberty clearly fails to make such a showing here. The Bureau notes that while the record in this proceeding may be complex and voluminous, each party has already fully

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<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Id.* at 3.

<sup>5</sup> 47 C.F.R. § 1.277(c).

<sup>6</sup> *Initial Decision of Administrative Law Judge Richard L. Sippel*, WT Docket No. 96-41, FCC 98D-1 (rel. Mar. 6, 1998).

<sup>7</sup> 47 C.F.R. § 1.277(c). *See also KIST Corp.*, 102 FCC 2d 288 n.2 (1985) (request for oral argument denied because requesting party did not show how oral argument would materially assist the resolution of the proceeding).

and adequately "fleshed out the issues of decisional significance" through the filing of detailed exceptions and replies to the *I.D.* Furthermore, throughout the two years of the proceeding, Liberty and the other parties have had full opportunity to analyze the record and to present its arguments through numerous pleadings. Thus, oral argument in this proceeding would amount to nothing more than mere verbal repetition of the arguments already set forth in the parties' multiple pleadings.<sup>8</sup>

2. Liberty's second argument is that oral argument is in order because the Bureau's "comportment . . . in this proceeding also merits review from the Commission."<sup>9</sup> The Bureau disagrees because Liberty's argument misconstrues the nature of the analysis the Bureau must undertake in what position to take in this proceeding. The Commission has instructed that:

An initial decision is not a mere report to be arbitrarily disregarded. In the absence of review, the initial decision is the decision of the agency. Section 557(b) of the Administrative Procedure Act. Even when review is granted, the initial decision must be taken into account by the agency and when necessary by a reviewing court.<sup>10</sup>

As the Bureau already stated in detail in its Reply, after a full and complete independent analysis of the evidence in this proceeding, the Bureau determined that the record as a whole amply supported the Presiding Judge's findings. The Presiding Judge's demeanor and credibility findings played an important role in the Bureau's decision, as they are entitled to

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<sup>8</sup> Liberty's Request also repeats arguments which it already set forth in its Exceptions to the Initial Decision. Because the Wireless Telecommunications Bureau's Consolidated Reply (Apr. 22, 1998) ("Reply") has already fully addressed these arguments, we will not again respond to any of Liberty's specific allegations.

<sup>9</sup> Request at 2.

<sup>10</sup> *Stereo Broadcasters, Inc.*, 74 FCC 2d 543 ¶ 8 (1981).

substantial deference.<sup>11</sup> The Bureau reviewed the record and decided that these demeanor and credibility findings were supported by substantial evidence. In its Exceptions, Liberty patently failed to demonstrate any legal basis for the Commission to reverse the *I.D.* Given the weight of the entire record evidence and Liberty's failure to provide the Commission with sufficient legal basis for overturning the *I.D.*, the Bureau determined that it is in the public interest to support the Presiding Judge's conclusions in the *I.D.*<sup>12</sup>

3. Liberty's third argument is that "if the ID is allowed to stand, Time Warner will have succeeded" in driving Liberty, a competitor, out of the marketplace.<sup>13</sup> Liberty also argues that "oral argument will enable the Commission to assess the impact on competition in New York and the possible displacement of Liberty's current subscribers."<sup>14</sup> The Bureau disagrees that oral argument is necessary here because the issues designated in this proceeding involve Liberty's qualifications to be a Commission licensee, not whether competition would be adversely impacted by the denial of its applications. In this regard, it belies logic to assert

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<sup>11</sup> *WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1141 (D.C. Cir.1985); *TeleSTAR, Inc.*, 2 FCC Rcd 5, 13, *rev. granted in part*, 3 FCC Rcd 2860 (1988). *See also* Reply at 20-21.

<sup>12</sup> Additionally, Liberty's argument that it did not have the opportunity to respond to the Bureau's Reply does not have any bearing on the issue before the Commission. Section 1.277 of the Commission Rules do not authorize the filing of responses to reply briefs as Liberty is well aware. Furthermore, the purpose of an oral argument is to assist the Commission, not to allow a party to interpose a verbal response to a reply brief.

<sup>13</sup> Request at 2.

<sup>14</sup> *Id.*

that there would be a dearth of video programming competition in the nation's largest market because the captioned applications are denied.<sup>15</sup>

4. In addition, Liberty is disingenuous in its claim that an adverse Commission decision could cause the "possible displacement of Liberty's current subscribers."<sup>16</sup> As Liberty itself admitted in the joint motion for summary decision, "[i]n March 1996, [Liberty's] customers were sold as part of an asset sale to Freedom New York, L.L.C. As a consequence of the sale, Liberty now provides microwave transmission services to Freedom New York, which in turn provides video programming services to [Freedom's] customers."<sup>17</sup> Therefore, at least for two years now, Liberty has not had any "subscribers," and certainly no subscribers to lose. Furthermore, the Bureau notes that beginning in April 1996, Freedom New York, L.L.C., and its parent, Residential Communications Network, Inc. ("RCN"), have filed dozens of applications with the Bureau for new microwave licenses to provide video programming service in New York City. Most of these applications seek authorization to activate RCN service along some of the same microwave paths which are currently licensed to

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<sup>15</sup> As the Bureau's Reply pointed out, by authorizing new video services such as direct broadcast satellite (DBS) and multichannel multipoint distribution service (MMDS), the Commission has already provided for robust competition in markets such as New York City. Reply at 22 n.83.

<sup>16</sup> Request at 3.

<sup>17</sup> Joint Motion by Bartholdi Cable Co., Inc., and the Wireless Telecommunications Bureau for Summary Decision (July 15, 1996) at i n.1. See also Reply at 22 n.82:

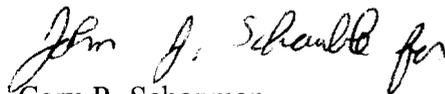
As a result of a transfer of some of its assets in March 1996, Liberty claims that it no longer provides video services directly to its subscribers. Rather, Liberty, through a contract with RCN, provides only the video transmitting service from its program headends using its Commission licenses, and RCN, in turn, operates the microwave paths to the approximately 30,000 video subscribers who were once Liberty's direct customers.

Liberty, including the very same paths which are subject to this proceeding. Thus, assuming the grant of all of these licenses to RCN, it would appear that the Commission's final decision in this matter will have little, if any, impact upon the state of competition in New York's video marketplace.<sup>18</sup>

For the foregoing reasons, the Chief, Wireless Telecommunications Bureau, believes that Liberty's Request for Oral Argument should be denied.

Respectfully Submitted,

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May 5, 1998

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<sup>18</sup> Section 101.31(e) of the Commission's Rules provides conditional authorization for RCN to activate service along these paths upon proper filing of the applications. *See* 47 C.F.R. § 101.31(e). Because of the Commission proceeding against Liberty, however, RCN has advised that it will await the Bureau's action on its pending applications, rather than operate its microwave network on conditional authority.

**CERTIFICATE OF SERVICE**

I, Denisee McCray, of the Wireless Telecommunications Bureau, certify that I have, on this 5th day of May, 1998, caused to be served by hand delivery or regular United States mail, copies of the foregoing "**WIRELESS TELECOMMUNICATIONS BUREAU'S OPPOSITION TO REQUEST FOR ORAL ARGUMENT**" to:

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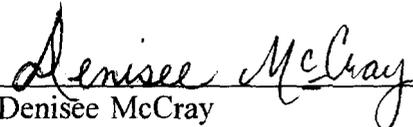
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