

FCC MAIL ROOM

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In re Applications of	)	WT Docket No. 00-41/A II: 23
	)	
LIBERTY CABLE CO., INC.	)	
	)	File Nos:
For Private Operational Fixed	)	708777
Microwave Service Authorization	)	708778, 713296
and Modifications	)	708779
	)	708780
New York, New York	)	708781, 709426, 711937
	)	708332
	)	712203
	)	712218
	)	712219
	)	713295
	)	713300
	)	717325

2001 SEP 11 / A II: 23

WNTM210  
WNTM385  
WNTT555  
WNTM212  
(NEW)  
WNTW782  
WNTY584  
WNTY605  
WNTX889  
(NEW)  
(NEW)

**MEMORANDUM OPINION AND ORDER**

**Adopted:** August 21, 2001

**Released:** August 30, 2001

By the Commission:

1. By this Memorandum Opinion and Order, the Commission denies the Petition for Reconsideration filed January 11, 2001 by Bartholdi Cable Company, Inc., formerly known as Liberty Cable Co., Inc. ("Liberty"), of our Decision in this proceeding. Liberty Cable Co., Inc., 15 FCC Rcd 25050 (2000). Our Decision denied fifteen applications of Liberty for private operational fixed microwave service ("OFS") facilities in New York City because of Liberty's extensive record of unlicensed OFS operations and untruthfulness in connection with its applications, and imposed a monetary forfeiture of \$1,425,000 for Liberty's admitted violations of Section 301 of the Communications Act.<sup>1</sup>

**I. BACKGROUND**

2. Liberty uses OFS paths to provide multi-channel video programming to apartment buildings in the New York metropolitan area. The Commission has granted Liberty forty-three

<sup>1</sup> Liberty sold most of its assets, including its subscriber base, to Freedom New York, LLC in March 1996. Freedom is 80% owned by RCN Corporation and 20% by Bartholdi. See Liberty Cable Co., Inc., 15 FCC Rcd 25050 ¶ 1 n. 1. In keeping with the designations used below and in our Decision, this opinion refers to the applicant as Liberty.

OFS licenses since 1991.

3. In this proceeding, Time Warner Cable of New York City and Paragon Communications ("Time Warner") and Cablevision of New York City - Phase I ("Cablevision") filed petitions to deny, which alleged, *inter alia*, that Liberty initiated OFS service to certain buildings prior to obtaining Commission authorization and that Liberty lacked candor before the Commission. Specifically, with regard to unauthorized OFS service, Time Warner identified two buildings to which Liberty was providing service without prior authorization. In response, Liberty admitted the premature activations and disclosed an additional thirteen buildings to which it was also providing OFS service without having obtained Commission authorization.

4. Following this disclosure, the Wireless Telecommunications Bureau requested that Liberty supply additional information concerning its unlicensed operations. Liberty did so and also informed the Bureau that its counsel was investigating the matter. After Liberty subsequently disclosed that four additional buildings were activated without authorization, bringing to nineteen the number of buildings that it admitted were prematurely activated, the Bureau directed Liberty to submit the results of the company's internal audit. Liberty submitted its Internal Audit Report ("IAR" or "Report") to the Bureau on August 14, 1995 with a request for confidential treatment under 47 C.F.R. §§ 0.457 and 0.459, which the Bureau, and ultimately the Commission, denied.

5. The Report, which contained relevant information describing Liberty's licensing operations and its knowledge with regard to the premature OFS operations, and which disclosed a total of ninety-three buildings served by unauthorized operations, was not available in this proceeding until two years later, after the court of appeals rejected Liberty's appeal of the Commission's decision denying confidential treatment. See Liberty Cable Co., Inc., 11 FCC Rcd 2475 (1996), *aff'd sub nom. Bartholdi Cable Co., Inc. v. FCC*, 114 F.3d 274 (D.C. Cir. 1997); see also Liberty Cable Co., Inc. v. FCC, No. 96-1030 (D.C. Cir. April 24, 1996) (granting stay request).

6. In the interim, the Commission designated for hearing issues to determine the facts and circumstances surrounding Liberty's admitted violations of Section 301 of the Communications Act, 47 U.S.C. § 301, and Section 94.23 of the Commission's rules, 47 C.F.R. § 94.23, involving unauthorized operations, whether Liberty violated Section 1.65 of the Commission's rules, 47 C.F.R. § 1.65, by failing to disclose these activations in pending applications and STA requests, and whether Liberty misrepresented facts, lacked candor, or attempted to mislead the Commission, and thus violated Section 1.17 of the Commission's rules, 47 C.F.R. § 1.17. Hearing Designation Order and Notice of Opportunity for Hearing, 11 FCC Rcd 14133 (1996) ("HDO"). The HDO also called for a determination of whether an order of forfeiture up to the statutory maximum should be issued against Liberty pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), for violations of the Act and the Commission's rules.

7. The Initial Decision ("I.D."), 13 FCC Rcd 10716 (ALJ 1998), found that Liberty acted in "reckless disregard" of Section 301 of the Act, that Liberty lacked candor and made misrepresentations in derogation of Section 1.17 of the rules, and that it deliberately violated the reporting provisions of Section 1.65 of the rules. Accordingly, the ALJ concluded that Liberty was not qualified to receive the OFS licenses at issue. At the same time, the ALJ rejected Liberty's proposal that it be assessed a monetary forfeiture in lieu of disqualification because "the condition

for Liberty's willingness to pay a substantial forfeiture" -- i.e., a finding that the violations resulted from mere negligence or inadvertence -- "has not been met." 13 FCC Rcd at 10797 ¶ 131.

## II. COMMISSION DECISION

8. The Commission conducted an independent review of the record in order to determine whether the preponderance of the evidence supported the ALJ's findings and affirmed the I.D.'s substantive conclusions with regard to Liberty's unauthorized activations and its lack of candor in dealing with the Commission. We found that Liberty's unlicensed operations were legion. Between July 11, 1994 and April 24, 1995, Liberty activated nineteen OFS microwave paths without receiving authority from the Commission. These are the unlicensed operations identified in the HDO. Furthermore, the record established that from June 1992 to January 1995, there were an additional seventy-four premature activations -- these paths subsequently received Commission licenses -- for a total of ninety-three unauthorized activations.

9. We concluded that, at the very least, Liberty's violations were in such total and reckless disregard of its obligations as a Commission licensee, to insure that it activated only authorized OFS paths, as to be tantamount to intentional misconduct. We also concluded that Liberty was untruthful with the Commission. Liberty lacked candor both with regard to whether and when it knew or could have known of the illegal operations and in statements made in multiple filings after there could be no doubt that the violations were known. Moreover, Liberty's misconduct was compounded by its repeated noncompliance with the Commission's reporting requirements.

10. Our Decision rejected Liberty's defense that its unlicensed operations were the result of mere inadvertence or negligence. Liberty's President and Chief Executive Officer, Peter Price, testified that he did not know of any unauthorized activations until April 27, 1995. The record established, however, that Price was explicitly warned by counsel in April 1993 of a present threat of unlicensed operations and received current status information from counsel in February 1995 which, by comparison with Liberty's own internal reports on the progress of its installations, would readily have confirmed the existence of unlicensed operations. The extraordinary number of unlicensed activations, which occurred over a long period of time, and the extensive time lags between activations and filings also undermined Liberty's explanations. These unauthorized operations account for fully three-fourths of the 126 buildings to which Liberty provided OFS service. Liberty activated over two-fifths of these paths prior to even filing an application with the Commission. Furthermore, Liberty's own audit Report indicated that several of Liberty's managerial employees or agents knew that there were illegal operations prior to April 1995. And, as a matter of law, we attached great weight to the ALJ's demeanor finding that Price's testimony with regard to his actual knowledge of unlawful operations lacked credibility.

11. We also concluded that Liberty knowingly filed applications and pleadings that made incomplete and intentionally misleading statements to the Commission regarding Liberty's operations and practices in violation of 47 C.F.R. §§ 1.17 and 1.65. Specifically, Liberty filed fourteen STA requests on May 4, 1995 without revealing the basic information that the unlicensed paths in question were already in operation. Liberty's nondisclosure of these existing operations was intentional because Price decided to delay reporting until Liberty had investigated the matter. In addition, when Liberty did admit fifteen premature activations in its May 17, 1995 reply to Time

Warner's pre-hearing allegations, it misrepresented its licensing practices by claiming that it "traditionally" sought STAs pending application approval and that its "pattern and practice" was to receive a grant or an STA prior to activation. Also Liberty filed more misleading documents on July 17, 1995 when it submitted applications for four additional buildings that had been prematurely activated, without revealing the fundamental fact that these facilities were already in operation.

12. We did not, however, endorse the ALJ's adverse findings regarding Liberty's candor and future reliability as a Commission licensee based on its document production at the hearing. Liberty withheld production of its audit Report from the hearing proceeding because it had obtained an emergency stay from the court pending its appeal of the Commission's denial of its claim that the Report was entitled to confidential treatment, and Liberty produced the Report after the court affirmed the Commission's ruling. We drew no adverse inference from these facts. Liberty also did not disclose several other important documents in initial discovery, but we concluded that there was insufficient evidence to establish that the delayed production was intended to preclude disclosure of damaging evidence.

### III. PETITION FOR RECONSIDERATION

13. In support of reconsideration, Liberty makes three principal arguments. First, it contends that the Commission erred by failing to reverse the ALJ's finding that Liberty exhibited a lack of candor by exercising its procedural right to appeal our ruling denying confidential treatment of the IAR. Liberty alleges that the negative inference erroneously drawn by the ALJ in this regard "tainted" his findings on the designated issues pertaining to unlicensed operations, misrepresentation, and 47 C.F.R. § 1.65, and can only be remedied by remanding the proceeding to the ALJ with instructions to reverse the challenged finding and all associated findings.

14. Next, Liberty argues that the Commission disregarded its own procedures and guidelines when it imposed a forfeiture of \$1,425,000 for Liberty's unlicensed operations. The Commission did not consider mitigation evidence, Liberty asserts, and improperly assessed the maximum forfeiture allowable by the statute without reference to the base forfeiture amount and the upward and downward adjustment factors specified in 47 C.F.R. § 1.80. Moreover, Liberty contends, a maximum forfeiture is not warranted in this case because no public harm resulted from its infractions. Liberty argues that this issue too should be remanded for development of a fuller record. Lastly, Liberty submits that the Commission's denial of the subject applications together with imposition of a maximum forfeiture is an excessive and virtually unprecedented sanction, particularly since Liberty's behavior was not intentionally deceptive.

15. On January 31, 2001, Time Warner, Cablevision, and the Enforcement Bureau<sup>2</sup> filed

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<sup>2</sup> The newly created Enforcement Bureau now serves as trial staff with regard to matters designated for hearing. See Establishment of the Enforcement Bureau and the Consumer Information Bureau, 14 FCC Rcd 17924 (1999); 47 C.F.R. § 0.111(b). It replaces the Wireless Telecommunications Bureau as a party to this proceeding.

oppositions to Liberty's Petition. Each of these parties supports the Commission's Decision in its entirety and urges denial of reconsideration in all respects. Liberty filed a reply on February 12, 2001.

#### IV. DISCUSSION

16. We deny Liberty's Petition. In seeking reconsideration, Liberty does not rely on new facts or changed circumstances that have occurred since the last opportunity to present such matters, and we do not believe it has demonstrated any material errors or omissions in our opinion. Moreover, in some respects its arguments are repetitive of points previously considered and rejected. As such, Liberty has not provided a sufficient basis for reconsideration. See WWIZ, Inc., 37 FCC 685 (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); Contemporary Media, Inc., 14 FCC Rcd 8790, 8792 (1999).

17. First, we reject Liberty's contention that our Decision failed to sufficiently reverse the ALJ's finding that Liberty's candor was called into question by its appeal of the Commission's confidentiality ruling with respect to the IAR, and that the allegedly unremoved "taint" of the ALJ's finding undermined our Decision. Pursuant to our authority to conduct an independent review of the record, see 5 U.S.C. § 557(b), the findings set forth in our Decision were based on our determination that they were supported by the weight of the evidence. In this regard, we unequivocally rejected the ALJ's finding concerning the IAR. We stated:

Lastly, we review the ALJ's adverse findings regarding Liberty's candor and future reliability as a Commission licensee based on its document production at the hearing. Initially, with regard to the IAR, we disavow any suggestion in the I.D. that Liberty's exercise of its procedural rights to seek confidentiality for the IAR under the Commission's rules or to appeal the Commission's denial of its claims to the court of appeals is in itself a basis for disqualification.

Liberty Cable Co., Inc., 15 FCC Rcd at 20572 ¶ 57. Contrary to Liberty's assertion, we clearly expressed our repudiation of the I.D.'s finding, thereby reversing any conclusion or inference that Liberty's exercise of its appellate rights could constitute a basis for disqualification for lack of candor. We reiterate that view now.

18. Moreover, the ALJ's finding had no bearing on our own candor conclusions and consequent denial of Liberty's applications. We found that Liberty lacked candor with the Commission on substantive matters entirely unrelated to its procedural appeal of the confidentiality ruling or its document production at the hearing. As outlined earlier, our Decision identified two principal areas in which Liberty was not fully forthcoming and candid with the Commission. Specifically, the preponderance of record evidence established that Peter Price, the Liberty management official responsible for day-to-day operations, who testified that he did not learn of any unauthorized activations until April 1995, either had actual knowledge of unlawful operations before that time or recklessly disregarded all indications of premature activations and made little effort to insure that Liberty was acting in compliance with basic licensing requirements. In addition, Liberty submitted multiple filings, including applications and STA requests, after it

admittedly learned of the unlicensed microwave operations in April 1995, in which it knowingly made incomplete and intentionally misleading statements to the Commission regarding Liberty's operations and practices.

19. Liberty mischaracterizes our Decision with out of context references intended to show that we placed improper reliance on the ALJ's finding. Thus, our conclusion that "Liberty deliberately withheld decisionally significant information" (15 FCC Rcd at 25071 ¶ 56) was based on Liberty's filing of applications and pleadings with the Commission that violated 47 C.F.R. §§ 1.17 and 1.65, and had nothing to do with Liberty's document production at the hearing or appeal of the confidentiality ruling. Similarly, our conclusion that "Liberty filed more misleading documents on July 17 [1995]" (*id.* at 25070 ¶ 53) was based on Liberty's undisputed failure to disclose four additional unauthorized operations and was not undermined by the ALJ's finding. And the ALJ's forfeiture recommendation, noted *id.* at 25073 ¶ 63 n. 6, was not the basis for our own forfeiture assessment. Indeed, it is telling that Liberty does not directly challenge or seek reconsideration of our substantive conclusions on the matters we did find to be disqualifying, namely, its blatant unauthorized operations, multiple instances of lack of candor, and repeated noncompliance with the Commission's reporting requirements. In short, Liberty does not establish that the ALJ finding it complains of had any decisional impact on our resolution of this proceeding.<sup>3</sup>

20. We next reject Liberty's contention that our assessment of a \$1,425,000 forfeiture for its unlicensed operations was contrary to our forfeiture policy requirements. After careful review of the record, our Decision concluded that Liberty's history of unlawful operations was extreme, and its violations amounted to intentional misconduct. In light of this record, and based on our consideration of the factors set forth in Section 503(b)(2)(D) of the Act and Section 1.80(b)(4) of the rules for determining the amount of the forfeiture, and our forfeiture guidelines, we continue to believe that imposition of a forfeiture equal to the statutory maximum is fully warranted. See Business Discount Plan, Inc., 15 FCC Rcd 24396, 24402 (2000) (\$1.8 million forfeiture for slamming violations conforms both to Section 503(b) and forfeiture guidelines).

21. To begin with, our Decision is entirely consistent with the legal requirements of the Act and the rules governing forfeitures. In imposing the maximum forfeiture, we expressly stated: "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." 15 FCC

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<sup>3</sup> On July 24, 2001, Liberty filed a Motion for Leave to File Supplemental Authority, which seeks to supplement the record to include the recent Court of Appeals decision in United States v. Microsoft Corp., Nos. 00-5212 and 00-5213 (D.C. Cir. June 28, 2001) (*per curiam*). Liberty asserts that the Court of Appeals vacated the District Court's remedies decree and remanded for a new determination because the Court of Appeals "modified the underlying bases of liability," slip op. at 100, and argues that the Commission's modification of the ALJ's candor finding relating to Liberty's appeal of the IAR confidentiality ruling similarly should support a remand. We deny this motion. First, the facts, legal issues, and appropriate remedy in the unique and complex litigation involving Microsoft's antitrust violations have little or no bearing here. Second, as explained in the text, our conclusion that Liberty lacked candor with the Commission is based on substantive matters completely unrelated to our modification of the ALJ's finding.

Rcd at 25075 ¶ 68. Moreover, we supported our conclusion by relying on recent cases involving comparably serious licensee misconduct where the Commission imposed the maximum authorized forfeiture. *Id.* As indicated, our Decision contained an extensive and detailed underlying discussion of the nature, pertinent circumstances, extent, and seriousness of Liberty's abundant violations of Section 301 and its disregard of its basic responsibilities as a licensee, in addition to its record of prior offenses and degree of management culpability. *See id.* at 25054-25058 ¶¶ 12-21, 25065-25069 ¶¶ 43-50. Therefore, contrary to Liberty's implication, it was unnecessary for us to repeat verbatim that analysis when imposing the forfeiture. It suffices to repeat our agreement with the ALJ's observation that 'this [is] one of the worst cases of a pattern of unlicensed spectrum operations since 1934.' *Id.* at 25075 ¶ 63.

22. Liberty cites 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), recon. denied, 15 FCC Rcd 303 (1999), wherein we added a note to Section 1.80 that incorporates guidelines for assessing forfeitures, and argues that we did not follow these guidelines in our Decision. Specifically, Liberty complains that we did not start with the base forfeiture amount for the violations at issue and apply the adjustment factors set out in the guidelines. Simply put, we were not required to do so. As the Report and Order itself makes clear, the guidelines are not meant to be binding strictures or to eliminate our discretion in individual cases:

[W]e 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. . . . [T]hese guidelines will not be binding on the Commission, the staff or the public. We retain discretion to take action in specific cases as warranted.

12 FCC Rcd at 17093 ¶ 8.

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.

*Id.* at 17099 ¶ 22.

[O]ur 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.

*Id.* at 17092 ¶ 6.<sup>4</sup>

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<sup>4</sup> Accord 47 C.F.R. § 1.80(b)(4), Note:

(continued...)

23. Nevertheless, we did not ignore the adjustment factors, but in fact stated after imposing the statutory maximum: "We find no downward adjustment factors present. See 47 C.F.R. § 1.80." Liberty Cable Co., Inc., 15 FCC Rcd at 25075 ¶ 68. The downward adjustment factors are: (1) minor violation; (2) good faith or voluntary disclosure; (3) history of overall compliance; and (4) inability to pay. First, Liberty's violations were not minor. As we said in our Decision, id. at 25073 ¶ 61, unlicensed radio operation is a serious violation of the Act, and enforcement of Section 301 is a core Commission responsibility. Second, Liberty initially disclosed certain of its violations only in response to Time Warner's allegations, and, even then, its statements were incomplete and affirmatively misleading. Third, Liberty's history of overall compliance was dismal, involving a total of ninety-three unauthorized activations, or three-fourths of the buildings to which Liberty provided OFS service. And, fourth, there is no indication of inability to pay; to the contrary, Liberty demonstrated its willingness to terminate the proceeding by paying a substantial forfeiture. See ¶ 7, supra; Liberty Cable Co., Inc., 15 FCC Rcd at 25064 ¶ 39 n. 5;<sup>5</sup> see also Brittan Communications International Corp., 15 FCC Rcd 4852 (2000) (\$1 million forfeiture for slamming violations not reduced where remedial measures taken only in response to complaints and threat of forfeiture, company provided no evidence of inability to pay forfeiture amount and remained viable after sale of assets, and complaints reflected pattern of violations).

24. Although our Decision did not review the upward adjustment factors, and was not required to do so, specific consideration of these factors also supports imposition of the maximum forfeiture. The individual factors are: (1) egregious misconduct; (2) ability to pay/relative disincentive; (3) intentional violation; (4) substantial harm; (5) prior violation of any FCC requirements; (6) substantial economic gain; and (7) repeated or continuous violation. First, Liberty's misconduct was undoubtedly flagrant, as we found in our Decision. See Liberty Cable Co., Inc., 15 FCC Rcd at 25073 ¶ 63. Second, there is no question of Liberty's ability to pay a significant forfeiture. Third, Liberty demonstrated an indifference and wanton disregard for its obligations to the Commission that was "equivalent to an affirmative and deliberate intent." Id. at (Continued from previous page) \_\_\_\_\_

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.

See also Business Discount Plan, Inc., 15 FCC Rcd at 24402 ¶ 14 (forfeiture for slamming violations premised on Commission's "broad discretion under Section 503(b) of the Act to determine forfeiture amounts based on the circumstances of each individual case.")

<sup>5</sup> Initially Liberty proposed a forfeiture amount of \$710,000, which it subsequently agreed to increase to \$1,010,000. Liberty does not explain why it is reasonable to pay a forfeiture of approximately \$1 million for what it claimed were unintentional violations but not reasonable to pay a larger forfeiture where the record established intentional wrongdoing. And while Liberty objects to paying the statutory maximum for a continuing violation of \$75,000 for each single violation of the Act, see 47 U.S.C. § 503(b)(2)(C), its own proposal included a forfeiture amount of \$75,000 for each instance in which it operated prior to filing an application. See Liberty Cable Co., Inc., 15 FCC Rcd at 25064 ¶ 39 n. 5.

25069 ¶ 50. Fourth, with regard to prior violations, in addition to the nineteen unauthorized operations identified in the HDO that occurred between July 11, 1994 and April 24, 1995, which were the subject of the forfeiture, there were an additional seventy-four premature activations from June 1992 to January 1995. Id. at 25054 ¶ 12.<sup>6</sup> Fifth, Liberty's violations were not isolated incidents but repeated and continuing, taking place over nearly a three year period. And, finally, Liberty stood to gain economically by providing service to subscribers even though it was not yet authorized to do so.<sup>7</sup>

25. Liberty's assertion that no substantial public harm resulted from its violations because it took care to avoid interference before commencing service does not by itself insulate it from imposition of a maximum forfeiture premised on all the other upward adjustment factors. Implementing the licensing scheme established by Congress in Section 301 is a fundamental Commission responsibility, and we have made repeated efforts to terminate all unlicensed radio operations, whether or not they cause actual interference. See id. at 25072-73 ¶ 61; Jerry Szoka, 14 FCC Rcd 9857, 9862 ¶ 13 (1999); recon. denied, 14 FCC Rcd 20,147 (1999). Moreover, the base forfeiture amounts for unauthorized operations and failure to comply with prescribed tower lighting, which Liberty cites as an example of public harm warranting an upward adjustment, are identical. See 47 C.F.R. § 1.80(b)(4), Note, Section I. In any event, a direct threat to public safety is not a prerequisite for imposition of a maximum forfeiture. See, e.g., PCS 2000, L.P., 12 FCC Rcd 1703, 1717-18 (1997) (maximum forfeiture of \$1 million for misrepresentation in connection with C Block auction).<sup>8</sup>

26. We also reject Liberty's claim that we did not adequately consider mitigation evidence. In fact, in contrasting this proceeding with another recent case involving unlicensed microwave paths where there were mitigating factors including the licensee's prior compliance with our licensing requirements and its voluntary disclosure of unlicensed operations in its applications and STA requests, we stated: "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." Liberty Cable Co., Inc., 15 FCC Rcd at 25075 ¶ 68 n. 8. We

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<sup>6</sup> Liberty was also assessed a separate \$80,000 forfeiture by the ALJ (which it did not appeal) for violating the cable franchise requirement and Section 1.65. See Memorandum Opinion and Order, FCC 97M-154, released September 11, 1997; Liberty Cable Co., Inc., 15 FCC Rcd at 25053 ¶ 6.

<sup>7</sup> In fact, Liberty exacerbated its lack of candor in its May 4, 1995 STA requests by claiming that approval was necessary to avoid losing customers, without disclosing that customers were already being served. See id. at 25069 ¶ 51.

<sup>8</sup> Liberty's argument that its infractions "would no longer be violations" (Petition at 15) under current rules, which permit conditional initiation of service upon filing an application, see 47 C.F.R. § 101.31(b), has no bearing on the violations of record. In any case, Liberty's claim is erroneous because Liberty activated six of the nineteen buildings identified in the HDO, and thirty-eight of its total of ninety-three unauthorized facilities, prior to filing an application with the Commission. See Liberty Cable Co., Inc., 15 FCC Rcd at 25067 ¶ 46.

also found that none of the four downward adjustment factors mitigated Liberty's violations. *Id.* at ¶ 68. Although Liberty argues it lacked notice of the impending forfeiture, the HDO gave Liberty full notice of a possible forfeiture up to the statutory maximum and an opportunity to present evidence, *see* 47 U.S.C. § 503(b)(3)(A), and Liberty attempted to mitigate its culpability in arguments presented to the ALJ when it sought to resolve the proceeding by paying a substantial forfeiture. *See Liberty Cable Co., Inc.*, 15 FCC Rcd at 25052 ¶ 5. Conspicuously, Liberty's instant Petition makes no attempt whatsoever to show what additional mitigation evidence or arguments the ALJ or the Commission should have considered or what evidence Liberty would present if the case were remanded.

27. Lastly, we reaffirm our conclusion that denial of Liberty's applications and imposition of the maximum statutory forfeiture is the appropriate remedy in this proceeding. Our Decision recited numerous reasons for reaching this conclusion:

First, Liberty's overall record of compliance with our rules and policies was extremely poor, and involved abundant violations of Section 301 of the Act and Section 94.23 of the Rules and repeated violations of Sections 1.17 and 1.65 of the Rules. Second, Liberty's proposal . . . that it should only pay a forfeiture was premised on an argument that Liberty's violations did not involve intentional misconduct, but the record does not support such a finding. Third, 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. . . . [Fourth,] Liberty's remedial measures were of limited impact.

*Id.* at 25074 ¶¶ 64-65.

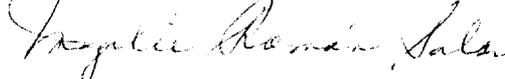
28. Although it concedes that the Commission has the authority under Section 503(b) to deny its applications and impose a forfeiture, Liberty asserts that its conduct is distinct from cases warranting the heaviest sanctions because it did not involve intentional deceit. We repeat, however, that Liberty's unlicensed operations were not the result of negligence or inadvertence, and that, at a minimum, Liberty's complete and reckless disregard of its obligations to the Commission was the equivalent of intentional misconduct. Moreover, the record establishes that Liberty lacked candor both with regard to its knowledge of illegal operations and in statements made in multiple documents subsequently filed with the Commission. In short, Liberty has provided no basis for the Commission to reconsider the exercise of its broad discretion to impose the sanctions chosen in this proceeding.<sup>9</sup>

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<sup>9</sup> In any event, our action is not "virtually unprecedented," as Liberty proclaims. In fact, the cases cited by Liberty (Petition at 18 n. 37) as illustrative of license removal all involved intentional deceit, as does this one. *See, e.g., Liberty Cable Co., Inc.*, 15 FCC Rcd at 25071 ¶ 56. Similarly, *Commercial Realty St. Pete, Inc.*, 11 FCC Rcd 15374 (1996), cited by Liberty (Petition at 17) as a proceeding warranting a comparably severe sanction, also involved misrepresentation. And Liberty's assertion (Petition at 18-19) that the Commission does not always disqualify for serious misconduct is not supportive of a different result in this case. *See* (continued....)

29. ACCORDINGLY, IT IS ORDERED That the Petition for Reconsideration filed January 11, 2001 and the Motion for Leave to File Supplemental Authority filed July 24, 2001 by Bartholdi Cable Company, Inc. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas

Secretary

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Liberty Cable Co., Inc., 15 FCC Rcd at 25074 ¶ 65 (distinguishing cases where applicants, unlike Liberty, removed wrongdoers and thereby averted disqualification).