

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
 Washington, DC 20554

In re Application of	)	WT Docket No. 96-41	
	)		
LIBERTY CABLE CO., INC.	)	File Nos.:	
	)	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

**CONSOLIDATED REPLY TO OPPOSITIONS**

Bartholdi Cable Co., Inc., formerly known as Liberty Cable Co., Inc. ("Liberty"), pursuant to Section 1.45(b) of the Commission's rules,<sup>1</sup> hereby files its Consolidated Reply to the Oppositions of Time Warner Cable of New York City and Paragon Communications ("Time Warner") and the Wireless Telecommunications Bureau ("Bureau") to Liberty's Motion to Strike of July 24, 1998.<sup>2</sup> Neither Time Warner nor the Bureau has offered adequate justification for the Bureau's unprecedented reversal of its position in the absence of changed facts or circumstances.

Accordingly, consistent with Liberty's Motion to Strike, the Bureau's Reply Brief should be stricken from the record.

<sup>1</sup> 47 C.F.R. § 1.45(b).

<sup>2</sup> This Reply is timely filed pursuant to Section 1.45(b) of the Commission's rules. 47 C.F.R. § 1.45(b).

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**I. DESPITE PROTESTATIONS TO THE CONTRARY, THE BUREAU'S REVERSAL IS TRULY UNPRECEDENTED.**

The Bureau does not dispute the magnitude of its reversal. Time Warner, however, challenges Liberty's characterization of the Bureau's Reply Brief and attempts to minimize the scope of the Bureau's reversal by suggesting that only the Bureau's "bottom-line" with respect to the appropriate sanction for Liberty's admitted rule violations has changed. Time Warner states: "Liberty's motion over-dramatizes the magnitude of the Bureau's 'change in position' . . . The Bureau's 'change in 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."<sup>3</sup> This is not the case.

The Bureau certainly changed its bottom-line but, as the chart appended to Liberty's Motion to Strike illustrates, it went far beyond simply supporting the sanction proposed by the ALJ.<sup>4</sup> In fact, the Bureau's Reply Brief rejected its own factual and legal positions, advanced over a period of more than two years, on each material issue of fact or law in this proceeding.<sup>5</sup> Tellingly, neither Time Warner nor the Bureau challenge any portion of Liberty's 11 page analysis of the Bureau's factual reversals. The result, as Liberty has pointed out, is that the Commission now has before it, for every material issue, pleadings from the Bureau that reach diametrically opposed conclusions based on the same facts. As far as Liberty can determine, such a reversal is literally unprecedented.<sup>6</sup>

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<sup>3</sup> Time Warner Cable of New York City and Paragon Communications' Opposition to Liberty's Motion to Strike, filed August 10, 1998 ("Time Warner Opposition") at 2 n.3.

<sup>4</sup> See Motion to Strike at Appendix 1.

<sup>5</sup> Thus, Time Warner is clearly in error when it states that the Bureau did not change position on "*any* particular fact." Time Warner Opposition at 7 (emphasis added). Indeed, as the Bureau's Reply Brief made clear, the Bureau changed position on *every* material fact. See Motion to Strike at 2-12.

<sup>6</sup> Time Warner and the Bureau also maintain that, contrary to Liberty's assertions, no bureau of the Commission has been "censured" for reversing position in a hearing proceeding. Time Warner Opposition at 11; Bureau Opposition at 5. Webster's Dictionary defines "censure"

Rather than dispute its reversal of position, the Bureau cites *Lutheran Church/Missouri Synod* in support of the notion that a Commission bureau may reverse position in a hearing proceeding with impunity.<sup>7</sup> However, that case is easily distinguished. In *Lutheran Church*, the Mass Media Bureau argued that a radio licensee failed to comply with the Commission's EEO rules and, accordingly, should be disqualified.<sup>8</sup> The ALJ agreed with respect to violations of the EEO rules but, rather than disqualifying the licensee, imposed reporting requirements to demonstrate future compliance.<sup>9</sup> Thus, the case is properly viewed as a simple disagreement between the Mass Media Bureau and the ALJ as to the appropriate *remedy* based on consistently-held facts. Here, by contrast, the Bureau has reversed itself not just with respect to remedy but on *every* material fact and issue, placing itself in the position of arguing against its own proposed findings. Like Time Warner's efforts to minimize the Bureau's about-face, the Commission should reject the Bureau's efforts to characterize its shift as "business as usual."<sup>10</sup>

## II. LIBERTY SEEKS RELIEF CONSISTENT WITH COMMISSION PRECEDENT.

A doctrine akin to judicial estoppel is recognized by the Commission and has been applied to prevent unjustified reversals of position comparable to the Bureau's.<sup>11</sup> Equally

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as "an expression of blame or disapproval." Webster's II New Riverside University Dictionary at 242 (1984). Liberty submits that where the Review Board comments that a party "d[id] not explain its change in position or, indeed, even acknowledge that it ha[d] reversed position," *Gulf Coast Communications*, 81 FCC 2d 499, 513 n.11 (Rev. Bd. 1980) (emphasis added), it is not expressing approval or even indifference toward that party's action but rather affirmative disapproval.

<sup>7</sup> Bureau Opposition at 4-5.

<sup>8</sup> *Applications of the Lutheran Church/Missouri Synod*, 10 FCC Rcd 9880, 9916 & 9918 (Initial Decision 1995).

<sup>9</sup> *Id.* at 9916.

<sup>10</sup> In addition, the Bureau cites *Trinity Broadcasting of Florida, Inc.*, Bureau Opposition at 4, which, due to its procedural posture, also provides no authority for the Bureau's position. Regardless of the position the Mass Media Bureau may have argued in *Trinity*, the case remains pending before the Commission and, hence, has no value as precedent. *Applications of Trinity Broadcasting of Florida, Inc.*, 10 FCC Rcd 12020 (Initial Decision 1995, *exceptions pending*). The Commission has not yet reviewed, much less approved, the Mass Media Bureau's action in that case.

<sup>11</sup> The Commission has flexibility in establishing procedural rules binding upon the Agency. *Century Broadcasting Corp. v. FCC*, 310 F.2d 864, 867 (D.C. Cir. 1962); *see also*

important, any standard of common sense and judicial order requires that parties not be permitted to reverse positions on factual or legal issues in the course of a single proceeding. Nevertheless, Time Warner and the Bureau advance an overly narrow interpretation of *Beaufort County Broadcasting* and a parochial view of judicial estoppel<sup>12</sup> in support the proposition that a bureau of the Commission acting as a party in a hearing proceeding may reverse itself at any time, without reason.

The purpose of the *Beaufort* doctrine is to protect the Commission's processes and, accordingly, its application is not limited to the narrow context of post-designation amendments as Time Warner and the Bureau suggest.<sup>13</sup> In opposing the post-initial decision amendment of a competitor, the ultimately prevailing applicant in *Beaufort* argued, citing Moore's Federal Practice on judicial estoppel, that its competitor was estopped from amending its application because it "had vigorously prosecuted its application . . . on a different legal theory."<sup>14</sup> In rejecting the amendment, the Review Board echoed the language of the prevailing applicant's estoppel claim, noting: "[the] proposed amendment is inconsistent with the [unsuccessful applicant's] major argument, both at the hearing and at oral argument . . . The Commission need

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*Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 630-31 (D.C. Cir. 1978). Accordingly, the D.C. Circuit's rejection of the doctrine of judicial estoppel has no effect on the Review Board's action in *Beaufort*, despite assertions by Time Warner and the Bureau to the contrary. Time Warner Opposition at 7; Bureau Opposition at 1-3.

<sup>12</sup> Both Time Warner and the Commission argue that judicial estoppel is not an appropriate remedy in this case because the Bureau did not successfully advance a position contrary to its Reply Brief in a prior proceeding. Time Warner Opposition at 7-8; Bureau Opposition at 2-4. The Commission should not be swayed by this "strawman" argument. As Liberty explained in its Motion to Strike, judicial estoppel also applies where a party makes contrary representations at different stages of a single proceeding. Motion to Strike at 19 n.75.

<sup>13</sup> Time Warner Opposition at 9; Bureau Opposition at 3. Notably, even the headnote accompanying the *Beaufort* decision acknowledges that the doctrine of judicial estoppel was applied. That headnote states: "Board rejected losing applicant's post-hearing amendment, which sought to change proposed community of license to preferred community, for lack of good cause; doctrine of judicial estoppel applies." *Beaufort County Broadcasting Co.*, 94 FCC 2d 572 (Rev. Bd. 1983), *review denied*, FCC 84-824 (June 19, 1984), *aff'd sub nom.*, *Beaufort County Broadcasting Co. v. FCC*, 787 F.2d 645 (D.C. Cir. 1986) ("*Beaufort County*")

<sup>14</sup> *Id.* at 574.

not play such games with applicants.”<sup>15</sup> As authority for this portion of its decision, the Review Board cited not the Commission’s policies on amending license applications but *Fischer v. FCC*.<sup>16</sup> That case -- which nowhere mentions the Commission’s policy on post-designation amendments -- held that the applicant for a broadcast license could not revive its dismissed application on appeal by varying its position before the Commission.<sup>17</sup>

Application of the *Beaufort* doctrine to strike the Bureau’s pleading is necessary to protect the integrity of the Commission’s processes.<sup>18</sup> The Bureau’s role as a party in a hearing proceeding is to provide the Commission with information useful to reaching a determination with respect to the designated issues.<sup>19</sup> However, by reversing its position on every material issue in this case without any change in the underlying facts or evidence the Bureau has not only ceased to be of assistance, it has affirmatively hindered the Commission in its truth finding function. As a result of the Bureau’s reversal, the Commission now has before it pleadings from the Bureau which reach diametrically opposed conclusions based on identical facts. Moreover, the Bureau has thoroughly undermined its own credibility. Accordingly, the Commission is well within its discretion to strike the offending pleading and force the Bureau, like all parties, to speak with one voice to the Commission.

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<sup>15</sup> *Id.* at 575 (internal quotations omitted).

<sup>16</sup> *Fischer v. FCC*, 417 F.2d 551 (D.C. Cir. 1969).

<sup>17</sup> *Id.* at 555. In *Fischer*, broadcast applicant Tidewater proposed service to rural Smithfield, Virginia which would include coverage of the more populous city of Norfolk. The Commission rejected the application because it failed to rebut the presumption that Tidewater primarily intended to provide service to Norfolk. On reconsideration, the Commission rejected Tidewater’s proposed technical amendments to direct service primarily to Smithfield. The D.C. Circuit upheld the Commission’s decision stating: “we think an applicant should not be permitted to exhaust all means of achieving the greater urban coverage and then, only upon failure in that direction, to turn its attention to its declared rural or suburban aims and purposes. The Commission is not required to play games with applicants.” *Id.*

<sup>18</sup> Time Warner notes that where a bureau changed its position in a prior proceeding, “the Commission declined to strike the pleadings containing the new positions.” Time Warner Opposition at 5. The statement is misleading, however, because no party requested that the pleadings be stricken in the cited cases.

<sup>19</sup> Contrary to the suggestions of Time Warner and the Bureau, striking the Bureau’s pleading will have no effect on the Bureau’s status as a party to this proceeding.

### III. CONCLUSION

The Bureau states that its "overriding mission is to advise the Commission of where it believes the public interest lies" and that at any time in a proceeding it "should be free to state what it truly believes to be in the public interest." However, the nobility of its stated purpose is not met by the Bureau's meandering behavior. Liberty submits that saying what the Bureau "truly believes" for the reply round of the Commission review phase of a proceeding -- while presumably saying what it did not truly believe at every other phase -- is procedurally and substantively vacuous. This is illustrated by the fact that the Bureau has now given the Commission in the record in this case precisely *opposite* conclusions of fact and law based on *exactly the same* evidence. Such conduct does not advance the Commission's decision-making process, aid the Commission's review function, or serve the public interest. To the contrary, Liberty submits that the Bureau's factual and legal vacillation provides no credible support for

the ALJ's position in this case and should be stricken from the record without further consideration.

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August 17, 1998

CERTIFICATE OF SERVICE

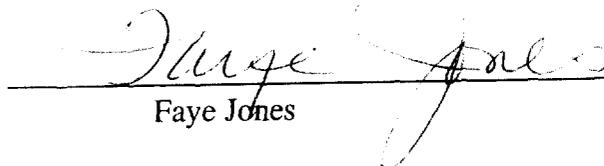
I Faye Jones hereby certify that on this 17th day of August 1998, I caused copies of the foregoing "Consolidated Reply to Oppositions" to be hand-delivered to the following:

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