

FCC MAIL SECTION **Before the**
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

FCC 97M-13

FEB 3 3 53 PM '97

70674

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)

ORDER

Issued: January 30, 1997 ; Released: February 3, 1997

On January 29, 1997, in accordance with Order FCC 97M-12, Liberty's counsel submitted to the Presiding Judge for in camera inspection a certified copy of a one page legal size document which contains the handwritten notes of Howard Barr that appear to have been made contemporaneously in a telephone conversation with Lloyd Constantine on June 22, 1995.

The notes relate to four unlicensed activated paths that had been then discovered. The notes also refers to a copy of "Jennifer's April 1993 letter" and indicates that it was being sent to Mr. Constantine. The contents of that letter are not identified.

The document (copy) was submitted to the Presiding Judge with the Declaration of Mr. Barr dated January 29, 1997, attesting to its accuracy as a copy of the original and identifying the notes as "privileged communications [Mr. Howard Barr] had with Mr. Lloyd Constantine on or about the afternoon of June 22, 1995." The document and the Barr Declaration (copy) were submitted with a letter from Robert Begleiter, Liberty's trial counsel, to the undersigned dated January 29, 1997, which states that in accordance with the aforementioned Order, Liberty is submitting for in camera inspection a "correct copy of Mr. Barr's undated handwritten notes of a conversation with Lloyd Constantine containing confidential legal communications regarding service to various buildings."

Mr. Barr's notes are attorney work product. FRCP 26(b)(3). The notes contain Mr. Barr's mental impressions and the opinion of Mr. Constantine on what actions should be taken, or that Mr. Barr would recommend should be taken, with respect to four unlicensed microwave paths. There is no indication that the document was communicated to the client. Therefore, it would not be protected by the attorney-client privilege. As work product, it is discoverable because the Bureau and Time Warner/Cablevision would have a substantial need for the information and the equivalent cannot reasonably be obtained at this time. Cf. FRCP 26(b)(3).

It is noted that the parties are in the process of negotiating the voluntary disclosure of other documents which have been identified by Liberty in a Log as subject to a claim of privilege. That negotiation process should continue until February 10, 1997 (FCC 97M-12), unless agreement is reached earlier, and that process of negotiation should be concluded before a decision is made as to the necessity for further testimony.¹

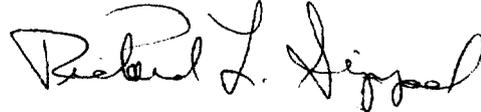
Rulings

IT IS ORDERED that Liberty shall produce forthwith a copy of the one page legal size document identified as the notes of Mr. Barr made on June 22, 1995, and a copy of Mr. Barr's Declaration dated January 29, 1997, which accompanies the document.

IT IS FURTHER ORDERED that the Bureau shall as soon as practicable independently determine by inspection that the copy is accurate and complete.²

IT IS FURTHER ORDERED that the document identified as "Jennifer's April 1993 letter" shall be produced (copies) or, if there is a privilege and/or a substantial question of its relevance, submitted for in camera inspection by 12 noon on January 31, 1997.

FEDERAL COMMUNICATIONS COMMISSION³



Richard L. Sippel
Administrative Law Judge

¹ To facilitate the process, any party may at anytime request a conference upon reasonable notice to all counsel and to the Presiding Judge.

² There is no reason to believe that the copy that was submitted does not truly represent the original. However, there is some blank space between the handwritten text that should be checked to assure the reliability of the copy.

³ Copies of this Order were faxed or e-mailed before 3:00 p.m. on the date of issuance.