

FCC MAIL SECTION

BOOK FILE ORIGINAL

JUL 9 10 35 AM '96

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

FCC 96M-171  
61743

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)

MEMORANDUM OPINION AND ORDER

Issued: July 3, 1996

;

Released: July 5, 1996

1. This is a ruling on Motion of Bartholdi Cable Company, Inc. (referred to herein as "Liberty/Bartholdi") Regarding Confidential Treatment Of Documents filed on June 25, 1996, and a supporting Memorandum Regarding Confidential Treatment Of Transcript And Transaction Documents that was filed on the same day by Freedom New York, L.L.C. ("Freedom"). An Opposition To Motion For Confidential Treatment Of Transaction Documents was filed by Time Warner Cable of New York City and Paragon Cable Manhattan ("Time Warner") on June 28, 1995. There was no responsive pleading filed by the Wireless Telecommunications Bureau ("Bureau").

2. In May 1996, the parties submitted a Stipulated Protective Order to the Presiding Judge which he signed upon presentment. It is limited in its application to the discovery phase of the case. It provides Liberty/Bartholdi, Time Warner, and any other party, considerable leeway in identifying written materials as "confidential" which during the discovery phase keeps the designated documents off the public record and away from executives and employees of the parties.<sup>1</sup> There also are provisions for treating depositions

---

<sup>1</sup> The term "confidential" is limited in the Stipulated Protective Order to "non-public information that could foreseeably have an adverse effect on the business or property of the producing party if it were generally disclosed to its consumers, customers, or competitors, or to the public."

and documents used at depositions as "confidential." It is noted that the parties have expedited discovery in this case to a considerable extent as a result of the agreement to adopt the Stipulated Protective Order.<sup>2</sup>

3. Under the Stipulated Protective Order, the Presiding Judge has the authority to permit specific, limited additional disclosure and/or to allow disclosure "notwithstanding its confidential classification." This ruling concerns limited issues of confidentiality arising out of a pending Motion To Enlarge Issues that was filed by Time Warner and is centered on a question of control over the licensed 18 GHz microwave facilities of Liberty/Bartholdi. The filing of the Motion To Enlarge Issues required the Presiding Judge to order the partial disclosure to litigation counsel of redacted documents that were used in connection with an acquisition of assets. Freedom, the acquirer of Liberty/Bartholdi assets, sought and was granted limited party status allowing Freedom to respond to the question of control under Time Warner's Motion To Enlarge Issues. See Order FCC 96M-123, released May 20, 1996. The documents in question (referred to collectively as the "Transaction Documents") include an Asset Purchase Agreement, a side letter to the Asset Purchase Agreement (referred to as Exhibit K to the Asset Purchase Agreement), a Transmission Services Agreement, and a Subcontractor Agreement. The need for this ruling arose out of a Prehearing Conference held on June 13, 1996, at which the Transaction Documents were discussed at length. At the request of Freedom and Liberty/Bartholdi (Tr. 166-168, 173-177), the transcript of that Conference was to be treated as "confidential" until there was an opportunity to consider the question of its confidentiality. (Tr. 177.) In a subsequent ruling, the parties were instructed to also address the requirements for maintaining agreements for Private Carrier status under Part 94. See Order 96M-161, released June 21, 1996.

4. Freedom and Liberty/Bartholdi do not object to now placing on the public record the complete transcript of the Prehearing Conference of June 13, 1996, the Transmission Services Agreement (as redacted), and the Subcontractor Agreement (as redacted). There is objection to placing on the public record the Asset Purchase Agreement and the side letter Agreement. The latter two documents are alleged to be "replete with extremely proprietary business information concerning Freedom's ongoing and future operations, the disclosure of which would be extremely competitively harmful." They are asserted to present a "road map of Freedom's ongoing and future operations and marketing strategy." Time Warner disagrees with that assessment. The Bureau takes no position.

5. Disclosure of documents that are germane to rulings in adjudicatory proceedings are in accord with the Administrative Procedure Act which requires rulings to be grounded on the record. 5 U.S.C. §555(e) and §556(e). There is a tension between the APA requirement for fully stated adjudicative rulings based on documents which are part of the record and FOIA's policy for permitting the protection of "trade secrets and commercial or financial information." See U.S. Department of Defense v. F.L.R.A., 114 S.Ct. 1006, 1012 (1994) (Court finds the relevant public interest in disclosure to be the significant contribution it

---

<sup>2</sup> Cf. Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission (GC Docket No. 96-55), FCC 96-109 ("Confidential Policy NPR"), released March 25, 1996, at Paras. 25-29 (the protective order approach).

makes to public understanding of the operations or activities of the agency). See also F.C.C. v. Schreiber, 381 U.S. 279, 291-92 (1965) (Commission empowered to authorize public disclosure of information or to receive data in confidence upon a balancing of public and private interests involved). The Commission continues to work towards the amelioration of that tension.<sup>3</sup>

6. The question of disclosure here is with respect to using Transaction Documents which were required to be turned over pursuant to an Order and which are cited by Freedom and Liberty/Bartholdi in urging grounds for ruling against a Motion To Enlarge Issues which is being sought by Time Warner. The situation in this case is distinguished from those protecting from public disclosure "trade secrets or commercial or financial information" that are voluntarily submitted in connection with a non-adjudicative filing. Cf. Critical Mass Energy Project v. N.R.C., 975 F.2d 871, 873 (D.C. Cir. 1992) (safety reports voluntarily submitted to agency on condition of confidentiality were afforded protection from disclosure in order to encourage future cooperation). However, the Asset Purchase Agreement and the side letter Agreement are qui generis business documents prepared for a completed commercial transaction which the Commission did not authorize and which could be the subject of an added issue. They are not documents which were produced voluntarily.

7. It still remains to be determined whether disclosure of the Asset Purchase Agreement and the side letter Agreement would cause "substantial harm" to Freedom's and/or Liberty/Bartholdi's competitive position. Id. at 878-880, citing National Parks and Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974). The arguments advanced in Liberty/Bartholdi's Motion and in Freedom's Memorandum are conclusory. There is insufficient explanation made on the nature of the information and how it might be used by competitors. Thus, there is insufficient information from which it could be determined that substantial commercial harm is likely to result from disclosure. The Asset Purchase Agreement is concerned with an historical event that was closed in March, 1996. In the Asset Purchase Agreement, Freedom and Liberty/Bartholdi have agreed on conditions to be fulfilled in the future. But those conditions are in the nature of time line events which trigger further payments. And the measures for dollar amounts and subscribers have been redacted. The side letter Agreement relates almost exclusively to the future. It pertains to certain marketing arrangements between a Liberty/Bartholdi affiliate and Freedom's parent company RCN.<sup>4</sup> Since the Motion To enlarge Issues is still under advisement, interim confidential treatment will continue to be afforded to the Asset Purchase Agreement and the side letter Agreement. However, if the Asset Purchase Agreement and/or the side letter Agreement are found to be necessary links in a chain of evidence that address a public interest issue in this case, those documents lose their right to confidential status. Classical Radio for Connecticut, 69 F.C.C. 2d 1517, 1520 (1978).

---

<sup>3</sup> See Confidential Policy NPR cited at fn. 2 above.

<sup>4</sup> The side letter Agreement appears to be crafted as a cryptic document which needs parole explanation to understand its future commercial significance. The document, which is Exhibit K to the Asset Purchase Agreement, was selected by Freedom and Liberty/Bartholdi as relevant to understanding the transaction.

8. The parties were also asked to address the application of Part 94 to the question of confidential treatment being afforded to documents which were used to transform Liberty/Bartholdi to a Private Carrier. Order 96M-161, supra. See 47 C.F.R. §94.17(3) (requiring private carrier agreements to be kept as part of station records) and §94.31(c) (related agreements must be submitted with applications for new facilities). The Transmission Services Agreement is represented by Freedom and Liberty/Bartholdi to be relevant to complying with Part 94. The Bureau and Time Warner have taken no position. Freedom and Liberty/Bartholdi further contend that §94.17(3), the provision for maintaining the agreements as a station record, does not require making the document available to the public. According to Freedom and Liberty/Bartholdi, the Transmission Service Agreement need only be available as a station record for inspection by the Commission staff. 47 C.F.R. §94.109 (inspection of stations and station records).<sup>5</sup>

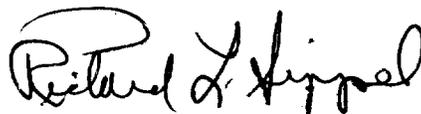
9. At this time, the Presiding Judge will only require that the complete transcript of Prehearing Conference of June 13, 1996, the redacted copies of the Transmission Services Agreement and the Subcontract Agreement be placed on the public record as agreed to by Freedom and Liberty/Bartholdi.

10. Freedom and Liberty/Bartholdi also request that the Presiding Judge issue his ruling on the Motion To Enlarge Issues under seal in order to permit a review for purposes of seeking confidentiality. As indicated above, the Asset Purchase Agreement and the side letter Agreement are links in the chain of events that need to be relied on in deciding whether or not to grant the Motion To Enlarge Issues. Since all of the Transaction Documents (redacted) are expected to lose their interim confidential status, the Presiding Judge's ruling based on those documents will be immediately placed on the public record.

ORDER

For the foregoing reasons, IT IS ORDERED that the Motion Of Bartholdi Cable Company, Inc. Regarding Confidential Treatment Of Documents IS GRANTED as an interim ruling as to the Asset Purchase Agreement and the side letter Agreement (Exhibit K), and otherwise IS DENIED.<sup>6</sup>

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel  
Administrative Law Judge

---

<sup>5</sup> If the document was placed in the stations' records when the transaction was closed in March, 1996, there is no reason for not advising the Bureau in March that the Transmission Services Agreement existed and was available for inspection

<sup>6</sup> Copies of this Memorandum Opinion And Order were faxed to counsel in the a.m. on date of issuance.