

FCC MAIL SECTION

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

FCC 96M-164
 61702

JUN 27 4 47 PM '96

In re Applications of	)	WT DOCKET NO. 96-41	
)		
LIBERTY CABLE CO., INC.)		
)		
For Private Operational Fixed	)	File Nos:	
Microwave Service Authorization	)	708777	WNTT370
and Modifications	)	708778, 713296	WNTM210
	)	708779	WNTM385
New York, New York	)	708780	WNTT555
	)	708781, 709426, 711937	WNTM212
	)	709332	(NEW)
	)	712203	WNTW782
	)	712218	WNTY584
	)	712219	WNTY605
	)	713295	WNTX889
	)	713300	(NEW)
	)	717325	(NEW)

MEMORANDUM OPINION AND ORDER

Issued: June 25 1996

Released: June 27, 1996

1. This is a ruling on a Motion For In Camera Review And Production Of Documents that was filed by Time Warner Cable of New York City and Paragon Cable Manhattan ("Time Warner") on June 18, 1996. An Opposition was filed by Liberty Cable Co., Inc. (now Bartholdi Cable Co., Inc.) ("Liberty") on June 19, 1996. A Reply was filed by Time Warner on June 20, 1996. The parties have complied with the prescribed pleading cycle. Order FCC 96M-153, released June 13, 1996. There has been no responsive pleading received from the Bureau.

2. Time Warner has identified three documents for in camera review which were selected from a Privileged Document Log prepared by Liberty's counsel. The Log both lists and identifies 129 documents for which attorney-client and/or attorney work product privilege is claimed. The Log list was furnished to counsel for Time Warner.

3. Time Warner represents that "a group of documents" that had not been previously produced by Liberty were delivered to Time Warner on June 18, 1996. The documents were in large part redacted and Time Warner now seeks to obtain unredacted copies.

4. Liberty has submitted with its Opposition the three documents for in camera inspection. In a footnote to its Opposition, Liberty requests an opportunity to also submit in camera "a brief explanatory memorandum" which could be used by the Presiding Judge to rule on the applicability of privilege. There is no such procedure authorized under Commission rules, rules of civil procedure, or rules of evidence and the Presiding Judge will not accept ex parte argument on a pending motion.

Documents Claimed To Be Privileged

Letter containing legal communications with H. Barr and enclosed drafts of amendment to Liberty's pending 18 GHz applications dated June 23, 1995 from Michael Lehmkuhl to Peter Price, Lloyd Constantine and Henry Rivera.

5. The letter from Mr. Lehmkuhl to Mr. Price dated June 23, 1995, is a cover letter with instructions for signature on exhibits to pending FCC applications. The letter contains no legal advice. Liberty provides no legal authority for protecting the letter from discovery. WWOR-TV, Inc., 5 F.C.C. Rcd 6261 (1990) (transmittal documents containing no facts provided by client and no legal analysis of counsel are not protected). The Commission has held that neither the attorney-client privilege nor the work product doctrine apply to transmittal letters. Id. Therefore, Liberty shall provide all parties with an unredacted copy of the June 23 letter.

6. The attachments to the letter include exhibits for Price's signature and the exhibits were intended for filing with pending applications at the Commission. One page is captioned "Statement Of Eligibility And Use" which is a uniform first page for each of fifteen (15) two page exhibits for separate receive sites at identified building locations. There is no representation as to the filing status of the exhibits. The documents are drafts submitted by a lawyer to a client for purposes of compliance with the law. The drafts might tend to reveal facts disclosed by the client to the attorney in the drafting stages which are confidential. See WWOR-TV, supra. and Opal Chadwell, 103 F.C.C. 3rd 840, 842 (Review Bd 1986). Copies of these documents need not be produced because as drafts they may reveal facts disclosed by a client in confidence and the attorney's related legal advice.¹

**Memo containing confidential legal communications re:
Liberty Path Inventory, dated April 5, 1995 from
Michael Lehmkuhl to Howard Barr.**

7. The document is as described. There is no indication that this document was furnished to the client. There are no circumstances or representations which indicate that the document was prepared in anticipation of litigation. It was prepared by Mr. Lehmkuhl, the attorney who has been identified previously as the attorney who was actually performing routine transactional work for Liberty in the relevant period. It is an informational communication to Mr. Barr, a senior attorney at the same law firm. There is no indication that it was furnished to the client. It analyzes and corrects path azimuths which had been calculated by an unidentified employee or third person. Contrary to Commission procedure, there is no authority cited by Liberty for protecting the document. See Tri-State Community Development and Communications Corp., 4 F.C.C. Rcd 2402 (Review Bd 1989) (a privilege claim must explain why

¹ Certainly the drafts were sent to the client for signature in connection with legal advice. The drafting process between attorney and client normally involves a continuous flow of confidential factual disclosures and related legal advice.

each document should not be produced), cited with approval in Georgia Public Telecommunications Commission, 5 F.C.C. Rcd 4560 (Review Bd 1990). The parties were specifically directed to that authority by the Presiding Judge. See Order FCC 96M-153, released June 13, 1996 at fn. 2.

8. This document, the "Liberty Path Inventory", although not explained in Liberty's Opposition, appears to be information assembled by the law firm for purposes of checking factual accuracy of compliance with Commission regulations. The document contains no legal theory or opinion and is unrelated to litigation.² Such material is not protected under FRCP §26(b)(3).³ See WWOR-TV, supra (documents not related to litigation preparation found to be unprotected work product). In that case, work product protection was afforded to a bank's written statement that was obtained by counsel to support the financial representations of a challenger to a renewal applicant. There, an element of anticipation of litigation was found to exist. Id. That element does not appear here in view of the date on which the document was prepared. Nor has the element of trial preparation been claimed or shown in Liberty's Opposition pleading.⁴ Therefore, copies of the document must be produced by Liberty.

**Fax transmission enclosing memo containing
confidential legal communication re: Time Warner's
and Cablevision's petitions to deny applications and
amendments dated April 15, 1995 from Howard Barr to
Lloyd Constantine, Peter Price, Henry Rivera and
Larry Solomon.**

9. The fax transmission forms are innocuous documents which are fully described above. There is no purpose served in requiring production of the faxes. There is also a formal transmittal memorandum from Howard Barr to Peter Price, Lloyd Constantine, Henry Rivera and Larry Solomon dated November 15, 1995, which forwarded copies of the Petitions To Deny of Time Warner and Cablevision. The petitions accompany the memo. This compilation of documents are determined to be within the rubric of preparation for litigation. And since all parties have copies of the Petitions To Deny, there has been no showing of substantial need or undue hardship if the documents are not produced.

² The document is dated April 5, 1995. The Constantine Affidavit attached to Time Warner's Motion recites that it was not until "late April 1995" that Liberty learned that it was using unauthorized microwave paths.

³ A review of the document also reflects the absence of any mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. Even if it were protected work product, there would be a substantial need for its discovery because the underlying data are exclusively in the control of Liberty.

⁴ Again, it has been held that a party seeking the protection of a privilege has the burden of establishing that one applies. Barclays American Corp. v. Kane, 746 F.2d 653, 656 (10th Cir. 1984). See also Peat, Marwick, Mitchell & Co. v. Kane, 748 F.2d 540, 542 (10th Cir. 1984) (a party asserting the privilege must make a clear showing that it applies).

Redacted Documents

10. There is no explanation offered for the delay in furnishing relevant document discovery to Time Warner and the other parties. Time Warner identifies four "inventories" of 18 GHz licenses that were prepared and furnished to Liberty by its outside FCC counsel on four separate dates that preceded Liberty's admitted awareness of its use of unauthorized paths: February 1995; January 1994; December 1993; and April 1993. These dates precede late April 1995, when Liberty claims to have been aware of its unauthorized use of microwave paths. See fn. 2 *supra*. Therefore, there is no basis on which to assert trial preparation as to these documents. And there are no legal reasons given by Liberty for redacting what appears to be 75-80% of the material. Since there is no basis given for protecting the information (which may be treated in discovery as "confidential" under the terms of the consent Order) and since the documents were not prepared for the purpose of litigation and do not contain any legal advice, theories, or opinions, Time Warner is entitled to receive unredacted copies.⁵

Telephone Notes And Memoranda

11. The comparative selections of quotes from Mr. Lehmkuhl's deposition testimony do not completely clarify the question of how notes of telephone conversations were recorded and retained or whether any of his telephone notes exist. However, in view of the proposed Motion For Summary Decision, and in the interest of conserving time, there will be no further consideration given to locating and deciphering his telephone notes.⁶ Nor will the Presiding Judge review marginal handwritten notes of counsel that have been redacted from documents. The need for such review is not shown because there has been no proffer by Time Warner of a need for work product, the writings may be scant and non-conclusive, or the writings, if useful, could contain mental impressions, conclusions, opinions or legal theories of the attorney which would be protected.

⁵ Liberty relies on an earlier ruling where the Presiding Judge denied extensive discovery on a residence (the "Europa") which was not the subject of the designation order. Memorandum Opinion and Order, FCC 96M-116, released May 15, 1996. The scope of that denied discovery was far broader and would have invited considerably more litigation beyond the issues designated. Here the evidence is not extensive and does not focus on any particular property. Rather, it is evidence of the universe of the paths that were utilized by Liberty which can be used for comparative purposes with other evidence that was prepared by Liberty. In view of the anticipated Motion For Summary Decision, this type of evidence could be useful to all parties for precision in determining the universe of the microwave paths used by Liberty during the relevant period.

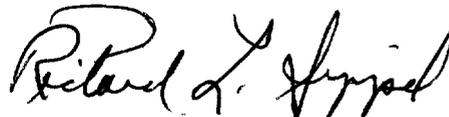
⁶ Even as this ruling was being drafted, there was correspondence on the point faxed in by Liberty's counsel.

Order

Accordingly, based on the foregoing, IT IS ORDERED that the Motion For In Camera Review And Production Of Documents filed by Time Warner Cable of New York City and Paragon Cable Manhattan on June 18, 1996, IS GRANTED in part and IS DENIED in part.

IT IS FURTHER ORDERED that Liberty Cable Co., Inc. (now Bartholdi Cable Co., Inc.) shall deliver to all counsel copies of the documents required to be produced under the above rulings by 4:00 p.m. on June 26, 1996.⁷

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel
Administrative Law Judge

⁷ A copy of this ruling was faxed to counsel for Time Warner, counsel for Liberty (N.Y. and D.C.), and Bureau counsel (e-mailed) when issued.