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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re Applications of	)	WT Docket No. 96-41	
Liberty Cable Co., Inc.)		
)		
For Private Operational Fixed	)	File Nos.:	
Microwave Service Authorization and	)	708777	WNTT370
Modifications	)	708778, 713296	WNTM210
	)	708779	WNTM385
New York, New York	)	708780	WNTT555
	)	708781, 709426, 711937	WNTM212
	)	709332	(NEW)
	)	712203	WNTW782
	)	712218	WNTY584
	)	712219	WNTY605
	)	713295	WNTX889
DOCKET FILE COPY ORIGINAL	)	713300	(NEW)
	)	717325	(NEW)
)		

To: The Honorable Richard A. Sippel
Administrative Law Judge

**WIRELESS TELECOMMUNICATIONS BUREAU'S OPPOSITION TO
LIBERTY CABLE CO., INC.'S MOTION TO DELETE ISSUE**

The Acting Chief, Wireless Telecommunications Bureau (Bureau), by her undersigned counsel, hereby opposes the Motion to Delete Issue (Motion) filed by Liberty Cable Co., Inc. (Liberty) on April 9, 1996. As the Bureau will demonstrate below, the Motion is both procedurally and substantively deficient and should therefore be denied.

1. Section 1.229 of the Commission's Rules allows a party to move to have a designated issue deleted within 15 days of the publication of the summary of the Hearing Designation Order (HDO) in the Federal Register. The Federal Register published the summary of the HDO in this matter on Friday, March 22, 1996. 61 Fed. Reg. 11,839 (1996). Any motion to delete issues

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would therefore have been due to be filed by Monday, April 8, 1996. Liberty filed its Motion on Tuesday, April 9, 1996. A copy of the first page of the Motion bearing the Secretary's date stamp is attached. *See* Attachment 1. Accordingly, the Motion was filed untimely.

2. Moreover, as the Secretary-stamped copy of the Motion shows, Liberty only filed the original and no additional copies of the Motion. Section 1.51 of the Rules requires that for all motions to be handled by an administrative law judge, the moving party must file an original *plus six* copies. Liberty's Motion is therefore deficient on this basis as well.

3. Chief Judge Stirmer made clear in his initial Order naming the presiding officer in this proceeding that the parties were expected to be familiar with Part 1 of the Commission's Rules. *See Liberty Cable Co., Inc.*, FCC 96M-34 (released March 13, 1996). Liberty's failure to observe these basic filing requirements, which are clearly stated in Part 1 of the Rules, therefore cannot and should not be countenanced. The Bureau requests that Liberty's Motion be dismissed as procedurally defective.

4. Liberty's request for deletion of the first issue is also substantively deficient.¹

¹ As defined in the Hearing Designation Order, the issue is:

1 (a) To determine the facts and circumstances surrounding Liberty Cable Co., Inc.'s operation of hardwired interconnected, non-commonly owned buildings, without first obtaining a franchise. *See* 47 U.S.C. § 541(b)(1), 47 U.S.C. Title VI and 47 C.F.R. § 76 *et seq.*

(b) To determine whether Liberty Cable Co., Inc. has violated Section 1.65 of the Commission's Rules, 47 C.F.R. § 1.65, by failing to notify the Commission of its provision of service to interconnected, non-commonly owned buildings.

(c) To determine whether, based on 1(a) and (b) above, Liberty is qualified to be granted the above-captioned private operational fixed microwave

(continued...)

Liberty's Motion, although captioned as a Motion to Delete is in essence a thinly veiled motion for summary decision. As the Bureau will demonstrate, a material and substantial question of fact does exist, and neither summary decision nor deletion of the issue in question is appropriate.

5. Liberty seeks deletion of the first issue which concerns Liberty's hardwiring of non-commonly owned buildings without a cable franchise. Liberty argues that it was impossible for it to obtain a cable franchise and that therefore (for some unexpressed reason), its violation of the Communications Act should be overlooked and the issue deleted from the hearing.

6. The Commission has made it clear that deletion of factual issues will not lie absent a showing that the issue was specified under a mistake of fact. *See Lorain Community Broadcasting, Co.*, 5 FCC 2d 808 (1966); *see also Summit Broadcasting*, 18 FCC 2d 83 (1969). Liberty has not demonstrated any mistake made by the Commission; therefore, deletion is inappropriate.

7. In its Motion, Liberty attempts to obscure this issue, which, nonetheless is clear. The issue designated is to determine the facts and circumstances surrounding Liberty's violation of the Communications Act of 1934, as amended (Act) and whether those facts and circumstances demonstrate that Liberty is unqualified to hold the captioned licenses. All of Liberty's arguments in its Motion concerning its inability to obtain a cable franchise could conceivably be considered to be within the realm of the facts and circumstances. Those arguments, however, do not mean

¹(...continued)
authorizations.

Hearing Designation Order and Notice Opportunity for Hearing, Liberty Cable Co., Inc. FCC 96-85 (released March 5, 1996) (HDO).

that *no* issue exists as to Liberty's qualifications to be a licensee despite its admitted violations of the Communications Act.

8. During the time Liberty interconnected the buildings listed in Appendix B of the *HDO*, the federal statute concerning hardwiring of buildings was clear. That statute stated:

[T]he term "cable system" means a facility, consisting of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include . . . a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, management, unless such facility or facilities uses any public right-of-way.

47 U.S.C. § 522(7)(B). Furthermore, Section 621(b)(1) the Act requires that a cable operator "may not provide cable service without a franchise." 47 U.S.C. § 541(b)(1). Therefore, during the time period in question, any company which used closed transmission paths (interconnection by hardwire) to non-commonly owned buildings to provide video programming was required to have a cable franchise.

9. It is undisputed that Liberty did provide such service. It is also undisputed that Liberty did not have a franchise. The issue is not, as Liberty would have this tribunal believe, whether it was *possible* for it to get such a franchise, but instead whether its failure to obtain such a franchise *affects its qualifications* to be a Commission licensee. Nothing in Liberty's Motion supports deletion of the issue. Deletion of this issue, therefore, is clearly inappropriate. Moreover, the fact that the controlling statute was later changed does nothing to alter the fact that at the time Liberty was hardwiring non-commonly owned buildings without a cable franchise, it was not allowed to do so under the statute. The simple response to Liberty's assertion of its inability to obtain a cable franchise is, then, that it should not have hardwired buildings. Liberty

had an alternative to interconnecting buildings -- that is, applying for operation fixed microwave service (OFS) facilities like the ones in question here.

10. To delete the issue because of the inability of Liberty to get a franchise would be to second guess or reverse the Commission's decision to designate this issue for hearing.² It is well established that the Presiding Judge lacks the authority to review the propriety of the designation of a case for hearing, or to issue a ruling which would have the effect of dismissing a hearing designation order as defective. *See Frank H. Yemm*, 39 Rad. Reg (P&F) 1657, 1658-59 (1977); *see also Anax Broadcasting Inc.*, 87 FCC 2d 483, 486 (1981).

11. Finally, Liberty's Motion in no way addresses subpart B of the issue which is to determine whether Liberty violated Section 1.65 of the Commission's Rules by failing to inform the Commission of its violations of the Act. Therefore, deletion of the entire issue is not proper.

Because Liberty failed to observe basic filing requirements in the submission of its Motion to Delete, the Bureau requests that the Motion be summarily dismissed. In the alternative, because Liberty has failed to demonstrate that no issue exists, the Motion should be denied.

Respectfully submitted

Michele C. Farquhar
Acting Chief, Wireless Telecommunications Bureau

April 18, 1996

By: _____

Joseph Paul Weber
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Mark L. Keam
Trial Attorneys

² If Liberty is actually seeking reconsideration of the *HDO*, its pleading is both late pursuant to Section 1.104(b) of the Rules, and filed with the inappropriate party.

ATTACHMENT 1

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To: Administrative Law Judge Richard L. Sippel

MOTION TO DELETE ISSUE PURSUANT TO 47 C.F.R. § 1.229

Pursuant to 47 C.F.R. § 1.229, Bartholdi Cable Co., Inc., formerly known as Liberty Cable Co., Inc., hereby moves to delete that portion of the Hearing Designation Order and Notice of Opportunity for Hearing released on March 5, 1996 alleging a failure of Liberty Cable Co., Inc. to apply for and obtain a cable franchise.

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CERTIFICATE OF SERVICE

I, Mark Keam, in the Enforcement Division, Wireless Telecommunications Bureau, certify that I have, on this 18th day of April, 1996, transmitted by facsimile and sent by regular First Class United States mail, copies of the foregoing "Wireless Telecommunications Bureau's Opposition to Liberty Cable Co., Inc.'s Motion to Delete Issue" to:

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April 18, 1996



Mark L. Keam