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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of	)	WT DOCKET NO. 96-41	
)		
LIBERTY CABLE CO., INC.	)	File Numbers:	
	)	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

WIRELESS TELECOMMUNICATIONS BUREAU'S
OPPOSITION TO MOTION TO STRIKE

1. The Chief, Wireless Telecommunications Bureau ("Bureau"), by his attorneys, now opposes the "Motion to Strike" filed by Bartholdi Cable Company, Inc. (formerly known as Liberty Cable Co., Inc.) ("Liberty") on July 24, 1998.

2. Liberty asks the Commission to strike the Bureau's reply brief in this proceeding using a variation of the doctrine of judicial estoppel. Liberty's request must be rejected for several reasons. First, the United States Court of Appeals for the District of Columbia Circuit has specifically rejected the use of judicial estoppel. Second, contrary to Liberty's argument, the Commission has never used that doctrine. Third, the Bureau has already adequately

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explained its position in this proceeding, so even if judicial estoppel was a valid doctrine, it would not be applicable. Fourth, Liberty's argument is inconsistent with the Bureau's duty to evaluate cases and inform the Commission where the public interest lies. Liberty's motion appears to be an improper attempt to reargue the merits of this proceeding. Accordingly, Liberty's motion should be denied, and the portion of the pleading that discusses the facts and merits of this case should be stricken.

3. "Judicial estoppel is used to preclude a party from taking a position that is inconsistent with one successfully asserted by the same party in a prior proceeding." United Mine Workers of America 1974 Pension v. Pittston Company, 984 F.2d 469, 477 (D.C. Cir. 1993). Liberty argues that the doctrine also applies when inconsistent positions are taken at different stages of a single administrative proceeding. Liberty Motion, p. 19 n.75. Liberty also points out that "[j]udicial estoppel has been applied in a number of federal circuits in cases involving civil litigation." Id. Liberty fails to mention, however, that the United States Court of Appeals for the District of Columbia Circuit, the court which would decide any appeal filed in this proceeding, does not recognize the doctrine of judicial estoppel. In United Mine Workers of America 1974 Pension v. Pittston Company, supra, the court noted that "we have not previously embraced the doctrine of judicial estoppel in this circuit and we decline to do so in this case." In Konstantinidis v. Chen, 626 F.2d 933, 938 (D.C. Cir. 1980), the court wrote:

Furthermore, we agree with the Tenth Circuit that utilization of the judicial estoppel theory 'would be out of harmony with (the modern rules of pleading)

and would discourage the determination of cases on the basis of the true facts as they might be established ultimately.’ Parkinson v. California Co., [233 F.2d 432, 438 (10th Cir. 1956).] We also believe that "(e)ven in the case of false statements in pleadings, public policy can be vindicated otherwise and more practicably and fairly in most instances than through suppression of truth in the future.’ Id.

4. Liberty argues that the Commission has "an administrative policy comparable in many respects to the common law doctrine of judicial estoppel." Liberty Motion, p. 19. A review of the authority Liberty cites for that position, however, shows that the Commission has never applied judicial estoppel or any such corollary doctrine. For example, Liberty places heavy reliance on Beaufort County Broadcasting Co., 94 FCC 2d 572, 575 (Rev. Bd. 1983). That case, however, applied the Commission’s rules for post-designation amendments, as opposed to the doctrine of judicial estoppel. The Review Board’s holding in that case was that "the Beaufort applicant has not shown good cause for its amendment."¹ Similarly, the Commission’s policy against post-cutoff comparative upgrading (Liberty Motion, p. 21) has nothing to do with the doctrine of judicial estoppel.

5. Even if the Commission recognized the doctrine of judicial estoppel, it would not apply to this case. In Konstantinidis v. Chen, supra, 626 F.2d at 938-939, the court wrote :

¹ Liberty argues that in Beaufort, "the Board upheld a ruling by the ALJ that relied on estoppel or preclusion because of Beaufort’s inconsistent position or opportunistic reversal of theory during litigation." In fact, there was no such ruling by the ALJ because the amendment changing communities was not filed until after oral argument before the Review Board. The quoted material refers to an argument made by the competing applicant, but the Board’s decision was based upon the criteria for post-designation amendments, as opposed to the doctrine of judicial estoppel.

Judicial estoppel operates to prevent a party from insulting a court through improper use of judicial machinery. Thus the concept's underlying rationale is that a party should not be allowed to convince unconscionably one judicial body to adopt factual contentions, only to tell another judicial body that those contentions were false.

Judicial estoppel applies when a party makes a factual representation to one tribunal and then makes directly contradictory factual representations to another factual tribunal. Here, Liberty is not arguing that the Bureau has presented false testimony or factual contentions. Instead, Liberty is unhappy with the Bureau's current analysis of the underlying record. Liberty is arguing that the Bureau is precluded from reviewing the Initial Decision in this proceeding and determining that the Presiding Judge's analysis was correct. While Liberty has every right to argue in its exceptions why its analysis of the record is correct, it cannot ask the Commission to expel opposing parties whose view of the record differs from its own.

6. Liberty's claim that the Bureau's change of position in this case "is unprecedented" (Liberty Motion, p. 18) is incorrect. In at least two major hearing cases within the last five years, the Mass Media Bureau has fundamentally changed its position in a hearing case after an I.D. was issued. In Trinity Broadcasting of Florida, Inc., (MM Docket No. 93-75), the Bureau argued before the ALJ that Trinity's license should be renewed with a \$500,000 forfeiture. When the ALJ decided that Trinity was not qualified to remain a Commission licensee (Trinity Broadcasting of Florida, Inc., 10 FCC Rcd 12020 (ALJ 1995, exceptions pending)), and the licensee filed exceptions, the Mass Media Bureau supported the I.D. and argued that Trinity was not qualified. In Lutheran Church/Missouri Synod, 12 FCC Rcd 2152

(1997) (subsequent history omitted) (MM Docket No. 94-10), the Bureau argued before the ALJ that the licensee was not qualified. After Judge Steinberg issued an I.D. granting a short-term renewal with a forfeiture (10 FCC Rcd 9880), the Bureau agreed with the I.D. on appeal.

7. Liberty cites several cases for the proposition that when the Bureau has "reversed" its position, its new position has not been adopted, or the Bureau has been censured. Liberty Motion, pp. 18-19. None of those cases supports the draconian remedy of striking the Bureau's reply brief. Indeed, some of the cases do not stand for the proposition for which Liberty cites them. For example, The Seven Hills Television Company, 2 FCC Rcd 6867, 6889 (Rev. Bd. 1987) contains no notation of "the inconsistency of the Bureau's position" as Liberty claims (Liberty Motion, pp. 18-19 n.72). While Liberty claims that the Private Radio Bureau was "censured for its disingenuous reversal" in Gulf Coast Communications, Inc., 81 FCC 2d 499, 513 n.11 (Rev. Bd. 1980) (Liberty Motion, p. 19), the decision does not "censure" the Private Radio Bureau. Instead, a footnote merely noted that the Bureau "does not explain its change in position or, indeed, even acknowledge that it has reversed its former position." In this case, the Bureau has explained in detail how it reached its current position. See "Wireless Telecommunications Bureau's Consolidated Reply," filed April 22, 1998, pp. 2-7, "Wireless Telecommunications Bureau's Opposition to Request for Oral Argument," filed May 5, 1998, pp. 3-4. Similarly, in Madison County Broadcasting, 70 FCC 2d 226, 227 (Rev. Bd. 1978) (Liberty Motion, p. 19 n.72), there was no suggestion that the Bureau did anything improper or that the Bureau's filing should be stricken.

8. The Bureau's explanations contained in its "Consolidated Reply" and "Opposition to Request to Oral Argument" conclusively show that the Bureau's current analysis is based upon a good faith analysis of the record and the Presiding Judge's Initial Decision. The Bureau's overriding mission is to advise the Commission of where it believes the public interest lies. If the Bureau's analysis of the public interest changes, particularly in light of a decision by an Administrative Law Judge, the Bureau should be free to state what it truly believes to be in the public interest. Liberty would force the Bureau to espouse a position it no longer believed in because of a concept of "judicial estoppel" which the Court of Appeals does not recognize. Liberty's argument would also treat the Initial Decision as a nullity entitled to no weight whatsoever. As the Commission has written, however:

An initial decision is not a mere report to be arbitrarily disregarded. In the absence of review, the initial decision is the decision of the agency. Section 557(b) of the Administrative Procedure Act. Even when review is granted, the initial decision must be taken into account by the agency and when necessary by a reviewing court.

Stereo Broadcasters, Inc., 74 FCC 2d 543 ¶8 (1981). In determining its position before the Commission in this proceeding, the Bureau was entitled (if not required) to consider the Initial Decision, as well as the underlying record. While Liberty is correct that the Bureau has not hesitated to file exceptions to initial decisions which the Bureau believes to be materially erroneous (Liberty Motion, pp. 16-17), the Bureau has reached a different conclusion in this case.

9. Much of Liberty's pleading appears to be little more than an attempt to reargue the merits of the proceeding. Liberty has had a full and fair opportunity to argue in its exceptions that the Initial Decision was wrong. The Commission should focus on the merits of this case instead of Liberty's specious and unsupported attempt to foreclose the Bureau from offering its view of the case. The Commission is fully able to review the record and determine whether Liberty has the necessary qualifications to be a Commission licensee. To the extent Liberty argues the merits of its case in the instant motion, its pleading is an unauthorized response to the Bureau's reply brief that should be stricken.

10. Accordingly, the Bureau asks the Commission to deny Liberty's "Motion to Strike."

Respectfully Submitted,

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August 10, 1998

CERTIFICATE OF SERVICE

I, John J. Schauble, an attorney with the Enforcement and Consumer Information Division of the Wireless Telecommunications Bureau, certify that I have, on this 10th day of August, 1998, caused to be served by regular United States mail (unless otherwise indicated), copies of the foregoing "Wireless Telecommunications Bureau's Opposition to Motion to Strike" to:

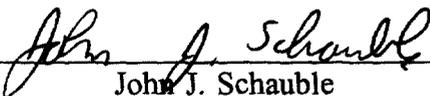
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