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BEFORE THE
Federal Communications Commission
WASHINGTON, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

OPPOSITION TO PETITION FOR RECONSIDERATION

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Time Warner Cable of New York City and Paragon Communications, by their attorneys and pursuant to Section 1.06 of the Commission's Rules, herein oppose the Petition For Reconsideration filed by Liberty Cable Company¹ on January 11, 2001. The Commission's decision in this case is fully supported by the record evidence and the forfeiture imposed for Liberty's egregious misconduct is completely justified.

¹Liberty is now known as Bartholdi Cable Company, Inc. To be consistent with the Commission's opinion, the name "Liberty" will be used herein.

I. Preliminary Statement²

Liberty's request that the Commission reconsider its decision affirming the Initial Decision of the Presiding Judge and imposing the further sanction of a \$1.45 million forfeiture should be denied. None of the three reasons Liberty cites for reconsideration have merit.

First, although the Commission disavowed the "suggestion" in the ALJ's Initial Decision that Liberty was being penalized for exercising its right to appeal a decision mandating disclosure of an "Internal Audit Report," Liberty argues that the Initial Decision's findings on Liberty's unlicensed operations were "tainted" and should not have been adopted by the Commission. In fact, a careful reading of the Commission's decision shows that it relied on none of the factual conclusions of the ALJ's Initial Decision regarding Liberty's misrepresentations in the hearing proceeding itself. Rather, the Commission adopted the ALJ's conclusions that Liberty had misrepresented facts and omitted material facts in three different submissions to the Wireless Telecommunications Bureau in 1995, before a hearing on Liberty's applications was designated. In addition, the Commission adopted the ALJ's conclusion that Liberty's widespread and sustained unlicensed operation of microwave facilities was, at a minimum, the result of Liberty management's operating in reckless disregard of its responsibilities as a Commission licensee. Neither the Commission nor the ALJ in any way used the Audit Report to reach these conclusions other than as evidence to establish the fact of Liberty's misrepresentations and the state of its management's knowledge about unlicensed operations.

²This Preliminary Statement includes the summary required by Section 1.49(c) of the FCC's Rules.

Second, Liberty's argument that the Commission's decision to impose a forfeiture in addition to denying the subject applications was "unfair" overlooks the fact that, prior to the Initial Decision, Liberty was arguing that a forfeiture of just over \$1 million was an appropriate sanction. During the course of advocating its voluntary forfeiture proposal, Liberty had the opportunity to present – and, indeed, did present – its "evidence in mitigation" in support of that theory. Interestingly, while it argues for a remand to take additional evidence, Liberty makes no proffer of what that evidence would be, in addition to what already is in the record. Moreover, the Hearing Designation Order itself gave Liberty notice of the possibility of the forfeiture as an added sanction; and it was Liberty who formally advised the Presiding Judge that it was willing to close the record. Thus, if there was any error, it was invited by Liberty itself.

Third, contrary to Liberty's arguments, there is nothing "excessive" about the penalty the Commission decided to impose; nor did the Commission fail to follow its own guidelines. The record in the hearing portrays an extraordinary example of egregious conduct on the part of a Commission licensee. The record shows a pattern of unlicensed operation continuing over a period of years, despite warnings from outside consultants and advisers, until a competitor – Time Warner Cable – "blew the whistle." Thereafter, Liberty engaged in a sustained program of misrepresentations and obfuscation to the Commission. Although not mentioned in the Commission's opinion, the fact is that denial of the applications alone – while important as a matter of general precedent to deter other would-be violators – is a small sanction to Liberty, given that it divested itself of most of its business at the time the Hearing Designation Order in the case was issued for the sum of approximately \$40 million. For that reason alone, a

substantial monetary sanction in addition to denial of the subject applications is an appropriate result.

II. Argument

A. The Commission's Decision Finding that Liberty Lacked Candor Does not Depend Upon any of the ALJ's Findings Regarding Liberty's "Internal Audit Report".

In attempting to portray the Commission's decision as being hopelessly tainted by the ALJ's comments regarding Liberty's efforts to keep the Internal Audit Report³ out of the hearing, Liberty fails to note that none of the three instances of lack of candor by Liberty that the Commission relies upon have to do with Liberty's conduct in the hearing proceeding itself.

The Commission's opinion focuses on three significant groups of false statements by Liberty:

- the May 4, 1995 STA requests, which failed to state that the applications for which STA was sought were for facilities that already were operating;⁴

³The Internal Audit Report ("Report") was a document furnished *ex parte* to the Wireless Bureau in response to a Section 308(b) request for more information about Liberty's "inadvertent activations." *Liberty Cable Company*, Initial Decision of Administrative Law Judge Richard L. Sippel, 13 FCC Rcd 10716 (ALJ 1998) (hereinafter cited as "I.D.") at ¶25. The Report purports to be the result of Liberty's counsel's investigation into Liberty's compliance with FCC regulations in applying for new microwave licenses and commencing operations of new microwave paths. I.D. at ¶29. The Commission's Order directing Liberty to supply the Report to Time Warner Cable and the other participants in the licensing proceeding and rejecting Liberty's privilege claims was upheld by the D.C. Circuit. *Liberty Cable Co. v. FCC*, 114 F.3d 274 (D.C. Cir. 1997), *aff'g. Liberty Cable Co.*, 11 FCC Rcd 2475 (1996).

⁴*Liberty Cable Company*, FCC 00-414 (rel. December 13, 2000) at ¶¶22, 51 (hereinafter cited as "FCC Opinion at ¶ __."); I.D. at ¶¶75, 78.

- the May 17, 1995 “Surreply,” which falsely stated that Liberty has traditionally sought STA for facilities and that its usual pattern and practice was to await a grant of authority before activating a microwave facility;⁵
- the July 17, 1995 STA requests, which, like those filed on May 4, failed to state that they were for facilities that already were operating.⁶

A review of the Commission’s discussion in its opinion shows that none of these findings relate to any of the misconduct in the hearing found by the ALJ. Indeed, as to the ALJ’s conclusion in that area, the Commission said: “Even though we concur with the ALJ that these episodes . . . were ‘disheartening,’ I.D. at ¶120, we also agree with his observation that it is a ‘difficult case to make’ that the withholdings were intentional, I.D. at ¶117, and we find there is not substantial evidence that they were.”⁷ The Commission’s decision in this case does not rely on any finding of misconduct during the hearing proceeding.

With respect to the May 4 STA requests, the Commission’s opinion relies on Liberty’s witnesses’ hearing testimony to support the proposition that these requests knowingly failed to state that the facilities to which they pertained were already operating.⁸ There is no mention of the Report or of Liberty’s handling of that document in the proceeding. Likewise, the Commission’s findings regarding the May 17 Surreply are based on the testimony of Peter Price, Liberty’s president, that he knew that the Surreply’s claim that Liberty’s practice was not to

⁵FCC Opinion at ¶¶23, 52; I.D. at ¶79.

⁶FCC Opinion at ¶51; I.D. at ¶83.

⁷FCC Opinion at ¶60.

⁸*Id.* at ¶51.

activate facilities before receiving authorization was false at the time it was made.⁹ The Report is mentioned only in the context of the Commission’s statement that Liberty’s management knew at least some of the information summarized therein before the document was created. Finally, the Commission’s opinion recites the uncontested fact that, like the May 4 requests, the July 17 STA requests failed to state that the facilities to which they pertained were already operating.¹⁰

The Commission’s opinion rejects the only excuse offered by Liberty – that it intended to file these requests together with applications that did not omit this material fact – saying, “[t]his episode is consistent with the ALJ’s finding that Liberty engaged in a pattern of failing to timely disclose pertinent information in its filings.”¹¹ In short, the Commission’s decision relies on only certain of the misconduct found by the ALJ: “We agree with the ALJ that Liberty filed applications and pleadings on May 4, May 17, and July 17 that made incomplete and intentionally misleading statements to the Commission regarding Liberty’s operations and practices in violation of the Commission’s rules.”¹² Thus, the Commission’s opinion was not based on any procedural misconduct other than the three specifically referenced instances.

Likewise, the Commission’s findings that “the record establishes an indifference and wanton disregard for the licensee’s obligations to the Commission . . .”¹³ are not based on any assessment of misconduct in connection with the Report. Rather, the Commission cites the

⁹*Id.* at ¶52.

¹⁰*Id.* at ¶53.

¹¹*Id.*

¹²*Id.* at ¶56.

¹³*Id.* at ¶50.

Report itself as evidence of Liberty's knowledge of problems in its compliance with its obligations as a Commission licensee.

The first mention of the Report in the discussion of Liberty's knowledge of its problems is a citation to the Report's conclusion that Jennifer Richter, one of Liberty's outside FCC counsel, knew of Liberty's unauthorized activations in 1993.¹⁴ Even there, the Commission does not rely on the Report's conclusion. Rather, it relies on a letter written by Ms. Richter in 1993 to Liberty's president, warning him about possible compliance problems, which he ignored: "an overt admonition and caution about future compliance that someone in Price's position could not reasonably have ignored. Yet, apart from focusing on Richter's incidental reference to the possible use of STAs . . . even with the most favorable reading of the record, Price appears to have done just that."¹⁵

The next use the Commission's opinion makes of the Report is to note the extremely large number of "premature" activations it reveals. Again, the Report is used as evidence of the extent of Liberty's non-compliance, which occurred over a three year period. Examining such evidence, the Commission concludes: "[They] can hardly be characterized as isolated instances or atypical occurrences . . . Rather, they establish an overwhelming pattern of unlicensed operations which, it is reasonable to conclude, would have been noticed by management officials who were even minimally attentive to their licensing responsibilities."¹⁶

¹⁴*Id.* at ¶43.

¹⁵*Id.*

¹⁶*Id.* at ¶46.

Finally, the Commission uses the Report as evidence that Liberty's management was not so uninformed about Liberty's compliance problems as it was contending. The Report concludes that Liberty's chief engineer, Behrooz Nourain, warned Price that he was rushing and might activate unlicensed paths; that Liberty's executive vice-president who, until his departure, had day-to-day operating responsibility, knew of unlicensed operations; and that Liberty's Operations Manager also knew of some unlicensed operations and had raised this issue at a meeting with senior management in 1994. Although Liberty objects to the ALJ's use of the Report, the Commission's opinion failed to note – as it could have – that not only was the Report an admission against interest by Liberty, but also that Liberty submitted the Report to the Wireless Bureau in 1995 as the definitive account of how it came to be operating unlicensed microwave facilities. In short, until it suited its purposes to say otherwise, Liberty told the Commission (in this instance, the Wireless Bureau when it – not the ALJ – had decision-making authority with respect to its licenses) that the Report was not just one piece of evidence, but the Gospel truth.¹⁷

In sum, there is absolutely no basis for Liberty's claim that the sanctions imposed by the Commission were in any way "tainted" by Liberty's actions during the hearing proceeding in this case, including Liberty's deliberate withholding of material evidence that Liberty knew would contradict assertions of fact made by Liberty during the hearing, which assertions were designed

¹⁷The FCC Opinion also adopts the ALJ's credibility finding with respect to Liberty's President, Peter O. Price. *Id.* at ¶48. The ALJ's discussion of this issue is largely contained within paragraph 40 of the I.D. The ALJ's finding that Price's testimony was not credible makes no mention of the Report. Rather, it is based on Price's own self-contradictions, the testimony of other witnesses and the documents that were addressed to Price during the relevant time period. So, there would be no justification for an argument that the ALJ's credibility finding with respect to Price was a reflection of any adverse inferences regarding Liberty's handling of the Report in the hearing proceeding.

to avoid or minimize culpability. To the contrary, the FCC Opinion makes clear that the sanctions imposed on Liberty were based on Liberty's wrongdoing wholly outside of the hearing proceeding itself.

B. The Forfeiture Imposed for Liberty's Flagrant Violations Was Fully in Accordance with the Commission's Forfeiture Guidelines and Precedents.

Despite the extensive record of its serious and ongoing violations of fundamental FCC licensing requirements, and despite the fact that Liberty had itself previously recommended the imposition of a comparable forfeiture, Liberty's Petition complains that the Commission imposed on it an "excessive forfeiture." Liberty argues that the Commission "disregarded its own established procedures" in determining that forfeiture and deprived Liberty of any opportunity to present mitigating evidence. According to Liberty, the forfeiture assessed for its transgressions was "substantially in excess" of those imposed on other wrongdoers in past cases. It thus seeks remand of the "forfeiture issue" to the ALJ, to "take evidence" on the appropriate amount to be imposed, "if any." Petition at 9-10.

Contrary to Liberty's protestations, if ever there was a record of evidence before the Commission that fully justified the imposition of a forfeiture over a million dollars, this is the case. Both the ALJ and the Commission concluded that Liberty's record of wrongdoing constituted "one of the worst cases" of unlicensed operations since the passage of the Communications Act in 1934, and an "egregious flaunting" of a fundamental licensing principle, which was exacerbated by Liberty's "total and reckless disregard of its obligations as a Commission licensee," lack of candor on material issues, and "repeated noncompliance" with

reporting obligations.¹⁸ Moreover, the Commission's opinion did not ignore Liberty's proffer of mitigation in accordance with the FCC's non-binding forfeiture guidelines, or deviate from any mandatory procedure, as Liberty alleges. The detailed record in this case fully supports the forfeiture imposed.

1. The Commission Did Not Ignore the Forfeiture Requirements in the Act and its Rules.

Initially, it should be emphasized that the Commission's opinion did not evidence any disregard for the legal requirements governing forfeitures, as Liberty's Petition claims. Thus, the FCC Opinion expressly stated that:

we conclude that a forfeiture should be imposed pursuant to 47 U.S.C. § 503(b). The statutory maximum under 47 U.S.C. § 503(b)(2)(C) for a continuing violation is \$75,000 for each single violation of the Act, and we believe this is the appropriate amount to be assessed here in view of the serious magnitude of the infractions... The amount in this case was determined after consideration of the factors set forth in 47 U.S.C. § 503(b)(2)(D), including the nature, circumstances, extent and gravity of the violations...¹⁹

Consistent with the statutory standard in Section 503(b), the Commission's opinion contains extensive detail regarding the nature, circumstances, extent and gravity of Liberty's violations.

Nor did the Commission ignore the possibility of mitigating factors, as set forth in its non-binding forfeiture guidelines. In fact, its opinion distinguished the present case from an earlier one involving unlicensed microwave paths, in which two mitigating factors had been present: the licensee's prior compliance with licensing requirements and its voluntary disclosure

¹⁸FCC Opinion at ¶¶62-64.

¹⁹FCC Opinion at ¶68 (emphasis added and footnote omitted).

of unlicensed operations. The Commission found that:

No such mitigation evidence is present here. The record in this case discloses, *inter alia*, a history of unlicensed operations and a lack of candor in STA requests and other filings with the Commission.²⁰

Thus, the Commission’s opinion expressly concluded that “[w]e find no downward adjustment factors present. See 47 C.F.R. § 1.80.”²¹ Liberty’s assertion that “the FCC, with no preamble, simply adopted the statutory maximum of \$75,000.00” (Petition at 11) plainly is wrong.

While Liberty criticizes the length of the Commission’s forfeiture analysis (Petition at 11), this case simply was not a difficult one with respect to the amount imposed. The Commission had already found infractions of a “serious magnitude,” which were fully detailed in its extensive opinion. Virtually the entire FCC Opinion thus serves as a “preamble” to the forfeiture imposed. Liberty’s “violations were serious, willful, recent, and repeated throughout most of its history as an OFS licensee, and involved the reckless, if not knowledgeable actions of the individual who, at all relevant times, served as its President and Chief Executive Officer.”²²

2. The Forfeiture Guidelines Do Not Mandate A Different Analysis, Particularly In Light of The Seriousness of the Violations Here.

Liberty’s Petition argues that the FCC disregarded its “established procedures” by not expressly “beginning” its analysis with the base amounts set out in its forfeiture guidelines and then methodically “working through” each of the adjustment factors in those guidelines on a

²⁰Id. at n. 8. As shown in Section II.B.3, *infra*, Liberty had a full opportunity to offer evidence of mitigating circumstances and all such evidence was taken into account by the Commission in establishing the appropriate forfeiture amount.

²¹Id. at ¶68.

²²Id. at ¶64.

step-by-step basis. Instead, according to Liberty, the Commission “jumped immediately” to the maximum amount of each forfeiture, resulting in an excessive forfeiture. Petition at 9. On the contrary, the record evidence regarding one of worst cases of unauthorized operations in history, compounded by misrepresentations and reporting failures, cried out for the maximum penalty possible. Even if this were a close case, however, the forfeiture guidelines cited by Liberty do not establish a rigid, “detailed procedure” (Petition at 10) requiring a step-by-step methodology in every instance, from which the Commission is not permitted to deviate.

The Commission has made clear that its forfeiture guidelines are just that, guidelines. The guidelines are neither binding nor mandatory and the Commission retains absolute discretion to depart from them in part or even entirely (which, in any event, was not the case in the FCC Opinion). In adopting the forfeiture guidelines in 1997, the Commission emphasized that:

we hereby adopt a base forfeiture amount structure that will serve as a guideline for determining forfeiture liability amounts for specific violations of the Act and the Commission’s Rules... these guidelines will not be binding on the Commission, the staff or the public. We retain discretion to take action in specific cases as warranted.²³

* * *

Although we have adopted the base forfeiture amounts as guidelines to provide a measure of predictability to the forfeiture process, we retain our discretion to depart from the guidelines and issue forfeitures on a case-by-case basis, under our general forfeiture authority contained in Section 503 of the Act.²⁴

* * *

We are satisfied that our procedures ... will allow the Commission to apply its guidelines in a consistent and fairly uniform manner, while retaining discretion to look at the individual facts and circumstances surrounding a particular violation.²⁵

²³*The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, Report and Order*, 12 FCC Rcd 17087 (1997) (“Forfeiture Policy Statement”) at ¶8 (emphasis added), *recon. denied*, 15 FCC Rcd 303 (1999).

²⁴*Id.* at ¶22 (emphasis added).

²⁵*Id.* at ¶6 (emphasis added).

Indeed, Section 1.80 of the FCC Rules, which sets out the guidelines as a Note thereto, makes clear that they do not establish a binding procedure:

The Commission and its staff may use these guidelines in particular cases. The Commission and its staff retain the discretion to issue a higher or lower forfeiture than provided in the guidelines, to issue no forfeiture at all, or to apply alternative or additional sanctions as permitted by the statute.²⁶

In short, the forfeiture guidelines do not dictate that the Commission methodically follow the cumbersome, step-by-step analysis prescribed by Liberty, expressly starting with a non-binding base amount in every case, particularly where the Commission has already found the most serious misconduct warranting a severe penalty. The approach taken here was fully consistent with that in previous cases of severe misconduct. *See, e.g., In re Applications of PCS 2000, LP*, 12 FCC Rcd 1703 (1997) at ¶¶ 52, 55 (imposing maximum forfeiture of \$1 million for serious misrepresentations, “determined after consideration of” the factors set forth in Section 503(b)(2), without specifying those factors, and stating that “no downward adjustment factors [were] present.”)

Moreover, Liberty’s suggestion that the ALJ must take evidence on whether “any” forfeiture should be assessed (Petition at 10) cavalierly ignores the extent of its wrongdoing as well as its own previous admission that a forfeiture over one million dollars would be appropriate. The Commission deliberately and appropriately chose to impose the maximum forfeiture on Liberty as “the appropriate amount to be assessed here in view of the serious magnitude of the infractions.”²⁷

²⁶47 C.F.R. § 1.80(b)(4), Note (emphasis added).

²⁷FCC Opinion at ¶68 (citations omitted).

3. Liberty Had A Full Opportunity To Argue For The Mitigation of Any Forfeiture Below, And Did So On The Record That Was Before The Commission.

Liberty claims that the FCC's purported failure to conduct a mitigation analysis was "particularly troubling in light of the incomplete nature of the record in this case." According to Liberty, because the issue of a forfeiture "arose only in light of a settlement" which the ALJ rejected, it had "no opportunity to argue the forfeiture issue or present evidence of mitigating factors." Petition at 13. That claim is simply not true.

On July 15, 1996, Liberty and the Wireless Telecommunications Bureau filed a Joint Motion For Summary Decision with the ALJ.²⁸ In that Joint Motion, Liberty initially proposed that a forfeiture of \$710,000 for its premature activation of microwave services would be an "appropriate penalty." Joint Motion at v. (Liberty later agreed to the Bureau's proposal that its forfeiture be increased to \$1,010,000, to reflect its failure to reveal the real situation underlying its May 1995 STA requests. FCC Opinion at n. 5.) Liberty also argued at length about numerous factors which it claimed mitigated its culpability.

Liberty now claims that its arguments focused on the Commission's Character Policy, rather than mitigation of a forfeiture. Petition at 9. On the contrary, an examination of its Joint Motion reveals that Liberty's mitigating arguments also directly addressed the four downward adjustment factors²⁹ listed in the forfeiture guidelines:

²⁸See Joint Motion By Bartholdi Cable Co., Inc. and Wireless Telecommunications Bureau For Summary Decision, WT Docket No. 96-41, filed July 15, 1996 ("Joint Motion"). The Bureau later withdrew its support for Liberty's position, after Liberty belatedly disclosed documents that undermined its legal and factual claims. FCC Opinion at ¶41.

²⁹See 47 C.F.R. § 1.80(b)(4), Section II.

- **Minor Violation.** Liberty argued, as it does again in its Petition, that “the public has not been harmed” because of its prior frequency coordination before operating illegally and because it stopped charging the affected customers for a period of time. Joint Motion at 49. Liberty also argued that its management was not aware of and did not condone these violations, and that there was no intent to mislead the Commission. *Id.* at 42, 44-45, 47-48.³⁰
- **Good faith or voluntary disclosure.** Liberty claimed that it moved swiftly to investigate the “premature activations” and “openly and fully disclosed” the violations at 19 buildings to the Commission. *Id.* at 45, 48.
- **History of overall compliance.** Liberty argued that its record of compliance had been good under a previous engineer and that it had instituted a compliance program to prevent the recurrence of future violations of applicable law, rules and regulations. *Id.* at 45, 48.
- **Inability to pay.** Significantly, Liberty did not argue that it was unable to pay a large forfeiture; indeed, its willingness to pay a forfeiture of \$1,010,000 (FCC Opinion at n. 5) demonstrates both its ability to pay the forfeiture ultimately assessed and the need for such a forfeiture to deter its principals from future wrongdoing. This is confirmed by the record evidence that Liberty sold the assets of its microwave operations for \$40,000,000 in 1996 and thus has reaped a substantial windfall flowing from its illegal activities.³¹

Thus, contrary to the assertions in its Petition now, Liberty fully argued the facts that it believed would mitigate its culpability on the record below. And, with the appeal of the ALJ’s order, that complete record was before the Commission when it reached the determination that no downward adjustment in the forfeiture was appropriate based on the mitigating factors asserted by Liberty.

Of course, a number of the claims Liberty made in support of mitigation below were later shown to be false. Liberty’s violations were actually much more extensive than it admitted, its

³⁰However, Liberty also conceded, and must be held to the admission that, its “violations were frequent” and its misconduct “serious.” Joint Motion at 47.

³¹See Memorandum Opinion and Order in WT Docket No. 96-41, FCC 96-178, ALJ Richard L. Sippel, released July 16, 1996 at ¶6. Time Warner had sought the addition of a hearing issue with regard to this sale, which Liberty had not reported to the ALJ.

principals were aware of those violations, its representations to the Commission were not candid and forthright, and its compliance history was exposed as one of the worst ever. But Liberty cannot claim to have been unfairly prejudiced by its own false statements in mitigation, when it was given the full opportunity to make them. Nor can it claim any legal right to change its explanations of its violations yet again on review, as its principals did at hearing after the release of documents that had been withheld from production in discovery.³² The fact remains that Liberty had a full opportunity to submit mitigating evidence below, and did so. It is equally clear that the Commission correctly determined that there is no basis for downward adjustment of the forfeiture imposed on Liberty due to any mitigating circumstances.

4. The Detailed Record In This Case Fully Supports The Forfeiture Imposed.

Despite the record in this case, Liberty now has the temerity to argue that the Commission failed to “offer any basis for the upward adjustment” of the forfeiture from the base amount to the maximum in the forfeiture guidelines, and that “there is evidence” that “many” of the aggravating factors in those guidelines do not apply. Petition at 14. On the contrary, as shown above, the Commission expressly concluded that the basis for the maximum forfeiture amount was the extensive nature of Liberty’s misconduct. However, even if each factor set out in the forfeiture guidelines is considered in greater detail, it is crystal clear that the record evidence

³²See, e.g., FCC Opinion at ¶30 (“in depositions given in May of 1996, [Peter] Price and Howard and Edward Milstein all stated that they may have learned of the premature OFS activations in May 1995 as the result of Time Warner’s May 5 pleading. When confronted with the February and April 1995 Lehmkuhl inventories and the April 1995 Nourain memorandum at the January 1997 hearing session, however, these witnesses changed their testimony to say they learned of the activations in April 1995, prior to Liberty’s May 1995 STA requests and Time Warner’s May 5, 1995 pleading identifying unlicensed operations...”).

fully supports the Commission's decision to impose the maximum forfeiture:

- **Egregious misconduct.** This factor alone justified the maximum forfeiture possible. The Commission found that Liberty's illegal operations were "legion," making this "one of the worst cases" of unlicensed operations since adoption of the Communications Act, exacerbated by Liberty's "total and reckless disregard of its obligations as a Commission licensee." Liberty compounded this legion of violations with its lack of candor and "repeated noncompliance" with reporting obligations. FCC Opinion at ¶¶62-63. Moreover, "misrepresentation to the Commission always is an egregious violation." *Forfeiture Policy Statement, supra*, at ¶21. It is hard to imagine Liberty's misconduct being any more egregious.
- **Repeated or continuous violation.** The Commission found that Liberty's 93 illegal activations over a three year period "can hardly be characterized as isolated incidents or atypical occurrences," but rather constituted "an overwhelming pattern of unlicensed operations." FCC Opinion at ¶46.
- **Intentional violation.** The Commission found that the preponderance of record evidence did not support Liberty's claim that its unlawful operations were the result of inadvertence or negligence. *Id.* at ¶50. In addition, the Commission found that Liberty filed applications and pleadings that made "intentionally misleading statements" to the government and "completely mischaracterized its practices." *Id.* at ¶56.³³
- **Prior violations of any FCC requirements.** Liberty has not contested the ALJ's decision to impose a separate forfeiture of \$80,000 for its violation of the statutory cable franchise requirements. *Id.* at ¶6. Moreover, the Commission found 74 illegal OFS activations before the 19 at issue in this case. *Id.* at ¶12. Liberty's violations were repeated "throughout most of its history as an OFS licensee." *Id.* at ¶64.
- **Ability to pay/relative disincentive and substantial economic gain.** As noted above, Liberty previously agreed to pay a forfeiture of \$1,010,000 and has been unjustly enriched through receipt of a payment of \$40,000,000 for the sale of its operations during the hearing.

In contrast, the record demonstrates, as the Commission concluded, no evidence of

³³Indeed, the Commission would have been fully justified in referring the matter for criminal prosecution under the federal code. See 18 U.S.C. § 1001.

mitigating factors: (1) the violations here were not minor; (2) rather than making a good faith disclosure, Liberty filed applications and pleadings that made intentionally misleading statements; (3) Liberty's regulatory history is one of non-compliance; and (4) Liberty has the ability to pay a significant forfeiture and, given its long record of misconduct, any lesser amount would not serve as a disincentive for future misconduct.

On reconsideration, Liberty attempts to argue against a maximum forfeiture on the claim that its illegal activations had been subject to prior frequency coordination, and thus did not harm the public. Liberty claims that the FCC "frequently reserves" the largest forfeitures for violations involving public harm. Petition at 14. But that claim ignores the very forfeiture guidelines on which Liberty has based its arguments on reconsideration. Those guidelines provide that misrepresentation or lack of candor in and of itself is so significant as to be subject to the statutory maximum for each service. Moreover, operation of radio transmitters without authorizations is not only one of the most significant forfeitures listed, but warrants a base amount equal to that for failure to comply with tower lighting requirements, the threat to public safety which Liberty cites as one of the most significant violations. See 47 C.F.R. § 1.80(b)(4), Note, Section I. Clearly, in connection with perhaps the most flagrant case of unauthorized operations since passage of the Communications Act, the Commission does not have to wait for Liberty to threaten life and property before imposing the maximum forfeiture. Moreover, contrary to Liberty's suggestion, the Commission has not been reluctant to assess very significant forfeitures for serious violations which did not impact public safety.³⁴

³⁴See, e.g., *In the Matter of AT&T Communications, Inc.*, Notice of Apparent Liability For Forfeiture, FCC 00-446, released December 21, 2000 (\$640,000 forfeiture assessed for "slamming," switching customers' long distance service without their consent); *In the Matter of*

Liberty also now argues that “the violations that underlie this case would no longer be violations,” because under the current FCC Rules an OFS applicant need not seek an STA grant before initiating operations. Petition at 15. But a later change in the law does not lessen the severity of deliberate violations before that change. For example, a licensee that had illegally acquired interests in eight radio stations in one market in 1995 would still be deemed to have committed a flagrant and serious violation of the FCC rules, and would not be heard to argue that the later change in the law had rendered its violation insignificant. Moreover, the change in the Rules cited by Liberty would not render its past practices legal even today. Section 101.31(b) of the FCC Rules, cited by Liberty, authorizes a microwave applicant to commence operations on a conditional basis only after filing a “properly completed formal application.” 47 C.F.R. § 101.31(b)(1). Of the 19 unauthorized paths listed in the HDO in this proceeding, Liberty activated six before filing any application whatsoever. Unfortunately, Liberty still fails to appreciate the gravity of its own history of wrongdoing, even after the Commission’s opinion. This fact itself is further justification for imposition of the maximum possible forfeiture, which in any case may have little deterrent effect on Liberty’s arrogant disregard for FCC processes, particularly in light of the \$40 million windfall already obtained by Liberty through a technical sale of its “assets” without the bare licenses subject to this hearing.

21st Century Faxe(s) Ltd, Notice of Apparent Liability For Forfeiture, FCC 00-425, released December 7, 2000 (\$1,107,500 forfeiture assessed for faxing unsolicited advertisements after a previous warning); *PCS 2000, LP, supra* (\$1 million forfeiture assessed for misrepresentation, false affidavit and destruction of documents by PCS bidder’s officer and bidding agent).

5. The Commission Did Not Improperly Rely Upon Any “Assertion” By The ALJ In Imposing The Maximum Forfeiture.

Liberty also claims that the Commission improperly relied upon “dicta” in the ALJ’s Initial Decision that, if a forfeiture was subsequently determined to be appropriate, then the total amount that the Bureau had sought would be warranted. Liberty, ignoring the fact that it supported the forfeiture sought by the Bureau, now argues that this statement by the ALJ was “not based on evidentiary analysis” and was further “tainted in its entirety” by the ALJ’s views with respect to the Audit Report. Petition at 16. But Liberty is again grasping at straws and seeking to create straw men.

Liberty’s argument apparently refers to a single footnote in the Commission’s opinion, in which the Commission simply notes the ALJ’s statement (FCC Opinion at n. 6). There is no evidence whatsoever that the Commission relied upon that statement in any way without conducting its own analysis. Rather, in the same paragraph in which that footnote appears, the Commission states that “[w]e have decided” to deny Liberty’s applications and that “we also believe” that a monitory forfeiture would serve the public interest, given Liberty’s egregious misconduct.³⁵ Thus, Liberty’s claim that the ALJ’s statement was “tainted” is simply irrelevant. Moreover, as shown in Section II.A., supra, none of the Commission’s opinion relies upon any finding of misconduct during the hearing, as Liberty attempts to infer.

C. Liberty’s Egregious Misconduct Fully Warrants Both The Denial Of Its Applications and Imposition of the Maximum Forfeiture.

Finally, Liberty claims that the Commission’s decision to both deny its applications and impose the maximum forfeiture was virtually “unprecedented” and beyond the “appropriate”

³⁵FCC Opinion at ¶63.

remedial response. According to Liberty, the FCC has “never before handed out this harsh a penalty for the type of conduct that Liberty engaged in here.” Petition at 17. Liberty concedes, however, that the Commission has statutory authority under 47 U.S.C. § 503(b) to impose both the dismissal of applications and the maximum forfeiture. *Id.* In fact, the one thing unprecedented in this case is the nature and extent of Liberty’s intentional misconduct. Despite Liberty’s attempts now to minimize its violations with a selective reading of the record, few if any cases before the Commission have involved this “type of conduct.”

Liberty attempts to distinguish this case from *Commercial Realty St. Pete, Inc.*, 11 FCC Rcd 15374 (1996), *aff’d*, 15 FCC Rcd 7057 (1999), in which the Commission both imposed a substantial forfeiture on an applicant and entered a settlement agreement with that applicant barring it from bidding in future auctions. The Commission had found that applicant guilty of misrepresentations regarding its bidding credit eligibility, violation of the anti-collusion rule, and default on its downpayments. Liberty claims that conduct was “far more egregious” than its own. Petition at 17.

In fact, although the exact type of misconduct may differ in this case, it is hard to imagine an overall record of misconduct as egregious as that here. Liberty seeks to minimize the findings of both the Commission and its ALJ that its “legion” of illegal activations constituted one of the worst cases of unlicensed operations in the history of the Communications Act. Similarly, Liberty seeks to minimize the findings that its “egregious flaunting” of a fundamental licensing requirement and “overwhelming pattern of unlicensed operations” demonstrated a “total and reckless disregard of its obligations as a Commission licensee.”³⁶ Moreover, the preponderance

³⁶*Id.* at ¶¶62-63.

of the record evidence refutes Liberty's claim that its unlawful operations were the result of mere inadvertence or negligence.³⁷ Liberty also ignores the fact that it compounded those intentional violations of fundamental licensing requirements through its "repeated noncompliance" with basic reporting obligations and its lack of candor.³⁸ Nor is this even Liberty's first forfeiture for serious misconduct. The Commission has previously assessed an \$80,000 forfeiture for Liberty's violation of the statutory cable franchise requirement.³⁹ Liberty's conduct certainly has been, to use its own words, "exceedingly egregious." Petition at 17.

Liberty also claims that its conduct can be distinguished from the *Commercial Realty* case as "not intentionally deceptive." Petition at 18. Again, its assertion ignores a wealth of record evidence. "[T]he preponderance of record evidence establishes that Liberty was not fully candid with the Commission. Liberty lacked candor not only with regard to whether and when it knew or could have known of the illegal operations but also in statements made in multiple filings after there could be no doubt that the violations were known."⁴⁰ Liberty filed applications and pleadings that "made incomplete and intentionally misleading statements" to the government and "completely mischaracterized its practices."⁴¹ Moreover, the record demonstrates that the principals of Liberty, when confronted with the documents they had initially failed to produce in discovery, changed their testimony on key points to make it consistent with those documents.

³⁷*Id.* at ¶50.

³⁸*Id.* at ¶62.

³⁹*Id.* at ¶6.

⁴⁰*Id.* at ¶62.

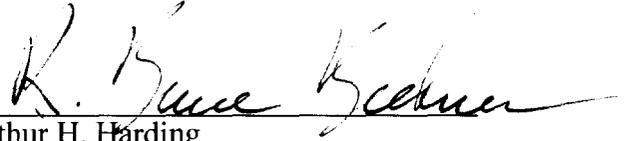
⁴¹*Id.* at ¶56.

In short, a review of the record evidence in the present case demonstrates convincingly that Liberty's violations are in a league of their own, making a routine sanction completely inappropriate. As noted above, Liberty has already sold the assets related to its wireless cable business for a substantial payment. Thus, the denial of its applications alone cannot serve as an effective sanction, without a substantial forfeiture. Nevertheless, the denial of license applications will make sure that the misconduct at issue here will receive appropriate consideration in future applications involving Liberty's principals.

III. Conclusion

There is not a shred of evidence that supports Liberty's argument that the Commission's opinion is "tainted" by any conclusion of the ALJ that Liberty's handling of the "Internal Audit Report" was misconduct in the hearing proceeding. The specific factual findings of the Initial Decision that the Commission's opinion adopts in no way depend upon – and thus could not be tainted by – any conclusion about the propriety of Liberty's efforts to delay until the last possible minute the production of the Internal Audit Report in the hearing. The Commission did not depart from the substance of its guidelines regarding the imposition of forfeitures, and the record of sustained and egregious misconduct by Liberty is well within the boundaries marked out by other Commission decisions imposing comparable forfeitures. For these reasons, Time Warner Cable of New York City and Paragon Communications urge the Commission to deny Liberty's petition in its entirety.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. Bruce Beckner". The signature is written in a cursive style with a horizontal line underneath it.

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CERTIFICATE OF SERVICE

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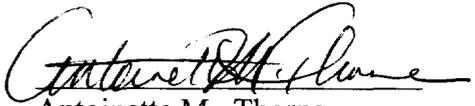
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