

ORIGINAL

WILEY, REIN & FIELDING

1776 K STREET, N. W.
WASHINGTON, D. C. 20006
(202) 429-7000

DOCKET FILE COPY ORIGINAL

ROBERT L. PETTIT
(202) 429-7019

FACSIMILE
(202) 429-7049

July 24, 1998

BY HAND DELIVERY:

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

RECEIVED

JUL 24 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: WT Docket No. 96-41.

Dear Ms. Salas:

On behalf of Bartholdi Cable Co., Inc., formerly known as Liberty Cable Co., Inc. ("Liberty"), enclosed are an original and 14 copies of a "Motion to Strike" in the above-captioned proceeding. The case is pending before the Commission on review of an Initial Decision. This motion seeks to have stricken from the record of this proceeding the Wireless Telecommunications Bureau's April 22, 1998 "Consolidated Reply."

The filing of a Motion to Strike a Bureau pleading is an unusual step and one that Liberty very much regrets having to take. However, the Bureau's procedural and substantive about-face in this case is itself unusual – indeed, unprecedented in its scope. On July 15, 1996, the Bureau and Liberty filed a Joint Motion in this case which would have resolved the specified issues in Liberty's favor but would have required Liberty to pay a substantial forfeiture. The Bureau's support for this Joint Motion was maintained *through at least nine separate pleadings and through the adduction of all the evidence in this case* over the course of approximately a year and a half.¹ However, the Bureau, wholly reversed its position on April 22, 1998 – in the reply round

¹ As the Commission is aware, this evidence eventually included an Internal Audit Report ("IAR"), prepared by Liberty's counsel detailing the licensee's wrongdoing, *which was submitted to the Commission on August 14, 1995*. The IAR was submitted with a request for confidentiality, which was denied by the Commission. The D.C. Circuit issued a stay of the release of the IAR but ultimately upheld the Commission's denial on June 3, 1997. After rehearing *en banc* was denied on September 10, 1997, the IAR was produced on September 16, 1997.

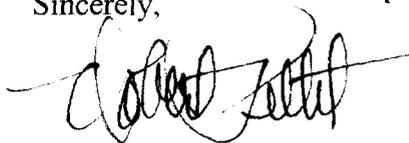
No. of Copies rec'd 07/24
List ABCDE

of Liberty's request for Commission review of the case.² As detailed in the Motion to Strike (and as presented in chart form in Appendix 1 to the Motion), the Bureau's reversal of position was so inexplicable and so complete that for *every material conclusion* contained in the Bureau's April 22 Reply, the record of this proceeding contains an *opposite conclusion* by the Bureau, *based on exactly the same evidence*. As further detailed in the Motion to Strike and pursuant to Commission precedent, Liberty submits that the Bureau's Reply should be dismissed without consideration in this proceeding.

Since the April 22 filing, Liberty has been in discussions with the Bureau looking towards either the withdrawal of the Bureau's pleading or a proposed settlement of the case. However, as counsel for Liberty and the Chief of the Bureau agreed today, those discussions have reached an impasse. Accordingly, Liberty believes that it has no recourse but to file the instant Motion.

Should any questions arise concerning this matter, please let me know.

Sincerely,



Robert L. Pettit
Counsel for Bartholdi Cable Co., Inc.

cc:	The Honorable William E. Kennard	Christopher Wright, Esquire
	The Honorable Susan Ness	David Solomon, Esquire
	The Honorable Harold Furchgott-Roth	John Riffer, Esquire
	The Honorable Michael Powell	Daniel B. Phythyon, Esquire
	The Honorable Gloria Tristani	Kathleen O'Brien-Ham, Esquire
	Ari Fitzgerald, Esquire	Howard Davenport, Esquire
	David Sidall, Esquire	Catherine Seidel, Esquire
	Paul Misener, Esquire	Katherine Power, Esquire
	Peter Tenhula, Esquire	Bruce Beckner, Esquire
	Karen Gulick, Esquire	Christopher Holt, Esquire

² Liberty notes that the presumably calculated timing of the Bureau's reversal of position deprived Liberty of any opportunity to refute the Bureau's substantive arguments within the normal pleading cycles.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In re Application of	)	WT Docket No. 96-41	
)		
LIBERTY CABLE CO., INC.	)	File Nos.:	
	)	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

MOTION TO STRIKE

CONSTANTINE & PARTNERS
Robert L. Begleiter
Yang Chen
477 Madison Avenue
New York, New York 10022
(212) 350-2700

WILEY, REIN & FIELDING
Robert L. Pettit
Peter D. Shields
Bryan N. Tramont
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

*Attorneys for Bartholdi Cable
Company, Inc.*

July 24, 1998

TABLE OF CONTENTS

	Page
SUMMARY	i
INTRODUCTION	1
I. THE BUREAU HAS REVERSED ITS POSITION IN EVERY MATERIAL RESPECT WITHOUT <i>ANY</i> CHANGE IN THE UNDERLYING FACTS.	2
A. Liberty's Knowledge of Wrongdoing	5
B. Joint Motion	7
C. Internal Audit Report	8
D. Disqualification and Forfeiture	10
E. Flagrant Disregard	11
F. Misrepresentation/Intent to Deceive	12
II. THE BUREAU HAS OFFERED NO CREDIBLE JUSTIFICATION FOR ITS DRAMATIC REVERSAL.....	13
III. CONSISTENT WITH COMMISSION PRECEDENT, THE BUREAU SHOULD BE ESTOPPED FROM REVERSING A POSITION CONSISTENTLY MAINTAINED THROUGHOUT THIS PROCEEDING, AND ITS REPLY SHOULD BE STRICKEN.....	18
IV. CONCLUSION.....	22

SUMMARY

In an unprecedented and unexplained about-face, on April 22, 1998 the Wireless Telecommunications Bureau ("Bureau") reversed its position on *every material issue* in this proceeding. The Bureau's reversal was not accompanied by any change in the underlying facts or evidence. Moreover, the Bureau made no attempt to explain its reversal in its Reply Brief ("Reply"), and only as an afterthought offered half-hearted justifications in an Opposition to Liberty's Request For Oral Argument. As a result, the Commission now has as part of the record in this proceeding *pleadings from the Bureau that reach diametrically opposite conclusions on exactly the same facts.*

From the days leading up to the filing of the Joint Motion on July 15, 1996 until the Bureau filed its Reply, Liberty and the Bureau worked towards an agreed-upon resolution of this matter. Through a series of nine successive pleadings, *including two pleadings submitted after the record in this proceeding was closed*, the Bureau consistently maintained that payment of a substantial forfeiture was the appropriate remedy in this case. At no time before its April 22 Reply did the Bureau *ever* suggest that Liberty lacked the character qualifications to serve as a Commission licensee.

Now, in the aftermath of the Reply, the Bureau belatedly attempts to explain its change of position, suggesting for the first time in its Opposition that its reversal flows from deference to the ALJ's demeanor findings. However, the Initial Decision ("ID") contains only two generally negative demeanor findings and the Bureau's Reply contains no evaluation of the effect of those findings on the totality of the evidence. In addition, the Bureau advanced the novel proposition that, upon issuance of an initial decision, the Bureau adopts a role comparable to that of a reviewing court that must defer to the ALJ's findings if they are supported by "substantial

evidence.” The assumption of judicial review functions, however, is inconsistent with the Bureau’s role as a party in this proceeding, the Administrative Procedures Act, the Communications Act, and prior Bureau practice.

Commission precedent forbids unjustified reversals of position within a proceeding. The policy was developed in the comparative hearing context to prevent the litigants from using self-contradiction as a means of obtaining unfair advantage. Liberty submits that, having consistently maintained over the course of a two year proceeding – before, during, and after the adduction of documentary and testimonial evidence – that Liberty has the qualifications to serve as a Commission licensee, the Bureau is estopped from reversing that position. Accordingly, the Commission should give the Bureau’s Reply no weight in its deliberations and it should be stricken from the record in this proceeding.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In re Application of	)	WT Docket No. 96-41	
)		
LIBERTY CABLE CO., INC.	)	File Nos.:	
	)	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

MOTION TO STRIKE

Bartholdi Cable Co., Inc., formerly known as Liberty Cable Co., Inc. ("Liberty"), pursuant to Section 1.41 of the Commission's rules, 47 C.F.R. § 1.41 (1997), hereby moves to strike the Wireless Telecommunications Bureau's ("Bureau's") Consolidated Reply ("Reply") filed April 22, 1998 in the above-captioned matter. As detailed below, the Reply reverses the Bureau's position – maintained since July 1996 – on every material issue in this proceeding without any corresponding change in the underlying facts or evidence. Remarkably, the Commission now has, as part of the record in this proceeding, *pleadings from the Bureau that reach diametrically opposite conclusions on exactly the same facts*. This about-face is unexplained, inconsistent with the Bureau's delegated authority, inconsistent with the applicable law, inconsistent with the Bureau's

practice, and in contravention of Commission rules and precedent. In light of these factors, the Bureau's Reply offers no reliable support for the Initial Decision,¹ should be given no weight by the Commission in its deliberations, and should be stricken from the record in this proceeding.

I. THE BUREAU HAS REVERSED ITS POSITION IN EVERY MATERIAL RESPECT WITHOUT ANY CHANGE IN THE UNDERLYING FACTS.

As the Commission is aware, this proceeding concerns Liberty's qualifications to be the licensee of various microwave stations used for the delivery of television programming, in competition with Time-Warner Cable, in New York City.² In late April 1995, Liberty's principals discovered that Liberty might have violated FCC rules by prematurely activating a number of microwave paths.³ The immediate reaction of Liberty's principals was to investigate through its outside counsel and to disclose its findings to the Commission. On May 17, 1995, Liberty identified certain paths that were operating without authorization.⁴ Liberty then engaged counsel to conduct a fuller audit to determine the scope and cause of the premature activations and to cure the problem to ensure against future violations. Liberty's counsel embodied their conclusions in an Internal Audit Report ("IAR") – a document which Liberty *submitted to the Commission and has been in the Commission's and the Bureau's possession since August 14,*

¹ *Liberty Cable Co., Inc.*, WT Docket No. 96-41 (rel. Mar. 6, 1998) ("ID").

² Liberty provides the technical backbone for wireless cable television services in New York City and Northern New Jersey using 18 GHz microwave frequencies.

³ Two such paths were reported to the Commission in a petition to deny filed by Time-Warner, Liberty's competitor, shortly after Liberty's principals learned that some of its paths might have been prematurely activated.

⁴ Liberty's applications for authorization to operate on those paths were designated for hearing on March 5, 1996. *Liberty Cable Co., Inc., Hearing Designation Order and Notice of Opportunity for Hearing*, 11 FCC Rcd 14133 (1996) ("HDO").

1995.⁵

From the days leading up to the filing of the Joint Motion on July 15, 1996 until April 22, 1998, Liberty and the Bureau worked towards an agreed-upon resolution of this matter. At no time during this period did the Bureau *ever* recommend that Liberty be disqualified from holding Commission licenses. To the contrary, throughout the adduction of *all* testimonial and documentary evidence in this case, the Bureau consistently and frequently maintained that Liberty's OFS license applications should be granted, conditioned on payment of a substantial forfeiture as an appropriate remedy for unintentional violations of the Commission's rules.⁶

In light of this, Liberty is constrained to point out that a number of statements contained in the Bureau's Reply regarding the procedural history of this matter are substantially misleading. For example, in its Reply the Bureau suggests that its about-face is somehow due to a change in the underlying facts.⁷ However, any such intimation is unfair and untrue. The last testimonial evidence in this proceeding was presented on May 29, 1997. The last piece of documentary evidence was accepted into evidence on November 5, 1997, and the entire record

⁵ For additional background on the history of this proceeding, *see* Liberty's Exceptions to Initial Decision (filed April 17, 1998) at 1-4 ("Exceptions").

⁶ For ease of reference, Appendix 1 is a chart, broken down by the major issues in this proceeding, which compares the Bureau's previous conclusions of fact and law in *nine* separate pleadings with its April 22 filing.

⁷ The Bureau states that its participation in the Joint Motion was "[b]ased on the total weight of the evidence that was admitted into the record *as of that time.*" Reply at 2 (emphasis in original). Likewise, the Bureau now says that its continued support of the Joint Motion in supplemental proposed findings of fact filed in June 1997 was a "'close call' based on the record *developed up to that time.*" Reply at 4-5 (emphasis in original). Of course, the Bureau neglects to say that the record "developed up to" June 1997 included *all* of the testimonial evidence and that the *only* additional documentary evidence admitted in the case was the IAR – a document which the Bureau has had in its possession since August 14, 1995. Perhaps most importantly, the Bureau further neglects to acknowledge that even after inclusion of the IAR and the close of the record, the Bureau continued to file in support of the Joint Motion.

was closed on November 10, 1997.⁸ At every juncture of the hearing – *both before and after the record was closed* – the Bureau continued its support of the Joint Motion, continued to find that Liberty had engaged in *no* misrepresentations, and continued to support the grant of Liberty’s license applications.

In addition, while the Bureau now hints that the Joint Motion was somehow the sole effort of Liberty,⁹ any such intimation is likewise unfair and untrue. Despite the Bureau’s backpedaling, the document which the Bureau and Liberty filed and consistently supported was a *joint* motion. The Bureau was active in writing and editing the Joint Motion – with full knowledge of the contents of Liberty’s IAR. Bureau counsel have not denied and cannot deny this to be the case.

Similarly, the Bureau is substantially misleading in its new characterization of the “level” of “support” which the Bureau gave to the Joint Motion. Despite what the Bureau now says,¹⁰ this “support” did not “decline[.]” over the course of the proceeding. Whether an applicant should be licensed by this agency is a yes-or-no question which requires a yes-or-no answer. It is not some continuum of “support” that ebbs and flows, as the Bureau would now have it. Perhaps it is enough to answer its novel position to point out that the Bureau consistently and repeatedly answered “yes” to the question of whether Liberty should be licensed. The Bureau’s answer did not change because of additional evidence or any apparent factor other than an adverse (and, as

⁸ As indicated *supra* at note 7, the only additional piece of evidence added to the record between May 29 and November 10 was the IAR, disclosed pursuant to a ruling of the D.C. Circuit and accepted into evidence on November 5, 1997.

⁹ In its Reply, the Bureau refers to the Joint Motion as “Liberty’s motion,” which presented “Liberty’s position”. Reply at 4-5.

¹⁰ See, e.g., Reply at 4-5 (Supplemental findings indicated the Bureau’s level of support for “Liberty’s motion” “decline[d]” but that the Bureau “refrained” from “completely” withdrawing its support for the Joint Motion).

Liberty has argued, erroneous) ALJ decision and a change in Bureau personnel responsible for the case. To the contrary, throughout this proceeding, the Bureau's bottom line, from the filing of the Joint Motion to the last pleading filed before the ALJ, was the same: "[T]he violations committed under these particular circumstances do not justify a finding that Liberty is unqualified to be a licensee. Rather, the appropriate remedy is for Liberty to pay a substantial forfeiture."¹¹

Thus, notwithstanding the Bureau's pallid attempts at revisionist history, even a cursory review of the record in this case reveals that despite the absence of any change in this long-closed record and despite the Bureau's consistent support of *its own* Joint Motion, the Bureau decided to change its mind on April 22, 1998, without explanation. Indeed, as detailed below and as summarized in Appendix 1, the Bureau's reversal is so complete and so inexplicable that *for every material conclusion* contained in the Bureau's April 22 Reply, the record of this proceeding contains an *opposite conclusion* by the Bureau *based on exactly the same evidence*.

A. Liberty's Knowledge of Wrongdoing

The Bureau's Reply states that "the Bureau believes there is a well founded basis" for determining that "Liberty's principals knew of premature activations [before April 1995]."¹² However, as Appendix 1 demonstrates, the Bureau's latest statement is directly contradicted by the Bureau's previous statements – based on precisely the same evidence. Indeed, prior to its April 22 Reply, the Bureau consistently and repeatedly determined that no Liberty principal had

¹¹ Bureau's Supplemental Proposed Findings of Fact and Conclusions of Law Regarding the Audit Report (filed Nov. 19, 1997) ("November 19th pleading") at 12 (citations omitted).

¹² Reply at 16; *see also* Appendix 1, p. 1. Remarkably, in arguing that Liberty learned of the unauthorized activations prior to late April 1995, the Bureau is urging a finding *contrary* to the ID which concluded that "based on the record after hearing the testimony, *it must be concluded* that the first discovery of the activations by Liberty's executives [sic] officers was due to the Nourain memorandum of April 26[, 1995]" ID ¶ 73 (emphasis added).

knowledge of the premature activations prior to April 1995, which, as Liberty has shown in previous pleadings, is the only conclusion supported by direct and substantial evidence.¹³ For example:

- On June 11, 1997 (after the close of testimony in the case), the Bureau found that “there is absolutely no record evidence that Liberty or its counsel were aware of unauthorized operation of microwave paths by Liberty prior to April 1995.”¹⁴
- On June 23, 1997, the Bureau concluded that “all the record evidence still establishes that Liberty did not know about any premature activations until April 1995”¹⁵
- On December 2, 1997 (after the record of the proceeding was closed), the Bureau continued to find that “[t]he 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.”¹⁶

Moreover, throughout this proceeding, the Bureau painstakingly reviewed various individual pieces of evidence – including the February 24, 1995 Lehmkuhl inventory,¹⁷ the 1993 license inventory,¹⁸ the IAR,¹⁹ and the Richter letter²⁰ – and concluded that none of those items

¹³ See Appendix 1, p.1.

¹⁴ Bureau Proposed Findings of Fact and Conclusions of Law for Phase II of Hearing Testimony (filed Jun. 11, 1997) (“June 11th pleading”) at 7; *see also* Appendix 1, p.1.

¹⁵ Bureau’s Reply to Time Warner’s Supplemental Proposed Findings of Fact and Conclusions of Law (filed Jun. 23, 1997) at 4 (“June 23d pleading”); *see also* Appendix 1, p.1.

¹⁶ Bureau’s Reply to Second Supplemental Proposed Findings of Fact and Conclusions of Law (filed Dec. 2, 1997) at 9 (“December 2d pleading”); *see also* Appendix 1, p.1.

¹⁷ Bureau’s Supplement Comments on Discovery After the Filing of the Joint Motion for Summary Decision (filed Oct. 22, 1996) at 3-5 (“October 22d pleading”); *see also* Appendix 1, p.1.

¹⁸ June 11th pleading at 7-8; *see also* Appendix 1, p.1.

¹⁹ November 19th pleading at 6-7, 14; *see also* Appendix 1, p.1.

²⁰ November 19th pleading at 7, 13; June 23d pleading at 6, 7; June 11th pleading at 5, 8-9, 12; *see also* Appendix 1, p.8. Similarly, despite the Bureau’s suggestion in its Reply that the Richter Letter notified Liberty of the existence of unauthorized activations, *see* Reply at 14-15, the Bureau repeatedly reached the opposite conclusion based on the same evidence. In fact, the Bureau reaffirmed its conclusion that the Richter Letter *does not* demonstrate Liberty’s

indicated a knowledge of unauthorized activations pre-dating April 1995. The Bureau offers no explanation for its wholesale reversal of its prior factual conclusions.

B. Joint Motion

Perhaps the most extraordinary about-face is the Bureau's remarkable conclusion that the Joint Motion – a document which the Bureau helped author and submit to the ALJ – contained a misrepresentation.²¹ In effect, the Bureau finds itself to have engaged in a misrepresentation during the hearing.

The ALJ found that the Joint Motion misrepresented facts when it stated that “Stern did not give Nourain a written memorandum detailing the application process.”²² The ALJ found the statement to be a misrepresentation because:

Mr. Stern . . . sent a memorandum to Mr. Nourain dated June 16, 1992, entitled ‘FCC Licensing - Transfer of Information.’ Mr. Stern reported in the memorandum that he had reviewed the history of Liberty’s licensing activities with Mr. Nourain and exchanged files so that Mr. Nourain has copies of all FCC licenses.²³

Liberty has already pointed out that the ALJ’s conclusion is contradicted on the face of the memorandum and by testimonial evidence, and those arguments need not be repeated here.²⁴ The

knowledge of premature activations prior to late April 1995 in pleadings filed after testimony closed and after the record closed in this proceeding. *See* Appendix 1, p. 8.

²¹ Reply at 18. As a party to the Joint Motion, the Bureau, like Liberty, is responsible for any statements contained therein, including any alleged misrepresentation. Moreover, as indicated above, Bureau counsel actively wrote and edited the Joint Motion. *See supra* at 4.

²² Joint Motion by Bartholdi Cable Co., Inc. and Wireless Telecommunications Bureau for Summary Decision (filed July 15, 1996) at 13 (“Joint Motion”).

²³ ID at 28.

²⁴ *See* Liberty’s Exceptions at 21-22; Liberty’s Reply Brief (filed April 22, 1998) at 17-18 (“Liberty’s Reply”). One point does deserve clarification. In its Reply, the Bureau adds, somewhat cryptically, that the Stern memorandum is “nevertheless advice about licensing that Mr. Nourain received.” Reply at 19. However, Liberty (and previously the Bureau) never suggested – certainly the Joint Motion did not suggest – that Mr. Nourain received *no* advice about licensing at all, merely that he did not receive detailed instructions from Mr. Stern. The Bureau’s strained interpretation of a single phrase in the Joint Motion cannot support a finding of

point here, however, is that the Stern memorandum has been in the Commission's and the Bureau's possession since August 14, 1995, and, thus, was well known to the Bureau when it helped author and submit the Joint Motion in July 1996.²⁵ Thus, if Liberty is found to have engaged in a misrepresentation on this basis, as the Bureau now urges, then the Bureau itself is equally culpable. Presumably, the Bureau does not really intend this unique and anomalous confession. However, Liberty submits that the Bureau's reversal on this point and corresponding (if unwitting) implication of itself in a misrepresentation compellingly demonstrate the recklessness of its new-found position.

C. Internal Audit Report

The Bureau's Reply now suddenly attributes great significance to the IAR and supports the ALJ's conclusion that the IAR is "the most credible and reliable evidence that explained the events which led to the designated issues."²⁶ In addition to concluding that the IAR is a significant piece of evidence, the Bureau now supports the ALJ's finding that it was "strategically withheld."²⁷

Again, Liberty has already pointed out that the ALJ's finding is unsupported by the

misrepresentation. *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 356-57 (D.C. Cir. 1998) (vacating the Commission's finding that a licensee lacked candor based solely on a strained interpretation of the word "requirement" as used in two of the licensee's pleadings).

²⁵ The Bureau acknowledges as much by noting, without elaboration, that the Stern memorandum was an attachment to the IAR. Reply at 19, n.74. Moreover, as Liberty explained in its Reply (Liberty's Reply at 17-18), a fair review of the Stern memorandum reveals that it does not convey detailed licensing information, a fact which the Bureau even now readily concedes by stating: "admittedly, [the Stern memorandum] is not a point-by-point instruction to Liberty on what to do to receive Commission licenses." Reply at 19.

²⁶ Reply at 9.

²⁷ *Id.*

record and, in fact, contrary to record evidence;²⁸ those arguments need not be reasserted here. However, for the Bureau to complain that the IAR was wrongfully withheld is particularly ironic given the incontrovertible fact that *the IAR has been in the hands of the Bureau and the Commission throughout this entire proceeding*²⁹ and the fact that Liberty on more than one occasion suggested that: “(i) a redacted version excluding the most sensitive information be released;” or that “(ii) Time Warner be permitted to review all or part of the submission subject to an appropriate confidentiality agreement.”³⁰ The Bureau fails to explain how either of these actions is consistent with the notion that the IAR was “strategically withheld” from the proceeding.³¹

The Bureau’s new claims with respect to the IAR’s significance are also troubling. As a legal matter, Liberty’s claims of privilege and confidentiality, which formed the rationale for withholding the IAR, could not protect the facts underlying the IAR from discovery.³² Moreover, disclosure of the IAR pursuant to the order of the D.C. Circuit enabled the Bureau to confirm openly in this proceeding what it had known and, indeed, asserted all along – that facts relevant

²⁸ See Exceptions at 7-9; Liberty's Reply at 14-15.

²⁹ See Exceptions at 7-8.

³⁰ Application for Review of Liberty Cable Company, Inc. (September 20, 1995); *see also* Liberty's Opposition to Time Warner's Motion to Place Documents in Evidence (Oct. 15, 1997) and documents cited therein.

³¹ Implicit in the Bureau’s new-found conclusions about the IAR is the notion that somehow Liberty was able to manipulate the appeal to avoid divulging the IAR in the hearing. However, as Liberty has pointed out (Exceptions at 8), this could not have been its motivation, since at the time Liberty filed for review of the Commission’s confidentiality ruling, *there was no hearing*. Indeed, the Commission initiated an “expedited” hearing knowing that the release of the IAR was subject to a stay and that an appeal of its confidentiality decision had been filed in the D.C. Circuit. Since both the Bureau and the Commission had full knowledge of the contents of the IAR, if either had thought that the IAR was critical to the hearing, the HDO would have been delayed until after a judicial resolution of the confidentiality issue. However, the Bureau elected to proceed with the hearing regardless of action by the D.C. Circuit.

to this proceeding contained in the IAR had *in fact* been disclosed and made part of the record.³³ Upon review of the IAR just last December, the Bureau concluded that its contents were already in the record³⁴ and that the IAR could not support an adverse finding with respect to Liberty's candor. The Bureau has also noted previously that the record in this proceeding was complete *even without the IAR*: "the Bureau submits that the record developed in this proceeding, even in the absence of the internal audit report . . . is sufficient for the Presiding Judge to render his decision"³⁵ Again, the Bureau has provided no new analysis explaining the reversal of its factual conclusions or how the findings of the internal audit enhance or add to the record painstakingly developed in this proceeding over months of testimony and document production.

D. Disqualification and Forfeiture

The Bureau also reverses course on the appropriate remedy for Liberty's admitted violations of Commission rules, abandoning its support for a forfeiture and advocating Liberty's disqualification. In its Reply, the Bureau concludes that "the preponderance of the record evidence establishes that Liberty does not possess the qualifications to be a Commission licensee."³⁶ However, throughout this proceeding the Bureau consistently maintained that a

³² *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981).

³³ December 2d pleading at 2, 6; November 19th pleading at i; *see also* Appendix 1, p.3.

³⁴ "Based on a thorough analysis, the Bureau believes that the Audit Report substantially comports with the evidence previously developed in this proceeding." November 19th pleading at i.

³⁵ Bureau's Proposed Findings of Fact and Conclusions of Law (filed Feb. 28, 1997) at 41 ("February 28th pleading).

³⁶ Reply at 21. The Reply makes no mention of the intense negotiations between Liberty and the Bureau culminating in Liberty's agreement to endorse a substantial forfeiture as the remedy for the alleged violations. Nor does the Reply mention that Liberty has already acquiesced in an increase in the amount of the forfeiture proposed in the Joint Motion (\$790,000) by \$300,000. Bartholdi Cable Proposed Findings of Fact and Conclusions of Law in Reply (filed Mar. 10, 1997) at 42-43.

forfeiture, rather than disqualification, is the appropriate remedy, stating even *after the record was closed* that “the appropriate remedy is for Liberty to pay a substantial forfeiture for its repeated violations.”³⁷ Now, after Liberty has relied on the Bureau’s consistent support for forfeiture as a remedy, the Bureau for the first time announces its support for disqualification in a pleading filed in such a manner as to deprive Liberty of an opportunity to respond. The Bureau has failed to demonstrate any change in facts or circumstances justifying its support for disqualification, and certainly has offered no evidence that Liberty intentionally violated the Commission’s rules - the only evidence that *conceivably* could support the Bureau’s reversal.

E. Flagrant Disregard

In its Reply, the Bureau abandons its previous well-developed and well-supported position that Liberty’s violations of Commission rules were due to negligence. Instead, the Bureau now “agrees with the *I.D.*’s conclusion that Liberty recklessly disregarded the Commission’s rules and regulatory procedures, and that such misconduct could not have been the result of mere inadvertence.”³⁸ The Bureau makes a futile attempt to support its conclusion,³⁹ but the Bureau neglects to acknowledge to the Commission that it previously (and repeatedly) pointed to the *same* evidence in support of the *opposite* conclusion.⁴⁰ As the Bureau concluded after testimony was complete, “based on the evidence, Liberty’s violations should not be considered wanton, gross, and callous. While certainly serious and inexcusable, the violations did not occur because Liberty possesses a total disregard for the Commission processes.”⁴¹ As

³⁷ November 19th pleading at 12; *see also* Appendix 1, pp. 4-5.

³⁸ Reply at 7.

³⁹ *Id.* at 17-18.

⁴⁰ *See* Appendix 1, p.6.

⁴¹ June 23d pleading at 11; *see also* Appendix 1, p.6.

the Bureau consistently acknowledged, Liberty's violations resulted from the failure of the company's president to properly supervise professionals working for Liberty, including Liberty's engineers and licensing counsel.⁴² The Bureau has introduced no evidence demonstrating that Liberty's inadequate oversight of individuals Liberty believed to be experts in their fields is attributable to anything more than negligence. Given that the facts underlying the Bureau's position before the ALJ have not changed, there is no basis for the Bureau's abandonment of its previous position.

F. Misrepresentation/Intent to Deceive

While the Bureau does not offer any evidence of an intent to deceive, and has not offered such evidence during the two-year duration of this proceeding, it nevertheless concludes that "the Presiding Judge was within his authority to determine that Liberty's behavior . . . showed a lack of candor and an intent to conceal the unauthorized activations."⁴³ Yet, as the Bureau and Liberty have agreed in at least nine previous pleadings, there is no record support for finding an intent to deceive.⁴⁴ In its last filing before the ALJ, the Bureau stated that "[a]n 'essential element' of misrepresentation is an 'intent to deceive.'"⁴⁵ Finding no such intent based on a factual record that has not changed, the Bureau concluded that "the Bureau does not support a finding that Liberty made material misrepresentations."⁴⁶ The Bureau's Reply offers no new evidence of an intent to deceive. Like the ID's conclusions that Liberty lacked candor and misrepresented facts before the Commission, the Bureau's conclusions are grounded only in

⁴² June 23d pleading at 11.

⁴³ Reply at 12.

⁴⁴ See Appendix 1, p.7.

⁴⁵ December 2d pleading at 6-7.

⁴⁶ *Id.*

speculation and should not receive serious consideration.

II. THE BUREAU HAS OFFERED NO CREDIBLE JUSTIFICATION FOR ITS DRAMATIC REVERSAL

In its Reply, the Bureau offered no justification for its about-face. Indeed, it seemingly could not bring itself to admit to the Commission that there has been no change in the underlying facts that would warrant a change in its position.⁴⁷ However, in response to Liberty's request for oral argument in this case, the Bureau now appears to offer two possible excuses for its change in position.⁴⁸

First, in its Opposition the Bureau states that its change in position is based on deference to the credibility and demeanor findings of the ALJ:

The Presiding Judge's demeanor and credibility findings played an important role in the Bureau's decision [to reverse its support of the Joint Motion], as they are entitled to substantial deference. The Bureau reviewed the record and decided that these demeanor and credibility findings were supported by substantial evidence.⁴⁹

Second, the Bureau appears to propound the novel theory of administrative law that, after release of an initial decision, the Bureau assumes a judicial review function and that its only analysis – apparently independent of its status as a party to the hearing – is to decide whether the ALJ's decision is supported by “substantial evidence.”

As demonstrated below, neither of the offered excuses is supported by legal principle or Commission practice or precedent. Indeed, the principles underlying the explanations – just as the Bureau's underlying actions in this case – are directly contrary to Commission precedent. As

⁴⁷ See *supra* note 7.

⁴⁸ Wireless Telecommunications Bureau's Opposition to Request for Oral Argument (filed May 5, 1998) at 3-4 (“Opposition to Request for Oral Argument”).

⁴⁹ *Id.* at 3-4.

such, the Bureau's revisionism should be summarily rejected.

As an initial matter, the Bureau's newly proffered explanations for its about-face are simply inconsistent with its April 22 filing. The Bureau's Reply contains no evaluation of the effect of the ID's demeanor findings on the totality of the evidence.⁵⁰ Indeed, by Liberty's count, the phrase "credibility and demeanor" appears exactly once in the Bureau's pleading.⁵¹ Nor could the Bureau's pleading focus on demeanor findings; a review of the ID reveals only two generally negative references to demeanor.⁵²

Likewise, the Bureau's newly-proffered explanation regarding its purported standard of review find no support in the Bureau's April 22 pleading. The Bureau's Reply is far from a judicial weighing of the sufficiency of evidence in light of the "substantial evidence" standard. Again, the phrase "substantial record evidence" appears in the Bureau's Reply exactly once – and only then in a reference to the *Commission's* reviewing authority.⁵³

⁵⁰ Remarkably, the ALJ's credibility findings represent only two relatively minor pieces of evidence adduced on the question of when Liberty learned of the unauthorized path activations. However, as Liberty has pointed out, upon review of *all* of the evidence, including the negative credibility findings, *even the ALJ concluded that Liberty's principals were unaware of the existence of unauthorized path activations prior to late April 1995.* ID ¶ 73. Moreover, as a party to the hearing, the Bureau observed the demeanor of Liberty's witnesses first hand and, presumably, factored its own credibility assessment into its prior pleadings.

⁵¹ The Bureau states its belief that "there is a well-founded basis for the Presiding Judge's determination that Liberty's principals knew of premature activations [before April 1995] based on reliable documentary evidence and the Presiding Judge's assessment of the credibility and demeanor of Liberty's witnesses." Reply at 16. Even in this, the Bureau gets it wrong. *See supra* notes 12 & 50.

⁵² The ID states that the testimony of Mr. Price, Liberty's president, "was vague and at times evasive." ID ¶ 70. In addition, with regard to a former Liberty employee, the ALJ noted that "Mr. McKinnon's inability or unwillingness to recall a key document . . . raises doubt about his credibility." ID ¶ 67. The Bureau's deference to the ALJ's "demeanor" findings regarding Mr. McKinnon is particularly curious given that Mr. McKinnon testified via deposition only and, hence, the ALJ had no opportunity to observe his demeanor.

⁵³ Reply at 20.

Despite the Bureau's attempts to recast its April 22 submission, the Reply on its face primarily consists of 23 pages of fact finding – quite independent of the ID and quite devoid of any reference to the inconvenient fact that the Bureau has consistently reached the opposite conclusions on the same evidence for more than a year and a half. All of the Bureau's *post hoc* window dressing cannot transform its Reply into something it is not.

Even if the Bureau's new-found explanations were plausible, they are legally unavailing. As Liberty understands it, the Bureau now believes that with the issuance of an initial decision in a hearing case, the Bureau's function changes so that it must defer to the ID as long as the ID appears to be supported by "substantial evidence." The Bureau's position is fundamentally flawed.

First, it is unclear whether the Bureau intends to arrogate to itself the legal function and authority to sit in review of ALJ decisions, but that is precisely the effect of its position. Yet, the Bureau has no delegated authority to review ALJ decisions.⁵⁴ To the contrary, since the elimination of the Review Board, the Commission specifically has reserved adjudicatory review functions *exclusively* to itself, "[to] a commissioner, or a panel of commissioners."⁵⁵ Moreover, the Bureau's assumed review function is inconsistent with the authority that *has* been delegated by the Commission to the Bureau to participate *as a party*.⁵⁶ Thus, the Commission has foreclosed any authority which the Bureau may wish to give to itself to review the ID for sufficiency of evidence.

More generally, the Bureau's position is fundamentally inconsistent with the hearing and

⁵⁴ 47 C.F.R. §§ 0.131, *et seq.*

⁵⁵ 47 C.F.R. § 1.271.

⁵⁶ HDO ¶ 33.

review processes outlined in the Administrative Procedure Act,⁵⁷ the Communications Act,⁵⁸ and the Commission's procedural rules.⁵⁹ Fundamental to these provisions is the notion that an entity cannot be both a litigant and a reviewing authority. In fact, both the APA and the Communications Act contain provisions expressly designed to prevent the overlap of judicial and non-judicial responsibilities within an agency.⁶⁰ These statutory principles are consistent with the Supreme Court's directive that the prosecutorial and adjudicative functions of an agency must be kept separate.⁶¹ Thus, the Bureau does not have discretion to act as either a party *or* a reviewing authority in the instant proceeding. Rather, it is constrained to act as a party.

Finally, the Bureau's position has no basis in Commission procedure or practice. Indeed, the Bureau cites no precedent for its use of judicial standards of review in the exercise of its decidedly non-judicial functions. Nor could it. Liberty is aware of *no* case in which any Bureau of this agency has abandoned its role as a party to a hearing by taking the position that its sole function on appeal to the Commission is to determine whether the ALJ's decision is supported by "substantial evidence." To the contrary, Bureaus historically have acted as parties throughout Commission review, including by challenging ALJ decisions.

Typical of the Bureau's historic posture in hearing cases is *Capitol Radio Telephone, Inc.*⁶² In *Capitol*, the Private Radio Bureau (predecessor to the Wireless Bureau) filed exceptions to an initial decision finding no grounds for revocation of Capitol's license or imposition of a

⁵⁷ 5 U.S.C. § 557.

⁵⁸ 47 U.S.C. § 309(e).

⁵⁹ 47 C.F.R. § 1.221(d).

⁶⁰ See 5 U.S.C. § 3105; 47 U.S.C. § 155(c)(8)

⁶¹ See *Wong Yang Sung v. McGrath*, 339 U.S. 33, *modified* 339 U.S. 908 (1950).

⁶² 11 FCC Rcd 2335 (1996).

forfeiture.⁶³ In its exceptions, the Bureau challenged the legal standard applied by the ALJ,⁶⁴ the conclusions the ALJ drew from the factual findings,⁶⁵ and the ALJ's assessment of the credibility of Capitol's witnesses.⁶⁶ As *Capitol* clearly shows, the Bureau simply has not previously applied a "substantial evidence" analysis to ALJ decisions. To the contrary, historically, the Bureau – in accord with the Commission's other operating Bureaus – has not hesitated to challenge ALJ fact finding,⁶⁷ conclusions,⁶⁸ or applications of law.⁶⁹

⁶³ *Id.* ¶ 1.

⁶⁴ *Id.* ¶ 13.

⁶⁵ *Id.* ¶¶ 15, 24.

⁶⁶ *Id.* ¶ 20.

⁶⁷ *See, e.g., International Fueling Co., Inc.*, 65 FCC 2d 660 (1977) (Safety and Special Radio Services Bureau rejects ALJ's interpretation of Rule 87.251(b) and rejects the conclusion about the reasonable beliefs of International Fueling as to its obligations); *Charles Leo Suggs*, 57 FCC 2d 1157 (1976) (Safety and Special Radio Services Bureau challenges both the factual findings and the conclusions of the ALJ); *Louis C. Stockard*, 42 FCC 2d 1032 (1973) (Safety and Special Radio Services Bureau raised exceptions to both findings of fact and conclusions); *J.H. Toomey & Sons, Inc.*, 13 FCC 2d 393 (1968) (Safety and Special Radio Services Bureau raised exceptions to both findings of fact and conclusions).

⁶⁸ *See, e.g., Gulf Coast Communications Inc.*, 81 FCC 2d 499 (1980) (Private Radio Bureau raised exception to Initial Determination on the basis that there should have been disqualification on an additional ground); *Albert H. Gould*, 75 FCC 2d 200 (1979) (Private Radio Bureau contended that judge failed to properly weigh the evidence of applicant's prior violations of the Commission's rules); *Walter Norman Russell*, 86 FCC 2d 43 (1981) (Private Radio Bureau disagreed with finding that there was no basis for continuing suspension of amateur operator's license); *Ernest M. Petter*, 57 FCC 2d 716 (1976) (Safety and Special Radio Services Bureau disagreed with conclusion that it had not met its burden in showing that station was in operation during time of violation); *James R. Weeks*, 48 FCC 2d 269 (1974) (Safety and Special Radio Services Bureau argued that the facts supported finding that Weeks had committed the violations); *James T. Beall*, 33 FCC 2d 869 (1972) (Safety and Special Radio Services Bureau claims that there should have been a finding of an additional violation for not allowing inspection of the facility); *Roy A. Filbert*, 6 FCC 2d 883 (1967) (Safety and Special Radio Services Bureau raised exceptions to the conclusions of the ALJ).

⁶⁹ *See, e.g., Robert J. Listberger, Jr.*, 76 FCC 2d 212 (1980) (Private Radio Bureau raises exception to judge's refusal to revoke license based on disparate treatment of other offenders); *Howard Iken*, 70 FCC 2d 204 (1978) (Safety and Special Radio Services Bureau rejected ALJ's authority to suspend an amateur operator license).

The Bureau's misperception of its role is highlighted by its suggestion that it can no longer advocate the proposed findings of the Joint Motion because "[a]n initial decision is not a mere report to be arbitrarily disregarded."⁷⁰ In fact, the ALJ's findings in no way constrain the position the Bureau may adopt because this standard of review the Bureau cites applies not to the *Bureau* or other parties but to the *Commission* when exercising its statutory power of review.⁷¹ The Bureau cites no precedent for the proposition that judicial "standards of review" govern the Bureau's participation in a hearing. Accordingly, the Bureau's concept of its own authority in hearings is legally flawed.

III. CONSISTENT WITH COMMISSION PRECEDENT, THE BUREAU SHOULD BE ESTOPPED FROM REVERSING A POSITION CONSISTENTLY MAINTAINED THROUGHOUT THIS PROCEEDING, AND ITS REPLY SHOULD BE STRICKEN.

As far as Liberty can determine, the Bureau's reversal in this case is unprecedented. Based on Liberty's research, never has a Bureau sought to effect a wholesale change in its conclusions of fact and law in a Commission adjudication absent some underlying change in the facts or law. Indeed, even in the rare and historically remote instances where a Bureau has reversed itself on specific procedural or substantive issues, the Bureau has not prevailed on its newly adopted position.⁷² Moreover, in the one instance where the Private Radio Bureau

⁷⁰ Opposition To Request For Oral Argument at 3 & n.10 (citing *Stereo Broadcasters, Inc.*, 74 FCC 2d 543 ¶ 8 (1981)).

⁷¹ Even this standard of review, of course, does not keep the Commission from reviewing the record and making its own factual findings. *See, e.g., FCC v. Allentown Broadcasting Co.*, 349 U.S. 358, 364 (1955).

⁷² *See The Seven Hills Television Company*, 2 FCC Rcd 6867, 6889 (Rev. Bd. 1987), *modified*, 3 FCC Rcd 879 (Rev. Bd. 1988), *partially vacated*, 4 FCC Rcd 4062 (OGC 1989) (Mass Media Bureau opposed reopening the record for the submission of documents relating to licensee ownership and subsequently sought to add an issue as to the licensee's candor for failure to disclose the documents. In refusing to add an issue, the Review Board noted the inconsistency

reversed itself on the issue of a licensee's character qualifications – on appeal the Bureau urged that the licensee was qualified to hold Commission licenses although the Bureau previously sought disqualification – the Bureau was not only unsuccessful in advancing its newly adopted position but also censured for its disingenuous reversal.⁷³ The Review Board noted that the Bureau: “d[id] not explain its change in position or, indeed, *even acknowledge that it ha[d] reversed its former position.*”⁷⁴

Perhaps not surprisingly, it is not only rare for a Bureau of the Commission but for *any* party to change position in the middle of FCC litigation. Nevertheless, on those rare occasions when parties have attempted to shift positions, the Commission has not hesitated to estop parties from making sweeping changes in position based on some momentary and fundamentally arbitrary whim. This notion has been expressed by the Commission in a number of ways. In the adjudicative context, the Commission has enforced this concept through an administrative policy comparable in many respects to the common law doctrine of judicial estoppel.⁷⁵ Under this

of the Bureau's position.); *Madison County Broadcasting*, 70 FCC 2d 226, 227 (Rev. Bd. 1978) (Broadcast Bureau supported petition to reopen the record to receive evidence of possible character policy violations and subsequently opposed appeal of an order denying the petition. The Review Board reversed the denial and remanded the case with instructions to reopen the record.)

⁷³ *Gulf Coast Communications*, 81 FCC 2d 499, 512-13 (Rev. Bd. 1980), *recon. den'd*, 88 FCC 2d 1033 (Rev. Bd. 1981).

⁷⁴ *Id.* at 513 n.11 (emphasis added).

⁷⁵ 18 Moore's Federal Practice § 134.30, at 134-61 (3d ed. 1998). Judicial estoppel has been applied in a number of federal circuits in cases involving civil litigation. “Judicial estoppel is intended to protect the integrity of the judicial process . . . [by] prevent[ing] litigants from playing ‘fast and loose’ with courts, and avoiding unfair results and unseemliness.” 18 Moore's Federal Practice § 134.31, at 134-65; *accord Bates v. Long Island R.R. Co.*, 997 F.2d 1028, 1937 (2d Cir.), *cert. denied*, 114 S.Ct. 550 (1993). Significantly for the purposes of this proceeding, “the doctrine applies when the inconsistent position is asserted at different stages of a single administrative proceeding.” *Id.* at 134-63 & n.10 (citing *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1565 (Fed. Cir. 1996)).