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BEFORE THE
Federal Communications Commission
WASHINGTON, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In Re Applications of)
)
LIBERTY CABLE CO., INC.)
)
For Private Operational Fixed)
Microwave Service Authorizations and)
Modifications)
)
New York, New York)

WT DOCKET NO. 96-41

To: The Commission

**TIME WARNER CABLE OF NEW YORK CITY AND PARAGON
COMMUNICATIONS' OPPOSITION TO LIBERTY'S MOTION TO STRIKE**

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TABLE OF CONTENTS

SUMMARY 1

ARGUMENT 3

 I. The Motion To Strike Must Be Denied Because It Is Not Supported By
 Commission Precedent And Inappropriately Prevents The Bureau From Exercising
 Its Right To Participate As A Party In This Proceeding. 3

 II. Liberty’s Reliance On The Doctrine of Judicial Estoppel, Or Any “Close Relation”
 Thereeto, Is Misplaced In This Case. 6

CONCLUSION 12

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Pursuant to Federal Communications Commission ("FCC" or "Commission") Rule 1.45, 47 C.F.R. § 1.45, Time Warner Cable of New York City and Paragon Communications ("TWCNYC") hereby file their opposition to the Motion to Strike ("Liberty's Motion") filed by Liberty Cable Co., Inc. ("Liberty")¹ on July 24, 1998. This opposition is timely filed pursuant to the one-week extension of time requested by TWCNYC on July 29, 1998, and consented to by Liberty.

SUMMARY

Liberty's Motion is a last-ditch effort to deny the Commission the opportunity to consider a pleading filed by the Wireless Telecommunications Bureau ("Bureau") that is contrary to Liberty's position. After the Bureau abandoned its support of the Joint Motion for Summary

¹TWCNYC is aware that Liberty Cable Co., Inc. is now known as "Bartholdi Cable Company, Inc." following the sale of most of the former Liberty's assets (including its name) to a subsidiary of RCN Corporation. However, for clarity, the applicant for the licenses at issue in this proceeding will be referred to by its former name, "Liberty."

Decision ("Joint Motion") it filed with Liberty and its support of a large forfeiture, rather than disqualification, as the appropriate sanction for Liberty's misconduct, Liberty now seeks to eliminate the Bureau as a party in the appeal from the Presiding Judge's Initial Decision by striking from the record the Bureau's Consolidated Reply, filed April 22, 1998 ("Reply") -- the Bureau's sole pleading before the Commission.² There is no Commission precedent for removing a party from a proceeding, because of positions taken by that party, especially a party expressly joined to the proceeding by Commission order. There is also no basis in Commission precedent for striking from the record a pleading rightfully submitted by a party to the proceeding merely because that party has taken a different position from one taken previously.³ The Bureau fully explained its departure from its prior position, and is entitled to file a pleading expressing its support for the Initial Decision that is now the subject of Liberty's appeal.

Contrary to what Liberty would have the Commission believe, the Bureau is not estopped from changing its position at this stage in this proceeding. The Bureau is free to alter its position here based on its evaluation of the entire record, including the Presiding Judge's conclusions.

²In the cover letter accompanying Liberty's Motion, Liberty states that since the Bureau filed its Reply, "Liberty has been in discussions with the Bureau looking towards either the withdrawal of the Bureau's pleading or a proposed settlement of this case." Letter to M. Salas from R. Pettit, July 24, 1998. Until receipt of this letter, TWCNYC was unaware of these discussions. TWCNYC notes that no settlement could occur without the agreement of *all* parties, including TWCNYC.

³Liberty's Motion over-dramatizes the magnitude of the Bureau's "change of position." The Bureau has never said that Liberty did not engage in misconduct or that such misconduct was benign or even excusable. Rather, until it filed the Reply, the Bureau argued that a forfeiture of unprecedented size -- \$800,000.000 -- was the appropriate sanction. As the evidence of Liberty's misconduct accumulated in the record here, the amount of the forfeiture recommended by the Bureau also increased. See Initial Decision, at n.17. The Bureau's "change of position" in the Reply consisted only of its apparent decision to support the Presiding Judge's rejection of a forfeiture as a sanction in favor of denial of the captioned applications.

While the Commission is free to give the Bureau's Reply whatever weight it deems appropriate in light of the Bureau's changed position on the question of the appropriate sanction, there is no basis for striking the Reply from the record.

ARGUMENT

I. The Motion To Strike Must Be Denied Because It Is Not Supported By Commission Precedent And Inappropriately Prevents The Bureau From Exercising Its Right To Participate As A Party In This Proceeding.

Liberty moves the Commission to strike the Bureau's Reply, because of its content. In the Reply, the Bureau withdraws its support for the Joint Motion by Liberty and the Bureau for Summary Decision, which had contended that forfeiture was an adequate sanction for Liberty's illegal operation of microwave facilities. The Reply supports the Initial Decision's conclusion that disqualification is the proper penalty. Reply, ¶¶ 3, 8. Liberty asserts that the Bureau should not be allowed to present its view of the Initial Decision to the Commission simply because that view is somewhat different from the Bureau's position before the Presiding Judge. See Liberty's Motion, at i-ii, 1-2. However, there is no Commission precedent for striking a pleading because it reflects a party's changed position. Furthermore, Liberty's Motion, if granted, would wrongly deny the Bureau its right to participate in the appeal of the Presiding Judge's Initial Decision.

Motions to strike, "as a general rule, are disfavored" and are infrequently granted. Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distrib., 647 F.2d 200, 201 & n.1 (D.C. Cir. 1981) (citing 5 C. Wright & A. Miller, Federal Practice and Procedure, § 1380, at 783 (1969)). Although the Commission has granted motions to strike in certain circumstances, none of them related to a party's considered decision to alter its position in a Commission proceeding. On several occasions, motions to strike pleadings that did not conform with Commission Rules have

been granted. See Motorola SMR, Inc., 12 FCC Rcd 5979, ¶ 11 (W.T.B. 1996) (reply filed three days late); Radio Jonesboro, Inc., 100 FCC 2d 941, ¶ 14 & n.4 (1985) (replies “were not requested by the Commission, and . . . no compelling reason ha[d] been offered why [the replies] should be accepted”); Jimmie H. Howell, 62 FCC 2d 880, ¶ 3 (Rev. Bd. 1977) (separately filed brief and list of exceptions did not comply with procedural requirement for consolidated exceptions and supporting brief). Pleadings containing irrelevant material (RKO General, Inc., 64 FCC 2d 713, ¶ 3 (1977)) or unsupported scandalous statements have also been stricken. Christian Childrens Network, Inc., 1 FCC Rcd 982, ¶ 9 (Rev. Bd. 1986) *review denied*, 2 FCC Rcd 7395 (1987); see also Fed. R. Civ. P. 12(f) (“court may order stricken from any pleading . . . any redundant, immaterial, impertinent, or scandalous matter”). However, the Bureau’s Reply is a permissible pleading that complies with all Commission Rules (see 47 C.F.R. § 1.277(c)) and that includes highly relevant material concerning the Initial Decision and Liberty’s exceptions thereto. Liberty does not claim otherwise.

Liberty asserts that the Reply must be stricken because the Bureau previously supported a lesser sanction for Liberty’s unlawful conduct. TWCNYC has found no Commission precedent that would require the Commission to strike the Reply for that reason. Although there are cases in which a Commission bureau has changed its position on an issue during a proceeding, no sanction has been imposed nor was the pleading removed from the record. See cases discussed *infra*, at Part II; see also Eugene Walton, 6 FCC Rcd 4236, ¶ 2 (Rev. Bd. 1991), *review denied*, 7 FCC Rcd 3237, *recon. denied*, 7 FCC Rcd 6037 (1992) (Mass Media Bureau “had indeed supported Walton’s Petition for Leave to Amend to the short-spaced site, although it later changed its position in supplemental comments”). Although the Commission has authority to

strike any pleading *sua sponte*,⁴ in the instances when a bureau changed its position in a proceeding, the Commission declined to strike the pleading containing the new position. See, e.g., Gulf Coast Communications, 81 FCC 2d 499 (Rev. Bd. 1980), *recon. denied*, 81 FCC 2d 1033 (Rev. Bd. 1981), discussed *infra*, at Part II. Thus, in this case, the Commission has no basis for striking or ignoring the Bureau's Reply.

In addition to being unsupported by Commission precedent, Liberty's Motion should be denied because it effectively and inappropriately seeks to eliminate the Bureau as a party to the appeal from the Initial Decision. The Bureau, which was specifically named as a party to this proceeding in the Hearing Designation Order, 11 FCC Rcd 14133, ¶ 33 (1996), has the right to participate in the appeal of any decision originating from that hearing. In particular, the Bureau is permitted to file a reply to any exceptions to or briefs supporting a Presiding Judge's initial decision that are filed by any other party. 47 C.F.R. § 1.277(c). The Reply is the Bureau's sole expression of its evaluation of the Initial Decision. Therefore, by requesting the Commission to strike the Reply in its entirety, Liberty improperly aims to terminate the Bureau's right as a party to present its views on the appropriate outcome of the appeal.⁵

Liberty's Motion also incorrectly asserts that the Bureau's role as a party in this case is limited to challenging the Presiding Judge's findings and conclusions by filing exceptions to the

⁴See Henry C. Armstrong, III, 92 FCC 2d 485, ¶ 12 & n.4 (Rev. Bd. 1983) (on Review Board's own motion letter was stricken as unauthorized pleading); Sunbeam Television Corp., 5 RR 2d 85, n.1 (1965), *aff'd sub nom.*, Community Broadcasting Corp. v. FCC, 363 F. 2d 717, 7 R.R. 2d 2085 (D.C. Cir. 1966) (on Commission's own motion appendices constituting a continuation of the main brief were stricken as exceeding page limitation).

⁵ TWCNYC notes that Liberty has asked for oral argument of its appeal. Presumably, then, Liberty would require the Bureau's silence at such an argument -- unless the Bureau spoke up on Liberty's behalf.

Initial Decision. See Liberty's Motion, at 16-17. However, the Bureau is not required to disagree with the Initial Decision merely because its holding is inconsistent with an earlier position. While a party does not frequently take a new position on appeal, it is not impermissible for a party to do so. See *infra*, Part II.

Liberty's Motion also contends that the Bureau's examination of the Initial Decision to determine whether the decision was supported by the record evidence is somehow inconsistent with its party status. Liberty's Motion, at 15-17. The Bureau, like any other party, can evaluate the Initial Decision and elect to agree or disagree with the Presiding Judge's findings and conclusions. Contrary to Liberty's claim, by undertaking this evaluation, the Bureau was not "arrogat[ing] to itself the legal function and authority to sit in review of ALJ decisions." *Id.* at 15. Rather, the Bureau was exercising its right to assess whether the Initial Decision could withstand review by the Commission on appeal. Liberty has not alleged any basis for striking the pleading, or for terminating or limiting the Bureau's participation in the appeal. As such, Liberty's attempt to prevent the Commission from considering a pleading that is adverse to Liberty must be rejected.

II. Liberty's Reliance On The Doctrine of Judicial Estoppel, Or Any "Close Relation" Thereto, Is Misplaced In This Case.

Liberty claims that the Bureau's change in position in this proceeding is prohibited by a "doctrine proscribing unjustified reversals in a single proceeding -- a close relation to judicial estoppel -- which was recognized by the FCC in Beaufort County Broadcasting Co., 94 FCC 2d 572, 575 (Rev. Bd. 1983), *review denied*, FCC 84-824 (June 19, 1984), *aff'd sub nom.*, Beaufort County Broadcasting Co. v. FCC, 7887 F.2d 645 (D.C. Cir. 1986)]." Liberty's Motion, at 20. This argument is fatally flawed for two reasons.

First, even if the situation that existed in this case were as Liberty described it -- the “unjustified reversal[] in a single proceeding” of a party’s position -- that situation is not analogous to judicial estoppel, nor is it even a “close relation” thereto. “The doctrine of judicial estoppel prevents a party from asserting a *factual* position in a legal proceeding, that is contrary to a position taken by him in a prior legal proceeding.” Bates v. Long Island R.R. Co., 997 F.2d 1028, 1037 (2d Cir. 1993) (emphasis added). There are two elements that must exist in order for judicial estoppel to apply: “[f]irst, the party against whom the estoppel is asserted must have argued an inconsistent position in a prior proceeding; and second, the prior inconsistent position must have been adopted by the court in some manner.” Id. at 1038. While the D.C. Circuit has expressly *not* embraced the doctrine of judicial estoppel (see, e.g., United Mine Workers of Amer. 1974 Pension v. Pittston Co., 984 F.2d 469, 477 (D.C. Cir. 1993)), it has, nonetheless, elaborated on the elements required if it were to espouse the doctrine by stating that, since “judicial estoppel should not be applied if no judicial body has been led astray[,] . . . success in the prior proceeding is clearly an essential element of judicial estoppel.” Konstantinidis v. Chen, 626 F.2d 933, 939 (D.C. Cir. 1980); see also American Methyl Corp. v. EPA, 749 F.2d 826, 833 n.44 (D.C. Cir. 1984) (doctrine of judicial estoppel is limited to “cases in which a party prevails on a claim in one court and proceeds in a calculated manner to manipulate a second court by asserting facts at odds with those advanced before the first court”).

The doctrine of judicial estoppel, or any related doctrine that may apply to administrative proceedings, does not apply to the Bureau’s Reply in this case. First, the Bureau’s “change of position” is its view of the appropriate sanction for Liberty’s misconduct, not that any particular fact (as opposed to conclusion about the facts) is -- or is not -- true. Secondly, the position taken

by the Bureau in the Joint Motion and subsequent pleadings addressed to the Presiding Judge -- that Liberty is qualified to be a Commission licensee, and should be sanctioned by forfeiture rather than disqualification -- was not successful, as shown by the Presiding Judge's Initial Decision, which declared Liberty to be unfit to be a Commission licensee. See Initial Decision, WT Docket 96-41, 13 FCC Rcd 10716, ¶¶ 119-24 & n.63 (1998). Moreover, the change in the Bureau's position on the issue of Liberty's qualification to be a licensee was in the course of the *same* proceeding, not a "*subsequent* proceeding where its interests have changed." Data General Corp. v. Johnson, 78 F.3d at 1556, 1565 (Fed. Cir. 1996) (emphasis added). Thus, Liberty's comparison of the Bureau's action here with the doctrine of judicial estoppel fails on all counts: it does not concern an assertion of fact, it was not a position adopted by the tribunal and the "change" took place in the same, not a subsequent, proceeding.

Second, Liberty's assertion that a doctrine closely related to judicial estoppel was recognized by the Commission in Beaufort County Broadcasting is disingenuous. Beaufort was a case involving competing applicants for a new FM radio station in which one applicant was denied the opportunity to change the location of its proposed station when it became advantageous to do so. Beaufort County Broadcasting's application stated that the location of its proposed station would be in Beaufort, South Carolina, a community that already had three other local stations. Barnacle Broadcasting's application stated that the location of its proposed station would be in Port Royal, South Carolina, a community that did not have its own local station. See Beaufort, 94 FCC 2d at 573. After a trial-type comparative hearing, the Presiding Judge concluded that Section 307(b) of the Communications Act required the grant of the application for a new FM station for Port Royal because it did not have its own local station already. Briefs and exceptions

to the Initial Decision were filed, and following oral argument, Beaufort County Broadcasting, the losing applicant, filed an amendment proposing to change its station location to the Section 307(b) preferred community of Port Royal, a position that it had not asserted any time previously. Id. at 573, 574. Because Beaufort County Broadcasting's change in station location was considered a "major amendment," which required that the application be returned to the end of the processing line, thereby losing its place and its right to be compared with previously filed applications, the Review Board found that an applicant who proposed such an action must make a persuasive showing of good cause for its amendment. The Review Board determined that Beaufort County Broadcasting made no such showing, and that its "opportunistic switch in station location" constituted game playing with the Commission, and should not be countenanced. Id. at 574-75.

Beaufort is not a recognition by the Commission of a "close relation" to judicial estoppel; it is simply an application of the Commission's Rules that prevent an applicant from opportunistically amending its license application. Beaufort is readily distinguishable from the present case because the Bureau is not a competing applicant with Liberty, nor does it involve a factual change in the document that is the basis for the proceeding, unlike a license application in a comparative hearing. Beaufort County Broadcasting's proposed amendment to its application in a comparative hearing is entirely different from the Bureau's changed view of the appropriate sanction for Liberty's misconduct.⁶

⁶ The cases cited by Liberty in note 84 of its Motion are likewise distinguishable from the present case, because all of those cases, like Beaufort, involve broadcast license applicants who amended their applications to improve their comparative standing following a comparative hearing in which they *lost*, but were appealing the decision before the Commission's Review Board. The
(continued...)

The cases other than Beaufort that Liberty relies on for the proposition that, where a Bureau has reversed itself on procedural or substantive issues, it has not prevailed on its newly adopted position (see Liberty's Motion, at 18), are also inapposite. For example, Liberty relies on Madison County Broadcasting, 70 FCC 2d 226 (Rev. Bd. 1978). In that case, however, the Broadcast Bureau supported petitions to reopen the record and enlarge issues in a comparative broadcast proceeding. The Presiding Judge denied such petitions, and the petitioner appealed. Id. at 227. On appeal, the Broadcast Bureau changed its position and opposed the reopening of the record. The Review Board reversed and remanded the Presiding Judge's decision. Id. Even though the Review Board ultimately ruled against the Broadcast Bureau's new position, the Broadcast Bureau's opposition to its former position was not struck from the record, nor was the Broadcast Bureau reprimanded in any way for changing its position. See also The Seven Hills Television Co., 2 FCC Rcd 6867, 6889 & n.66 (Rev. Bd. 1987), *modified*, 3 FCC Rcd 879 (Rev. Bd. 1988), *partially vacated*, 4 FCC Rcd 4062 (OGC 1989) (Review Board merely noted that the Broadcast Bureau's position changed regarding the reopening of the record of the proceeding to

(...continued)

Bureau in the present case is simply not comparable to a losing broadcast applicant who is appealing a hearing decision. Rather, the Bureau gave its support to Liberty, the party that ultimately was deemed to be unfit to hold the microwave licenses for which it applied, and now, upon Liberty's appeal from that decision, the Bureau has decided to must support the decision reached by the Presiding Judge. The Bureau has done nothing to improve its position in the proceeding. In fact, the Bureau has nothing to gain or lose by changing its position, unlike the broadcast applicants in the cases cited by Liberty in note 84. Moreover, in the case of comparative broadcast proceedings, there are specific rules governing the representations made by applicants on their applications, and how or whether those representations may be amended, and at what point in the proceeding such amendments may be made. See, e.g., LeFlore-Dixie, Inc., 100 FCC 2d 331, 334 (1985) (discussing rule against varying integration plans from original plans to those presented at hearing). There are no such equivalent rules in the context of character hearings, such as the one held in the present case.

address matters occurring after the record was closed). Similarly, the Bureau's Reply in the present case should not be stricken from the record.

Finally, Liberty's claim that, in Gulf Coast Communications, 81 FCC 2d 499, the Private Radio Bureau "was not only unsuccessful in advancing its newly adopted position but also censured for its disingenuous reversal" is fiction. Liberty's Motion, at 19. While the Private Radio Bureau did indeed take one position in its proposed findings and conclusions on a particular issue, and then change that position on appeal from the Initial Decision in that case, the Review Board did not censure the Bureau. Rather, the Review Board merely stated, in a footnote, that "[t]he Bureau strongly urged disqualification of Gulf Coast in its proposed findings and conclusions, and does not explain its change in position or, indeed, even acknowledge that it has reversed its former position." Id. at n.11. That is the full extent of the Review Board's comments on the Private Radio Bureau's change in position. Even if this statement could somehow be construed as a "censure," in the present case, the Bureau not only acknowledged its change in position, but also fully explained the evolution of its ultimate departure from its support of the Joint Motion. See Reply, ¶¶ 3-7.

CONCLUSION

For all of the foregoing reasons, the Commission should deny Liberty's Motion to Strike, and consider the Bureau's Reply, as it considers all other pleadings submitted in the appeal from the Initial Decision issued in this proceeding.

Respectfully submitted,



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Dated: August 10, 1998

CERTIFICATE OF SERVICE

I, Debra A. McGuire, hereby certify that a copy of the foregoing Time Warner Cable of New York City and Paragon Communications' Opposition to Liberty's Motion to Strike was served, via facsimile or hand delivery, this 10th day of August, 1998, upon the following:

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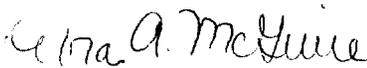
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