

ORIGINAL

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

FCC 96M-118

61367

In re Applications of	)	WT DOCKET NO. 96-41	
)		
LIBERTY CABLE CO., INC.)		
)		
For Private Operational Fixed	)	File Nos:	
Microwave Service Authorization	)	708777	WNTT370
and 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
	)	713300	(NEW)
	)	717325	(NEW)

FCC MAIL SECTION

MAY 16 12 22 PM '96

MEMORANDUM OPINION AND ORDER

Issued: May 14, 1996 ; Released: May 16, 1996

1. This is a ruling on Bartholdi Cable Co., Inc.'s [formerly Liberty Cable Co., Inc. and referred to herein as "Liberty"] Motion To Compel Production Of Documents By Cablevision Of New York City - Phase 1 ("Cablevision") that was filed by Liberty on April 22, 1996. Cablevision's Opposition To Liberty's Motion To Compel was filed on May 6, 1996. Liberty filed a Reply on May 10, 1996.

2. On April 3, 1996, Liberty served a Document Request seeking eleven categories of documents from Cablevision. On April 15, 1996, Cablevision served its Response in which Cablevision stated that it has only publicly filed documents that are responsive to Request No. 2² seeking documents given to the Commission regarding Liberty's fitness for licenses. A similar response was made as to Request No. 3 which asks for documents exchanged with Time Warner which relate to Liberty. To the extent that such documents exist Liberty is referred to the public record in judicial and administrative proceedings.

¹ The Reply is an unauthorized pleading. See 47 C.F.R. §1.294(b). The matters are repeated in the Motion To Compel and Cablevision is not harmed by the Reply in view of this ruling. Therefore, a Motion To Strike filed by Cablevision on May 15, 1996, is moot and no responsive pleading need be filed by Liberty.

² Request No. 1 dealt with documents that Cablevision intends to use at hearing. There is no dispute over that Request

Similarly, for Request No. 4, on Liberty's fitness or qualifications, Cablevision has or will produce, voluntarily, the following:

documents, or portions thereof, to, from, by, between or among N.Y.C. Cablevision and Cablevision of Hudson County that contain factual information concerning: (a) Liberty's operation of Non-Common Systems without obtaining a cable franchise; Liberty's operation of OFS facilities prior to obtaining F.C.C. authorization; and (c) Liberty's lack of candor before the F.C.C., if any such documents exist.

3. In its Motion To Compel, Liberty persists in seeking only documents that are responsive to Requests Nos. 5 through 11³ that are documents which Liberty contends to be:

relevant and material to the question of whether local authorities eve[r] required Liberty to obtain a franchise or a multichannel video programming distribution ("MVPD") that did not use public right-of-way in providing cable television services.

See Liberty's Reply pleading at 2. Liberty argues that such documentary evidence may provide proof that a franchise was not required from local franchising authorities. Liberty hopes to prove through Cablevision's documents that:

[Liberty] would have violated no law by constructing and operating its Non-Common Systems and moreover would have no obligation to disclose its operation of Non-Common Systems.

Id. at 3. Liberty also argues that the documents would be further relevant in showing "the regulatory environment" at the time that Liberty was constructing its Non-Common Systems. The relevance and the decisional significance of such evidence would be speculative at best and Liberty has failed to make a convincing argument that such evidence could have any decisional significance.

4. Cablevision correctly argues that the issues for litigation here are the circumstances surrounding the admitted construction and operation by Liberty of Non-Common cable systems without a franchise and whether Liberty has misrepresented itself or was lacking in candor in related disclosures to the Commission. Whatever the "regulatory environment" may have been, the evidence of Cablevision's dealings with local and federal regulatory agencies are too remote to show that there was a pattern or practice which somehow would justify

³ Liberty indicated this cutback on its document requests in its unauthorized Reply pleading that it filed in response to Cablevision's Objections.

Liberty to operate outside the law.⁴ Documents that are speculatively sought by Liberty would relate to such remote subjects as lobbying for or against local franchise procedures which is a type of evidence that could send this case far adrift. Certainly, such evidence would not be likely to show that Cablevision was similarly situated in dealing with the same franchise jurisdictions and was treated differently than Liberty. Therefore, the Cablevision documents that are now sought by Liberty concerning Non-Common Systems in New York City, New York State and/or New Jersey, the availability of franchise procedures for such systems, and documents disclosing communications among the parties relating to such franchise procedures are not yet shown to be relevant. 47 C.F.R. §1.311(b) (evidence that can be discovered must be shown to be at least calculated to lead to the discovery of additional evidence).

Order

Accordingly, IT IS ORDERED that in accordance with the foregoing, Bartholdi Cable Co. Inc.'s Motion To Compel Production Of Documents By Cablevision Of New York City - Phase 1 filed by Liberty on April 22, 1996, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel
Administrative Law Judge

⁴ By way of illustration, cf. United States v. Armstrong (Sup. Ct. No. 95-157), wherein the Supreme Court recently ruled that when statistics are used to show selective prosecution, there must be a credible showing of different treatment of similarly situated persons. The Supreme Court's Decision was issued on May 13, 1996, and it is the subject of a lengthy report in the New York Times, May 14, 1996 at A20. There is no contention on showing by Liberty that it is similarly situated to Cablevision vis a vis regulatory agencies and that Liberty has been treated differently to its detriment.