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DOCKET FILE COPY ORIGINAL

May 2, 1996

BY HAND DELIVERY

The Honorable Richard L. Sippel
Administrative Law Judge
2000 L Street, N.W., Suite 220
Washington, D.C. 20554



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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: *Applications of Liberty Cable Co., Inc. Private Operational Fixed
Microwave Service Authorization and Modifications
(WT Docket No. 96-41)*

Dear Judge Sippel:

On behalf of Bartholdi Cable Co., Inc., formerly known as Liberty Cable Co., Inc. ("Liberty"), we submitted on April 25, 1996 a Reply to the Opposition by Time Warner Cable of New York City ("Time Warner") to Liberty's Motion to Delete Issue. We write to correct footnote 6 of Liberty's Reply.

First, footnote 6 contains a typographical error. The New York State Commission on Cable Television (NYSCCT) issued an order to show cause in August 1994, not 1995. Apparently, we replicated a similar typographical error contained on p. 8 of Time Warner's Opposition.

On a more substantive note, the following statement in footnote 6 is not entirely correct: "Until the City had initiated its rulemaking, which was only after Liberty initiated its federal litigation, the City maintained that a franchise was both unnecessary and unavailable." The words "both unnecessary" must be deleted in order to make this sentence accurate. The City initiated its rulemaking around February 1995, after Liberty initiated litigation in December 1994. To the extent the above-referenced sentence may be construed to mean that the City did not expressly articulate a franchise requirement for Liberty prior to February 1995, it is incorrect.

Our review of documents filed in Liberty's litigation reveals that in July 1994, one of Liberty's attorneys received through the City of New York's Department of Information Technology and Telecommunications (DOITT) a letter from the City's Law Department stating that "a 'franchise' from the City is not required to provide a microwave transmission service unless such service uses cable or a similar closed transmission path to connect (whether across City streets or only using private property -- see *F.C.C. v. Beach Communications, Inc.*, 113 S.

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CONSTANTINE & PARTNERS

Hon. Richard L. Sippel

- 2 -

May 2, 1996

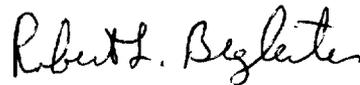
Ct. 2096 (1993)) buildings which are not commonly owned, controlled or managed.” A copy of the relevant series of correspondence is attached hereto for your reference.

Based on this correspondence, the City had apparently changed its position regarding the necessity of a franchise for Non-Common Systems by the end of July 1994. However, Liberty remains correct that no franchise procedure applicable to Liberty was then available and in fact no process became available until well after Liberty began its lawsuit. Thus, the essential premise of Liberty's argument is left undisturbed by the factual correction.

Liberty's disclosure also reveals a factual misstatement in Time Warner's Opposition which duplicated an apparent factual error on the district court's part. At pp. 8-9 of the Opposition, Time Warner writes, "the district court found, [*sic*] Liberty did not even communicate with the City about a cable franchise until October 1994, *after* the NYSCCT had issued its show cause order [*citing Liberty Cable Co. v. City of New York*, 893 F. Supp. 191, 205 (S.D.N.Y. 1995)]." As the attached correspondence shows, Liberty did contact the City about the franchise requirement in July 1994, well before the Order to Show Cause issued.

We hope that this clarification helps to shed some additional light on the facts relevant to Liberty's Motion to Delete.

Respectfully submitted,



Robert L. Begleiter

Encl.

cc: Joseph Weber
Katherine Power
Mark Keam
R. Bruce Beckner
Christopher Holt

FISCHBEIN • BADILLO • WAGNER • ITZLER

808 THIRD AVENUE, NEW YORK, NY 10022

(R12) 808-1000



July 6, 1996

07/11

Mr. Thomas J. Dunleavy
Deputy Commissioner
Department of Information Technology
& Telecommunications
75 Park Place
New York, New York 10007

Mr. Thomas J. Dunleavy
Deputy Commissioner
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& Telecommunications
75 Park Place
New York, New York 10007

Mr. Thomas J. Dunleavy
Deputy Commissioner
Department of Information Technology
& Telecommunications
75 Park Place
New York, New York 10007

Re: Cable Television Franchise Requirements

Dear Mr. Dunleavy:

We represent Liberty Cable Company, Inc. ("Liberty"), which has been providing cable television service to numerous buildings in New York City for the past several years. Indeed, Liberty provides the only meaningful competition to the established cable television companies operating in the City, such as Time Warner¹.

Because Liberty does not utilize property owned by the City of New York to provide its cable television service, Liberty has been operating without a franchise or license from the City. The City of New York Department of Telecommunications and Energy ("DTE") has previously orally confirmed that Liberty is not required to obtain any license or franchise from the City. The purpose of this letter is to obtain written confirmation of this orally stated position.

The issue of whether a cable television system that does not utilize the property of the City is required to be licensed or franchised has been formally addressed by the DTE. The DTE, in response to an application for a cable license from the Russian American Broadcasting System ("RABS"), has previously held that if

Even so, Liberty has only about 15,000 subscribers compared to Time Warner's 850,000.

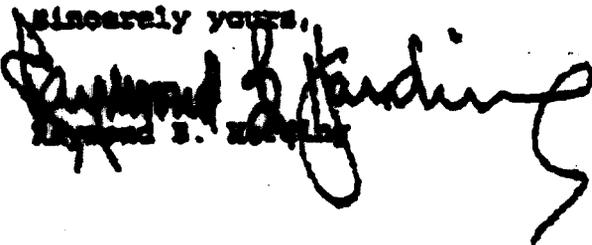
July 6, 1994
Page 2

a cable television system does not utilize the "inalienable" property of the City, it was not required to be licensed by the DTE or to receive a franchise from the City. A copy of the RABS license application and the response of the DTE is attached hereto.

Like the RABS, Liberty does not utilize the inalienable property of the City for either public or private purpose. Like the RABS, Liberty transmits cable television service by means of microwave to various multifamily buildings. In doing so, Liberty does not use any public streets, rights of way or other property of the City to deliver its cable television service. Liberty's television service is subsequently carried by cable from the microwave antenna directly to the building residents, once again without the use of City property.

Liberty hereby requests the City's written confirmation that, like RABS, Liberty does not need a cable television franchise or license from the City to operate its cable television systems so long as Liberty does not use the inalienable property of the City for the provision of cable television service.

Thank you for your cooperation.

Sincerely yours,

Raymond S. Wagner

RSM:ch

Enclosure



DEPARTMENT OF INFORMATION TECHNOLOGY
AND TELECOMMUNICATIONS

75 Park Place, 6th Floor
New York, N.Y. 10007

VIA FAX

July 22, 1994

Raymond B. Harding, Esq.
Fischbein Badillo Wagner Itzler
909 Third Avenue
New York, New York 10022

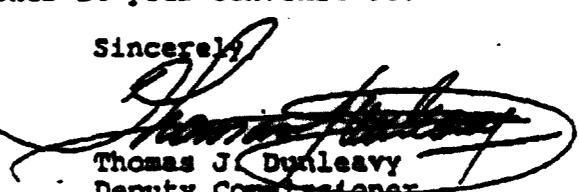
Re: Cable Television Franchise Requirements

Dear Mr. Harding:

As I told you when we spoke on July 12th and 19th, I referred your letter of July 6, 1994 to the Law Department for an opinion. Attached is a copy of the response dated July 21, 1994, which I received from Bruce Regal of the Corporation Counsel's office.

We are available to meet and discuss all aspects of cable television franchise requirements at your convenience.

Sincerely,



Thomas J. Dunleavy
Deputy Commissioner

Attachment

c: Eileen E. Huggard, Esq.
David E. Bronston, Esq.
Bruce Regal, Esq.



LAW DEPARTMENT

100 CHURCH STREET
NEW YORK, N.Y. 10007
Room 6D17
PAULA CROTTY
Corporation Counsel

(212) 785-1327

July 21, 1994

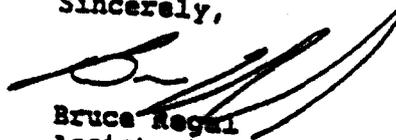
Thomas Dunleavy
Department of Information Technology
and Telecommunications
75 Park Place - 6th Floor
New York, New York

Dear Tom:

You have asked me to review a legal issue raised in a letter, dated July 6, 1994, which you received from a representative of Liberty Cable Company, Inc. ("Liberty"). The question raised is whether a microwave video transmission service such as Liberty requires a "franchise" (as that term is defined in federal law) from the City to operate. The answer, very briefly, is that such a "franchise" from the City is not required to provide a microwave transmission service unless such service uses cable or a similar closed transmission path to connect (whether across City streets or only using private property — see *F.C.C. v. Beach Communications, Inc.* 113 S. Ct. 2096 (1993)) buildings which are not commonly owned, controlled or managed.

I would be happy to provide you with a more complete legal analysis of the issues underlying this conclusion at your request.

Sincerely,



Bruce Regal
Assistant Corporation Counsel

Certificate of Service

I hereby certify that on this 3rd day of May, 1996, I caused copies of the foregoing "Letter to The Presiding Officer" to be sent via facsimile and first class, postage prepaid mail to the following:

* Administrative Law Judge
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Lorraine F. Handel

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