

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

JAN 31 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Application 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	)	70871, 709426, 711937	WNTM212
	)	708332	(NEW)
	)	712203	WNTW782
	)	712218	WNTY584
	)	712219	WNTY605
	)	713295	WNTX889
	)	713300	(NEW)
	)	717325	(NEW)

To: The Commission

**OPPOSITION TO
PETITION FOR RECONSIDERATION**

Cablevision of New York City ("Cablevision"), pursuant to Section 1.106(g) of the Commission's rules, 47 C.F.R. § 1.106(g), opposes the Petition for Reconsideration filed by Bartholdi Cable Co., formerly known as Liberty Cable Co., Inc. ("Liberty"), of the Commission's Decision in the above-captioned proceeding ("Decision").^{1/}

INTRODUCTION

As an initial matter, the most fundamental obligation of an FCC licensee is to be candid with the Commission. The Commission does not have the resources to police all of its many licensees, and must rely on the good faith representation made by license applicants and

^{1/} *Liberty Cable Co., Inc.*, WT Docket No. 96-41, FCC 00-414 (rel. Dec. 13, 2000) ("Decision").

No. of Copies rec'd 074
A B C D E

licensees.^{2/} For this reason, Liberty's extensive history of unlicensed operations and untruthfulness before the Commission demonstrates a level of bad faith towards the Commission that warrants the imposition on Liberty and its principals of the Commission's most severe penalty, disqualification to hold an FCC license. In light of the severity of the remedies not only available to the Commission, but proper under the circumstances, such as disqualification, a \$1.45 million fine is a small sanction for Liberty.

Liberty makes, in essence, two claims. Liberty first argues that because the Commission "disavowed" but did not reverse the Initial Decision ("ID") of Administrative Law Judge Richard L. Sippel ("ALJ") and the ALJ's "tainted" findings, the Commission erred and should reconsider its Decision and remand the matter to the ALJ with specific instructions.^{3/} Liberty claims that the ALJ drew "a substantial negative inference on Liberty's character based on the company's exercise of its legal right to appeal" the Commission's finding regarding confidential treatment of an Internal Audit Report ("IAR") submitted by Liberty.^{4/} The IAR 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."^{5/} The IAR purports to be the result of Liberty's counsel's investigation into Liberty's compliance with FCC regulations in applying for

^{2/} *Id.* at ¶ 56 ("[t]he requirement for absolute truth and candor from those appearing before the Commission is fundamental because the Commission must rely heavily on the completeness and accuracy of the submissions made to it by applicants") citing, *Swan Creek Communications v. FCC*, 39 F3d 1217, 1222 (D.C. Cir. 1994); *Sea Island Broadcasting Corp. v. FCC*, 627 F2d 240, 243 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 834 (1980).

^{3/} *Liberty Cable Co., Inc.*, Petition for Reconsideration of Bartholdi Cable Company, Inc., WT Docket No. 96-41 at 2, 7-8 (file Jan. 11, 2001) ("Petition for Reconsideration").

^{4/} *Id.* at 2, 3-6.

^{5/} *Liberty Cable Co., Inc.*, Initial Decision of Administrative Law Judge Richard L. Sippel, 13 FCC Rcd 10716, 10728 (1998) ("ID").

new microwave licenses and commencing operations of new microwave paths.^{6/} The Commission's Order directing Liberty to supply the IAR to the other participants in the licensing proceeding was upheld by the D.C. Circuit.^{7/}

Liberty also takes issue with the fines imposed by the Commission. Liberty argues that the Commission's \$1.45 million monetary sanction is "unfair", inconsistent with the Commission's guidelines regarding the imposition of forfeitures, and "excessive".

I. THE COMMISSION'S DECISION WAS NOT TAINTED BY ANY FINDINGS REGARDING THE INTERNAL AUDIT REPORT

The Commission's Decision thoroughly addressed all the relevant evidence of record. It properly affirmed, with modifications, the ID in denying the above-captioned applications of Liberty for private operational fixed wireless microwave service ("OFS") facilities in New York City and imposed a \$1.45 million forfeiture.

First, there is no evidence to support Liberty's argument that the Commission's decision is "tainted" by any conclusion of the ALJ that Liberty's handling of the IAR demonstrated lack of candor by Liberty or amounted to misconduct in the hearing proceeding. The Commission did not adopt any of the factual conclusions of the ID regarding misrepresentations in the hearing proceeding itself. Instead, the Commission adopted the ALJ's conclusions that Liberty misrepresented facts and omitted to state material facts in three different filings submitted to the Wireless Telecommunications Bureau in 1995. In fact, the Commission does not cite to anything other than Liberty applications and pleadings on May 4, May 17, and July 17, 1995 to support its determination that Liberty intentionally made "incomplete and misleading statements to the

^{6/} *Id.* at 10730.

^{7/} *Bartholdi Cable Co., Inc. v. FCC*, 114 F.3d 274 (D.C. Cir. 1997), *aff'g. Liberty Cable Co., Inc.*, 11 FCC Rcd 2475 (1996).

Commission regarding [its] operations and practices in violation of the Commission’s rules.”^{8/}

The Commission also adopted the ALJ’s conclusion that Liberty’s widespread and sustained unlicensed operation of microwave facilities was, at a minimum, the result of management at Liberty operating in reckless disregard of its responsibilities as a Commission licensee. There is no evidence whatsoever in the Commission’s Decision to support Liberty’s claim that the Commission and the ALJ used the IAR other than as evidence to establish the fact of Liberty’s misrepresentation and the state of its management’s knowledge about unlicensed operations.

II. THE COMMISSION’S PENALTY WAS NOT EXCESSIVE

Second, Liberty’s claims that the Commission failed to follow its own forfeiture requirements and imposed an “excessive” penalty on the company are false.^{9/} The Commission imposed the forfeiture on Liberty pursuant to 47 U.S.C. § 503(b). It determined that the statutory maximum for a continuing violation of \$75,000 for each single violation of the Act was appropriate in this case “after consideration of the factors set forth in 47 U.S.C. § 503(b)(2)(D)”.^{10/}

Consistent with the statutory standard in Section 503 (b), the Commission’s Decision contains extensive detail regarding the nature, circumstances, extent and gravity of the violations. Contrary to Liberty’s claims, the Commission did consider mitigating factors; but, it found “[n]o such mitigation evidence” in the present case.^{11/} Nor did the Commission err by

^{8/} Decision at ¶ 56.

^{9/} Petition for Reconsideration at 9-16.

^{10/} Decision at ¶ 68.

^{11/} *Id.*, n.8.

beginning its forfeiture analysis with the statutory maximum.^{12/} As the Commission clarified in its 1997 Order adopting forfeiture guidelines, those guidelines will “not be binding on the Commission,” and the Commission will “retain discretion to take action in specific cases as warranted.”^{13/} Moreover, Liberty had been put on full notice of the possibility of such a forfeiture as an added sanction by the Hearing Designation Order itself, and had full opportunity to offer evidence of mitigating circumstances.

Contrary to Liberty’s arguments, the level of the Commission’s sanctions are not unprecedented. The Decision is fully consistent with other cases of severe licensee misconduct.^{14/} The record fully supports the Commission’s decision to impose the maximum forfeiture. Nor can Liberty offer any true mitigating factors. Instead, Liberty claims that the Commission “frequently reserves” the largest forfeitures for violations involving public harm.^{15/} However, in the very forfeiture guidelines on which Liberty has based its argument on reconsideration, misrepresentation or lack of candor is considered significant enough to be subject to the statutory maximum for each service. Also, operation of radio transmitters without authorization is not only one of the most significant forfeitures listed, the base amount for this offense is equivalent to the forfeiture for failure to comply with tower lighting requirements --

^{12/} Petition for Reconsideration at 9.

^{13/} *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, 17093 (1997), recon. denied, 15 FCC Rcd 303 (1999).

^{14/} See, e.g., *In re Applications of PCS 2000, L.P.*, 12 FCC Rcd 1703, 1718-19 (imposing the maximum forfeiture of \$1 million for “willful and repeated violations [of the Act and] for misrepresentations made to the Commission” and finding “no downward adjustment factors present”, after consideration of factors set forth in Section 503(b)(2), but without specifying those factors set forth in Section 503(b)(2) or setting forth a mitigation analysis).

^{15/} Petition for Reconsideration at 14.

the very offense which Liberty cites as one of the most threatening to the public interest.^{16/} Most importantly, there is extensive Commission precedent for assessing significant forfeitures for violations that do not directly threaten public safety.^{17/}

^{16/} See 47 C.F.R. § 1.80(b)(4), Note, Section I.

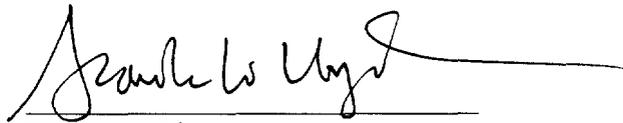
^{17/} See, e.g., *In the Matter of AT&T Communications, Inc.*, Notice of Apparent Liability for Forfeiture, FCC 00-446 (rel. Dec. 21, 2000) (assessing \$640,000 forfeiture for “slamming”); *In the Matter of 21st Century Fax(s) Ltd.*, Notice of Apparent Liability for Forfeiture, FCC 00-425 (rel. Dec. 7, 2000) (assessing \$1,107,500 forfeiture for faxing unsolicited advertisements after previous warnings); *PCS 2000, L.P.*, *supra* (assessing \$1 million forfeiture for misrepresentation, false affidavit and destruction of documents by PCS bidder’s officers and bidding agent).

CONCLUSION

For these reasons, the Commission should reaffirm its Decision upholding the Initial Decision of Administrative Law Judge Richard L. Sippel in this proceeding.

Respectfully submitted,

CABLEVISION OF NEW YORK CITY

A handwritten signature in black ink, appearing to read "Frank W. Lloyd", written over a horizontal line.

Frank W. Lloyd
James A. Kirkland
Paula Deza
Bryan T. Bookhard
Counsel for Cablevision of New York City

Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300

January 31, 2001

DCDOCS:188375.4(41cn04!.DOC)
01/31/01

CERTIFICATE OF SERVICE

I, Dallas Fields, a secretary with the firm of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., certify that I have, by the methods indicated, this 31st day of January, 2001 forwarded copies of the foregoing "Opposition To Petition For Reconsideration" to:

By hand delivery to:

John I. Riffer, Esq.
Assistant General Counsel - Administrative Law
Office of General Counsel
Federal Communications Commission
445 12th Street, S.W., Room 8-A660
Washington, D.C. 20554

Charles W. Kelley, Esq.
Judy Lancaster, Esq.
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 3B-443
Washington, D.C. 20554

By 1st class mail to:

Arthur H. Harding
R. Bruce Beckner
Fleischman and Walsh, L.L.P.
1400 Sixteenth Street, N.W.
Washington, D.C. 20036

Robert L. Pettit, Esq.
Scott D. Delacourt, Esq.
Joshua S. Turner, Esq.
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Robert L. Begleiter, Esq.
Gary J. Malone, Esq.
Yang Chen, Esq.
Constantine & Partners
477 Madison Avenue
New York, New York 10022

Dallas Fields

Dallas Fields