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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In Re Applications of

LIBERTY CABLE COMPANY, INC.

WT Docket No. 96-41

For Private Operational Fixed Microwave
Service Authorization and Modifications

New York, New York

TO: The Commission

Response of Time Warner Cable of New York City and Paragon Cable Manhattan to
Request for Oral Argument by Liberty Cable

Time Warner Cable of New York City and Paragon Cable Manhattan (collectively, "TWCNYC") hereby respond to the request of Bartholdi Cable Co., Inc. ("Liberty Cable") for the Commission to hear oral argument¹ on Liberty Cable's exceptions to the Presiding Judge's Initial Decision (ID) in this matter.² Although TWCNYC neither supports nor opposes Liberty Cable's Request, TWCNYC is filing this Response to respond to and correct certain mis-statements by Liberty Cable in the Request.

Two of the three arguments advanced by Liberty Cable in support of its Request -- that the "compartment" of the Wireless Telecommunications Bureau "merits review from the Commission" and that, "if the ID is allowed to stand, Time Warner will have succeeded . . . in

¹Request for Oral Argument, In re Application of Liberty Cable Co., Inc., WT Docket No. 96-41 (filed April 29, 1998) (hereinafter, the "Request").

²Initial Decision of Administrative Law Judge Richard L. Sippel, In re Applications of Liberty Cable Co., Inc. WT Docket No. 96-41, FCC 98D-1 (rel. March 6, 1998) (hereinafter, the "ID").

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driving a competitor from the marketplace" -- are based on mis-statements of fact and concern immaterial issues. Request at 2. Neither is a valid reason for oral argument.

Liberty Cable's argument that, "if the ID is allowed to stand, Time Warner will have succeeded [in] driving a competitor out of the marketplace," is both misleading and based on statements of fact that Liberty Cable knows to be false.³ The argument implies that Liberty Cable and TWCNYC compete with each other in the sale of multi-channel video programming to subscribers in metropolitan New York City. In fact, such competition has not existed for more than two years. Moreover, even if it did exist, the presence -- or absence -- of economic competition for an applicant for a Commission license has absolutely no bearing on that applicant's fitness to receive or hold a license.

Contrary to its present suggestion that it competes with TWCNYC for the sale of multichannel video programming to subscribers in metropolitan New York City, Liberty Cable admitted that in February 1996, it contracted to sell the assets of its so-called "private cable" business, except its FCC licenses and pending applications, to a subsidiary of RCN Corporation called Freedom, LLC ("Freedom") in exchange for some \$40 million in cash and notes payable together with a minority ownership in Freedom held by Liberty's owners. See Order, *In re Application of Liberty Cable Co., Inc.*, WT Docket No. 96-41, FCC 96M-178 (rel. July 16, 1996) (hereinafter "July 16, 1996 Order") at ¶ 6. As Liberty Cable itself has admitted, the assets sold included "existing subscribers." Opposition to Motion to Enlarge Issues filed by Bartholdi Cable Company and Freedom, LLC, *In re Application of Liberty Cable Co., Inc.*, WT Docket

³ TWCNYC's participation in this proceeding is based solely on its desire to see that Liberty Cable operates within the regulatory framework that is applicable to it and thereby competes fairly, rather than unfairly.

No. 96-41 (filed May 7, 1996) at p. 4. Thus, after closing the sale in March, 1996, Liberty Cable Co., Inc. had no more “subscribers” as that term is commonly used or in the sense that Liberty Cable had used that term in the applications and requests for Special Temporary Authority that are relevant to this proceeding.⁴

The only present business conducted by Liberty Cable in metropolitan New York City and relevant to this proceeding is the holding of FCC microwave licenses and grants of interim operating authority for facilities that now serve Freedom’s subscribers. Under the agreements between Liberty Cable and RCN Corporation, Freedom provides the personnel to operate Liberty Cable’s FCC-licensed microwave facilities; and those facilities are operated for Freedom’s exclusive benefit. July 16, 1996 Order at ¶¶ 8, 9. These agreements further provide that Freedom may apply for FCC licenses to use these same facilities and, upon grant of such applications, Liberty Cable must not only relinquish its FCC licenses but also, without payment of any additional consideration, transfer title to the equipment operated under such licenses to Freedom. See *Id.* at ¶ 15. In fact, Freedom already has pending applications for at least some of the facilities that are the subject of this proceeding. *ID* at ¶ 10 and n. 7. Thus, there will be no interruption of service, even to Liberty Cable’s *former* subscribers, if the Commission adopts the *ID* and denies the captioned applications.

Finally, the need for the Commission to “review the comportment” of the Wireless Telecommunications Bureau in this proceeding, cited by Liberty Cable in its Request, is without factual or legal basis. Whatever complaints Liberty Cable may have with the conduct of the

⁴ Among the assets sold to Freedom was the name “Liberty Cable.” Consistent with that, the corporation known as Liberty Cable Company, Inc. changed its name to Bartholdi Cable Company, Inc. See *I.D.* at ¶ 1, n. 1.

Wireless Telecommunications Bureau in the case, Commission review of the ID is not the appropriate vehicle to air those complaints. The ID, which is the matter under review, is the product of the Presiding Judge, not the Wireless Telecommunications Bureau. Although the Bureau, acting under delegated authority from the Commission, is the decision-maker in licensing proceedings not designated for hearing; it did not have that role here. The Commission's issuance of the Hearing Designation Order ended the Bureau's role as decision-maker for the captioned applications. The Wireless Bureau is now only a party to this proceeding. The Bureau's actions, whether "consistent and principled" or "arbitrary and capricious," do not infect the decision itself any more than does such conduct by any other party.

Moreover, as a factual matter, Liberty Cable's suggestion that there is a need for the Commission to "solicit clarification of the Bureau's position" is belied by the Bureau's unequivocal statements in its Consolidated Reply: (1) that the ID "properly concluded that Bartholdi Cable Company, Inc. . . . should be denied the captioned fifteen applications for authorization to provide operational fixed microwave service"; (2) that the ID "properly denied the Joint Motion by Bartholdi Cable Co., Inc., and the Wireless Telecommunications Bureau for Summary Decision, filed on July 15, 1996"; and (3) that "the Bureau fully supports the Joint Brief in Support of Initial Decision, filed by Time Warner Cable of New York City *et al.*" Wireless Telecommunications Bureau's Consolidated Reply, *In re Applications of Liberty Cable Co., Inc.* WT Docket No. 96-41 (April 22, 1998) at i. There is no ambiguity in any of these statements.

Likewise, there is no factual support for Liberty Cable's suggestion that the Bureau's "change of position" was, in fact, arbitrary and capricious. The Bureau's "Consolidated Reply" devotes a number of pages to explaining the evolution of its position vis-a-vis Liberty Cable, the

Joint Motion for Summary Decision and Liberty Cable's overall fitness to receive grants of the captioned applications. As the Bureau's "Consolidated Reply" explains, its change of position was the product of increasing evidence of Liberty Cable's misconduct in the record and accumulating instances of Liberty Cable's misconduct in the proceeding itself. Moreover, once faced with the fact of the Presiding Judge's ID, the salient question for the Bureau -- like the question facing the Commission itself -- is whether the ID's findings and conclusions are supported by evidence in the record. It is neither "arbitrary" nor "capricious" for the Bureau to have concluded that the ID, notwithstanding its rejection of the 1996 Joint Motion to which the Bureau was a party, is supported by evidence in the record; and, consequently, for the Bureau to support the ID before the Commission.

Respectfully submitted,



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Dated: May 4, 1998

CERTIFICATE OF SERVICE

I, Debra A. McGuire, hereby certify that a copy of the foregoing Response of Time Warner Cable of New York City and Paragon Cable Manhattan to Request for Oral Argument by Liberty Cable was served, via facsimile or hand delivery, this 5th day of May, 1998 upon the following:

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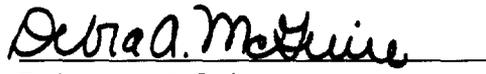
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