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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of	)	WT Docket No. 96-41	
	)		
LIBERTY CABLE CO., INC.	)		
	)	File Nos:	
For Private Operational Fixed	)	708777	WNTT370
Microwave Service Authorization	)	708778, 713296	WNTM210
and Modifications	)	708779	WNTM385
	)	708780	WNTT555
New York, New York	)	708781,709426,711937	WNTM212
	)	708332	(NEW)
	)	712203	WNTW782
	)	712218	WNTY584
	)	712219	WNTY605
	)	713295	WNTX889
	)	713300	(NEW)
	)	717325	(NEW)

To: The Commission

ENFORCEMENT BUREAU'S OPPOSITION TO PETITION FOR RECONSIDERATION

1. On January 11, 2001, Bartholdi Cable Co., Inc., formerly known as Liberty Cable Co., Inc. ("Liberty"), filed a "Petition for Reconsideration" ("petition"). Liberty seeks reconsideration of the *Decision*, FCC 00-414, released December 13, 2000. Pursuant to 47 C.F.R. §1.106 (g) and *Order*, FCC 01I-01, the Enforcement Bureau[1] hereby submits the following opposition.

[1] By Order, 14 FCC Rcd 17924 (1999); 64 FR 60715 (November 8, 1999), the Commission created, *inter alia*, the Enforcement Bureau. One of the functions of the new Bureau is to serve as trial staff with regard to matters designated for hearing. *See* section 0.111(b) of the Commission's rules, 47 C.F.R. § 0.111(b). Consequently, the Enforcement Bureau has replaced the Wireless Telecommunications Bureau as a party to this proceeding.

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2. Background. In its *Decision*, the Commission denied Liberty's fifteen captioned applications for private operational fixed microwave service facilities ("OFS") in New York City. The Commission denied the applications because of "Liberty's extensive record of unlicensed OFS operations and its untruthfulness" (*Decision* at pp. 1-2) in connection with those applications. In addition, the Commission imposed a forfeiture of $1,425,000 for Liberty's admitted violations of 47 U.S.C. § 301.

3. In seeking reconsideration, Liberty argues that the Commission erred by failing to reverse the finding of the Administrative Law Judge ("ALJ") that Liberty displayed a lack of candor by exercising a procedural right of appeal. According to Liberty, that finding violated a constitutional right and tainted virtually every other significant finding made by the ALJ. Next, Liberty contends that the forfeiture imposed was excessive and that this occurred because the Commission failed to follow its own procedures and impermissibly relied on tainted conclusions made by the ALJ. Liberty further argues that the Commission never took evidence on mitigating factors. Finally, Liberty submits that both denial of its license applications and imposition of a forfeiture were unprecedented and far beyond the Commission's standard practice.

4. Discussion. Reconsideration is appropriate only where the petitioner either shows a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters. *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); 47 C.F.R. § 1.106(c). Inasmuch as Liberty does not attempt to raise new facts, its petition must stand or fall on

whether it can demonstrate the existence of a material error or omission in the *Decision*. *MO&O*. In the Bureau's view, Liberty does neither. Thus, its petition should be denied.

5. Liberty's first concern is that the Commission erred in disavowing, but not reversing, what it considers to be "tainted" findings by the ALJ that resulted from Liberty seeking confidentiality for an Internal Audit Report ("IAR"). That report, received into evidence after extensive testimony was received, contained information that described Liberty's licensing operations and its knowledge with regard to premature OFS operations. The IAR plainly suggested that Liberty's operations and knowledge differed significantly from testimony previously offered. Liberty asserts that the ALJ's expressed disapproval of its interlocutory appeal regarding the confidentiality issue "tainted" the *Initial Decision's* ("*I.D.*") findings regarding violations of 47 U.S.C. §301 (unlicensed OFS operations), 47 C.F.R. § 1.17 (misrepresentations), and 47 C.F.R. §1.65 (failure to update a pending application), as well as the remedies he imposed and recommended. Liberty argues that only reversal of the *I.D.* can correct the taint. We disagree.

6. In its *Decision*, the Commission reviewed at length the record evidence. With respect to unlicensed operations, the Commission observed that there were a total of 93 unauthorized activations that occurred at various times between June 1992 and April 24, 1995. *Decision* at ¶ 12. Liberty points to nothing that suggests this conclusion was erroneous. As for candor, the Commission concluded that Liberty's claim that it did not know prior to April 1995 about unauthorized operations was false. After reviewing the evidence, the Commission concluded that Peter Price, Liberty's President and Chief Executive, "at the very least, ... recklessly disregarded all indications of premature activations and made little effort to insure that Liberty was acting in compliance with basic

licensing requirements." *Decision* at ¶ 50. In this regard, the Commission properly accepted the *I.D.'s* credibility findings regarding Mr. Price because they were consistent with other record evidence. In addition, the Commission observed that several key witnesses for Liberty changed their testimony with respect to when Liberty learned of the unauthorized operations. Moreover, with regard to Liberty's candor and future reliability as a Commission licensee, the Commission noted, among other things, that 14 applications for special temporary authorization ("STA") did not disclose that the facilities in question were already in operation. The Commission correctly viewed the omissions as "blatant," which were compounded by other assertions. *Id.* at ¶ 51. The *Decision* went on to recount additional submissions from Liberty, which further reflected less than complete candor. *Id.* at ¶¶ 52-53 and 56. In sum, the *Decision* amply supports its conclusions about Liberty's unauthorized operations and its lack of candor. Liberty has failed to demonstrate that the "taint" of which it complains had any bearing on the *Decision*.

7. Liberty next argues that the Commission erred by disregarding its established procedures for imposing forfeitures. Liberty is mistaken. The *Decision* details at length Liberty's rule violations and found them to be "at the very least, ... in such total and reckless disregard of its obligations as a Commission licensee ... as to be tantamount to intentional misconduct." *Id.* at ¶ 62. After considering all the pertinent circumstances, and explicitly finding no downward adjustment factors present, the Commission concluded that the 19 Section 301 violations that were not time-barred warranted the maximum permissible forfeiture. *Id.* at ¶ 68. The Commission supported its conclusion by reference to three contemporaneous cases, two of which imposed the maximum forfeitures for the violations committed. In this regard, contrary to Liberty's suggestion,

the Commission was not obligated to reference the base figure for a Section 301 violation set forth in the *Forfeiture Guidelines*[2] inasmuch as the *Forfeiture Guidelines* did not become effective until well after the date of Liberty's violations. Even if the base forfeiture had been referenced in the *Decision*, the Commission found Liberty's conduct here to be so egregious as to warrant an upward adjustment to the maximum amount. Moreover, although Liberty faults the Commission for failing to conduct a "mitigation analysis," it does not suggest what the Commission should have considered but did not consider. In short, Liberty has failed to present evidence or precedent that supports its request for reduction or reversal of the forfeiture imposed by the Commission.

8. Finally, Liberty argues that the denial of its applications and the imposition of the maximum forfeiture are excessive and unjustified. We disagree. As Liberty acknowledges, the Commission has the authority both to deny license applications and impose a forfeiture penalty. The *Decision* made plain that Liberty's significant misconduct, which included lack of candor, justified denial of Liberty's applications. *Decision* at ¶ 63. Further, the circumstances surrounding the violations of Section 301 of the Act, which included numerous other statutory and rule violations, more than justified imposition of a forfeiture. *Id.* at ¶¶ 63-8. The cases cited by Liberty are not remotely comparable to the matter at issue. Liberty has failed to demonstrate error, much less error of such a magnitude as to warrant rescission or a substantial reduction of the forfeiture.

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[2] *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17108-09 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) ("*Forfeiture Guidelines*").

9. Conclusion. For the foregoing reasons, the Petition for Reconsideration filed by Liberty should be denied.

Respectfully submitted,

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January 31, 2001

Certificate of Service

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