

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

**REPLY TO OPPOSITIONS TO
PETITION FOR RECONSIDERATION**

Bartholdi Cable Co., Inc., formerly known as Liberty Cable Co., Inc. ("Liberty"), by its attorneys and pursuant to Section 1.106(h) of the Commission's rules, hereby replies to the Oppositions to Petition for Reconsideration ("Oppositions")¹ filed January 31, 2001.

In its Petition for Reconsideration ("Petition"), Liberty demonstrated that the FCC erred in "disavowing," rather than reversing, the ALJ's finding that Liberty exhibited a lack of candor by appealing the agency's finding on confidential treatment of an internal audit report ("Audit Report" or "IAR") – an error that tainted the material findings in this case. In addition, Liberty showed that the agency disregarded its own procedures in imposing an unprecedented double

¹ Oppositions were filed by Time Warner Cable of New York City and Paragon Communications ("Time Warner"); Cablevision of New York City ("Cablevision"); and the FCC's Enforcement Bureau.

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penalty – denial of the designated applications and imposition of a \$1,425,000 forfeiture. The Oppositions attempt to save the *Order* by arguing that any error is not material, the Commission specifically did not rely on any tainted findings, and it acted within its discretion in fashioning a penalty. These efforts ultimately fail. As Liberty will demonstrate herein, the *Order* relies on tainted findings of the ALJ, and such error – which impinged upon Liberty’s Fifth Amendment due process rights – is by definition material. With respect to the forfeiture, the agency cited its own guidelines even while disregarding them, and afforded Liberty no opportunity to present mitigating evidence supporting reduction of the ordered fine. Accordingly, Liberty respectfully requests that this matter be remanded to the ALJ for further proceedings consistent with the relief requested in Liberty’s Petition.

I. CONTRARY TO THE SUGGESTION OF THE OPPOSITIONS, AFFIRMING THE ALJ’S TAINTED FINDINGS WAS NOT HARMLESS ERROR

The *Order’s* reliance on tainted findings of the Initial Decision rises to the level of material error.² The Oppositions attempt to shore up the *Order* by arguing that taint from the negative inference the ALJ drew from Liberty’s exercise of its right to appeal affected very few of the Initial Decision’s findings, and that the Commission scrupulously avoided reliance on those findings in the *Order*. Time Warner at 4-5; Cablevision at 3; Enforcement Bureau at 3-4. Neither premise is accurate. The taint resulting from the negative inference was extensive, affecting the Initial Decision’s material findings. Moreover, the agency relied on tainted conclusions in entering findings adverse to Liberty.

The Oppositions mischaracterize the extent of the taint of the ALJ’s negative inference by suggesting that it only affected the Initial Decision’s findings on Liberty’s conduct at hearing.

²*Liberty Cable Company*, FCC 00-414 (rel. December 13, 2000) (“*Order*”); *Liberty Cable Company*, Initial Decision of Administrative Law Judge Richard L. Sippel, 13 FCC Rcd 10716 (ALJ 1998) (“*Initial Decision*”).

However, as Liberty explained in its Petition, the negative inference tainted the material findings in this case. Petition at 4-6. Specifically, the taint extended to the Initial Decision's findings regarding unlicensed operations (47 U.S.C. § 301), misrepresentation (47 C.F.R. § 1.17) and failure to update an application with relevant information (47 C.F.R. § 1.65). *Id.*

Moreover, contrary to the suggestion of the Oppositions, the Commission did not circumscribe its conclusions so as to avoid reliance on the ALJ's tainted findings. While the agency "disavowed," but did not reverse, the Initial Decision's finding that Liberty lacked candor in exercising its right to appeal, it repeatedly relied on findings of the Initial Decision tainted by this negative inference. For example, the ALJ lumped withholding the Audit Report in with late production of the Lehmkuhl inventories and Richter memo and found that Liberty engaged in a "pattern" of failing to timely disclose documents and "serialized" disclosure. Initial Decision at 16-19, 74, 76. The Commission disagreed and concluded that there was little evidence that Liberty deliberately withheld evidence. *Order* at 23. Nevertheless the *Order* cited the Initial Decision's findings on Liberty's "pattern" of failing to timely disclose in support of its Section 1.17 finding that Liberty lacked candor. *Id.* at 21. Similarly, the agency reiterated the ALJ's finding that Liberty "deliberately withheld significant information" in entering an adverse finding under Section 1.65, failure to update an application. *Id.* at 22. Accordingly, it is clear that the taint of the ALJ's negative inference was not contained. In affirming the ALJ's negative findings against Liberty, the Commission perpetuated findings obviously affected by the ALJ's belief that Liberty had acted improperly in asserting its rights to withhold disclosure of the IAR.

Because affirming the Initial Decision's tainted findings violated Liberty's Fifth Amendment right to pursue a lawful appeal before the D.C. Circuit, the error is by definition material. As Liberty stated in its Petition, "Denial of a procedural right guaranteed by the

Constitution . . . is never ‘harmless error.’”³ Given the extent of the taint at issue here, the Commission’s *Order* is not susceptible to a “quick fix.” Instead, this matter should be remanded to the ALJ with instructions to reconsider his findings in light of the conclusion that Liberty acted within its legal rights in withholding the IAR.

II. THE OPPOSITIONS FAIL TO REBUT LIBERTY’S ARGUMENT THAT THE PENALTIES ORDERED IN THIS CASE ARE CONTRARY TO FCC PROCEDURE AND PRECEDENT

A. The Oppositions Fail To Explain Or Justify The FCC’s Departure From Its Own Forfeiture Guidelines

The Oppositions fail to demonstrate that the FCC followed its own procedures in imposing the forfeiture at issue here. The Oppositions contend that the agency acted consistently with the guidelines that govern the imposition of forfeitures in this case. *Time Warner* at 10, *Enforcement Bureau* at 5, *Cablevision* at 4. In the alternative, they argue that whether or not the Commission followed those guidelines is irrelevant given that the FCC has unfettered discretion to set the guidelines aside and make decisions on a case-by-case basis. Both of these arguments fail.

Despite the suggestion of the Oppositions, bare citation of the forfeiture guidelines, without conducting the prescribed analysis, does not constitute compliance with the FCC’s procedures. Both *Time Warner* and *Cablevision* cite to the same passage in the *Order*, where the Commission made a passing reference to Section 503. *Time Warner* at 10; *Cablevision* at 4. There, the agency acknowledged the statute by stating that “[t]he 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.” *Order* at 26. The statutory reference is to the correct standard, but if such an analysis was conducted it does not appear in the four

³ *Petition* at 8 (citing *WJR, The Goodwill Station v. FCC*, 174 F.2d 226, 241 (D.C. Cir. 1948), *rev’d on other grounds*, 337 U.S. 265 (1949)).

corners of the *Order*. Time Warner goes on to cite the Commission's similarly curt reference to the forfeiture guidelines in Section 1.80 of the FCC's rules as further evidence that the Commission conducted the proper analysis. Time Warner at 11. Again, however, the agency's statement is conclusory, for the guidelines are nowhere applied. It is not enough for the FCC to simply recite that it has taken the relevant factors into account, without providing any textual evidence that it has actually done so. Such an "analysis" fails utterly to "provide the needed measure of predictability to the process" of administrative sanctions, and could, in fact, be used to justify nearly any conclusion.⁴

While the FCC has the discretion to depart from its guidelines and decide matters on a case-by-case basis, the Commission gave no indication of its intent to do so here. Had the agency wished to depart from the guidelines, it should have announced clearly that it was doing so. Here, however, the Commission cited the guidelines and declared it was applying them. It is arbitrary and capricious for the agency to misapply the forfeiture guidelines and then claim case-by-case discretion as a *post hoc* justification.

Like *post hoc* arguments that the agency exercised its case-by-case discretion in calculating the forfeiture at issue here, the Enforcement Bureau's argument that the guidelines are not applicable to the conduct under review is contradicted by the *Order* itself. The Enforcement Bureau argues that the agency need not have applied the guidelines because the violations in question occurred before they were adopted. Enforcement Bureau at 5. Yet whether the FCC might have elected to ignore the guidelines is now a moot point because the Commission declared it was applying them. Given that the Commission purported to apply the guidelines in this case and cited the guidelines in the *Order*, the agency is estopped from arguing on reconsideration that the guidelines do not apply. *Order* at 26.

⁴ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules*, 12 FCC Rcd 17087, 17092-93 (1997) ("*Policy Statement*").

B. In Proposing A Joint Settlement, Liberty Did Not Acquiesce To The Penalties Imposed By The Commission

The Oppositions mischaracterize the record in this proceeding to the extent they suggest Liberty consented – or even partially consented – to the unprecedented double-penalty imposed in this case. It is a matter of record that Liberty never agreed to the \$1,450,000 forfeiture imposed by the Commission. That forfeiture is nearly half again as large as the amount proposed by the Bureau and Liberty in the Joint Motion. Initial Decision at 81. Similarly, Liberty did not assent to the final forfeiture amount proposed by the Wireless Bureau. Time Warner at 20. While Liberty and the Bureau did agree upon a \$1,010,000 forfeiture as part of an overall settlement package, the Bureau went on to increase that figure to \$1,850,000. As the Initial Decision notes, Liberty never “indicated a willingness to pay that additional sum.” Initial Decision at 81.

Moreover, a precondition of any forfeiture proposed by Liberty was grant of the designated applications – a condition that was not satisfied in this case. Liberty issued its forfeiture proposal in the context of an overall settlement agreement. One of the terms of the agreement, embodied in the Joint Motion for Summary Decision, was that the designated applications for new OFS paths be granted. Liberty never considered or acquiesced to coupling the significant forfeiture it proposed in the Joint Motion with dismissal of the applications. In short, Liberty’s agreement to a specific forfeiture was conditional. Given that the conditions precedent to Liberty’s acceptance of a forfeiture were not satisfied, the Joint Motion cannot be construed as consent to the unprecedented penalty the agency instead imposed.

III. THE OPPOSITIONS WRONGLY SUGGEST THAT LIBERTY HAS BEEN AFFORDED AN OPPORTUNITY TO PRESENT MITIGATING EVIDENCE SUPPORTING A REDUCTION OF THE ORDERED FORFEITURE

The Oppositions do not challenge Liberty's assertion that there was no opportunity to argue the forfeiture issue, including by presentation of mitigating evidence, during a hearing on the merits. Instead, Time Warner and Cablevision argue that Liberty had its opportunity, and argued the issue, in the Joint Motion for Summary Decision. Cablevision at 5 (Liberty "had full opportunity to offer evidence of mitigating circumstances"); Time Warner at 14. Alternatively, the Enforcement Bureau asserts that Liberty should have presented its mitigation case on reconsideration, a position Time Warner implicitly seconds by raising – for the first time on reconsideration – an argument in support of an increase in the base forfeiture amount. Neither argument is sufficient to overcome the Commission's material error.

The ALJ's unusual decision to simultaneously deny the Joint Motion for Summary Decision and issue the Initial Decision deprived Liberty of an opportunity to present mitigating evidence supporting a reduction in any forfeiture. *Order* at 8. Because the ALJ issued the Initial Decision before argument of the case on the merits, the record was effectively closed with the Joint Motion. At that time, the forfeiture issue had not been argued. While the Joint Motion proposed a forfeiture negotiated with the Wireless Bureau in the context of an overall settlement, the ALJ rejected the proposal. Even where the Initial Decision proposed a different, larger forfeiture, it did so only in *dicta*. Accordingly, Liberty had no opportunity to argue for reduction of the forfeiture and, at that time, did not need to because no forfeiture was imposed.

Time Warner's argument that the Joint Motion itself embodies a full mitigation argument is logically flawed. A necessary prerequisite to making a meaningful proffer of mitigating evidence is notice of the forfeiture proposed. As explained above, at the time of the Joint Motion, no forfeiture was on the table. Liberty could not reasonably be expected to use the Joint

Motion to argue for reduction of a forfeiture that would later be proposed, in *dicta*, by the ALJ, or a different forfeiture to be adopted still later by the Commission.

A petition for reconsideration also is not the proper vehicle for offering evidence of mitigation, as the Enforcement Bureau suggest. In criticizing Liberty for failing to present mitigation evidence in its Petition, the Enforcement Bureau ignores limitations on the scope of a reconsideration proceeding imposed by the FCC's rules. Enforcement Bureau at 5. While a petition for reconsideration must "state with particularity the respects in which the petitioner believes the action taken by the Commission...should be changed,"⁵ the petition is not intended to be an exhaustive catalog of all the petitioner's relevant evidence. Indeed, given the page limitations on reconsideration petitions, it generally would be impossible for petitioner to make out an evidentiary case while simultaneously identifying error and arguing for its reversal. Recognizing these limitations, the agency's rules provide that a petition "may request that additional findings of fact and conclusions of law be made."⁶ This is exactly the relief Liberty requests – a remand to the ALJ for new findings on the forfeiture issue after the presentation of mitigating evidence.

Time Warner similarly ignores the limited scope of a reconsideration proceeding by arguing – for the first time on reconsideration – that an increase above the base forfeiture is warranted in this case. Time Warner argues that an increase is appropriate because Liberty's asset sale to RCN enhances the company's ability to pay. Time Warner at 19. However, as Time Warner is well aware, when Liberty disclosed the RCN asset sale, the Bureau conducted a 308(b) inquiry. Based on that investigation, the Bureau specifically elected not to pursue the

⁵ 47 C.F.R. § 1.106(d)(1).

⁶ 47 C.F.R. § 1.106(d)(2).

matter further.⁷ Moreover, neither the ALJ nor the Commission mentioned an alleged “windfall” from the RCN transaction as a basis for increasing the forfeiture imposed on Liberty above the base amount. An Opposition to a Petition for Reconsideration is not the proper vehicle for raising this question of first impression. Accordingly, the agency should disregard Time Warner’s argument in support of an increased forfeiture as improperly raised.

IV. CONCLUSION

For the foregoing reasons, Liberty respectfully requests that the Commission deny the Oppositions and remand this matter to the ALJ for further proceedings consistent with the relief requested in Liberty’s Petition for Reconsideration.

Respectfully submitted,

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⁷ Hearing Before the Honorable Richard L. Sippel, Administrative Law Judge, WT Docket No. 96-41 (Dec. 12, 1996) at 356.