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Norma G. Bradshaw

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FEDERAL COMMUNICATIONS COMMISSION

In Re Applications of:)	WT Docket No.:	96-41	
)			
)			
LIBERTY CABLE CO., INC.,	)	File Nos.:		
For Private Operational	)	70877		WNTT370
Fixed Microwave Service	)	708778, 713296		WNTM210
Authorization and	)	708779		WNTM385
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)

C O R R E C T E D C O P Y

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

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Courtroom 2
FCC Building
2000 L Street, N.W.
Washington, D.C.

Friday,
January 10, 1997

The parties met, pursuant to notice of the Judge
at 10:05 a.m.

BEFORE: HON. RICHARD L. SIPPEL
Administrative Law Judge

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E X H I B I T S

FOR IDENTIFICATION IN EVIDENCE REJECTED

Liberty/Bureau:¹

1	Prev.	374	
2	Prev.	375	
3	Prev.	379	
4 through 12	Prev.	381	
13	Prev.	392	
14	Prev.		398
15	Prev.		403

TW/CV:

1	427	428 (proffer)	
2	430	430	
3	430	431	
4	431	432	
5	432		433
6	434	434	
7	435		435
8	436	436	
9	436		436
10	438		439
11	441	441 (w/redactions)	

¹ Liberty/Bureau Exhibits 1 - 15 were given to the court reporter and were marked for identification prior to receipt into evidence.

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13	447		447
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Hearing Began: 10:05 a.m.

Hearing Ended: 1:11 p.m.

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P R O C E E D I N G S

1

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10:05 a.m.

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JUDGE SIPPEL: All right. This is the first -- the first day of hearing session. And the purpose for today's session is to receive into evidence the documents that are going to be used and testified to by the witnesses next week. And that's the business that I really want to conduct today.

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Now, I noticed -- I couldn't help but notice that there's been some activity in connection with a late delivered document. And I'm going to -- I'm going to be as cool, calm and collected as I can be about that this morning. But there's -- there's no doubt in my mind that it's a piece of evidence that should have been disclosed in this case six months or longer ago. And -- but there's nothing really that can be accomplished today with it except I will give you some instructions with respect to what's going to happen next week with Mr. Lehmkuhl's testimony.

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And there is a motion pending to -- I'm not sure what it is, Mr. Beckner, that -- I do know what it is that you're asking for. You want an inquiry -- a formal inquiry on the record with respect to the completion or not of the document discovery. Is that correct?

24

MR. BECKNER: That's correct. But that's --

25

JUDGE SIPPEL: There's a motion and there will be

1 an opposition throughout the motion. And, you know, I'll
2 take that up at a later time. The -- let me say -- let me
3 just say very briefly about that situation, I want to be
4 sure that when I close the record that I feel confident that
5 I've done everything I can to get all the significant
6 evidence in the record that's needed to make the decision.
7 All right. That's where I come out in this.

8 I don't want to do -- I don't want any unnecessary
9 procedures to -- to go down a list from A to Z to be sure
10 that, you know, every button is buttoned. But I sure don't
11 want to leave this record and I won't leave this record with
12 any kind of a queazy feeling that I don't have its -- that's
13 all I need to say. Do you have anything to say about this?

14 MR. WEBER: Not at this time, Your Honor. I mean,
15 when you bring up the issue of the late filed discovery,
16 we'll let you know our opinions on it. But at this point,
17 we're willing just to go on with the admissions session.

18 JUDGE SIPPEL: All right, because the Bureau has -
19 - I mean, I want you to know that I'm -- I'm aware of the --
20 I'm focused on the fact that what I'm being asked to decide
21 is a joint motion from the Bureau as well as from Liberty.
22 And, therefore, if it's -- if the completeness of discovery
23 with respect to what's relevant to that motion is Liberty's
24 problem, it's the Bureau's problem, too. And, I mean, I
25 really expect -- I expect some assurance that I do have a

1 complete record before we shut this down.

2 Now, having -- having said that preliminarily, let
3 me say what we're going to do today, is we're going to get
4 these documents marked and into the record. I want to have
5 a proffer of relevances to each document before it comes in.
6 Some of those proffers will be very quick. Most of them
7 will be. But if there are questions with respect to
8 relevance -- I don't want to get into the materiality
9 because that's too fuzzy, but relevance is right on target.
10 And I want to be sure that I know why a particular document
11 is being offered into evidence in connection with a
12 particular witness.

13 I don't expect to drag this out, but I do want to
14 have at least that much done. I'm prepared to go forward
15 with this throughout today until we get it done. And I
16 leave that up -- we'll see how it goes. And I'm certainly
17 amenable to a break for lunch if that's what it takes. But
18 I'm prepared to go forward. And I know that counsel from
19 New York are interested in getting back to New York. And I
20 know that the weather out there isn't the best as you would
21 like it to be. So I do want to move this along.

22 On the first day of testimony next week, we're
23 going to start at 10:00. Under the revised schedule, it
24 will be Mr. Milstein, followed by Mr. Nourain, followed by
25 Mr. Lehmkuhl, followed by Mr. Price, with Mr. -- Mr.

1 Ontiveros -- am I pronouncing that right, Ontiveros?

2 MR. SPITZER: That's correct, Your Honor.

3 JUDGE SIPPEL: -- being held in reserve. I'm
4 really interested in the question of Mr. Ontiveros'
5 (phonetic) testimony as for purposes of having a full and
6 complete record. I don't particularly care whether he's
7 characterized as a rebuttal witness or a direct witness. I
8 just want his testimony if it reaches a point where I think
9 that it's required to get this phase completed. Now,
10 there's been a motion filed with respect to that and there's
11 been an opposition filed by Liberty with respect to that.
12 So we'll get back to that further today.

13 I'll tell you where I'm coming out on it. Right
14 now I want to reserve the ruling on it. I want to hear
15 testimony. I want to hear what Mr. Milstein and what Mr.
16 Nourain say with respect to what they did with Mr.
17 Ontiveros. And I have the transcript of his deposition, Mr.
18 Ontiveros deposition. And that's going to be the -- that's
19 going to be where the judgement call is going to be made; in
20 other words, is there anything more that he might add other
21 than what we've got from his deposition.

22 If he doesn't come in as a witness, Mr. Beckner,
23 Mr. Holt, you can -- we'll receive his deposition in full in
24 the record as a proffer and anything else that you want to
25 add to that so that the record be -- so that you make your

1 record from here. But I don't want Mr. Ontiveros to testify
2 unless I feel that his testimony is going to help.

3 Okay. The second day of -- so the second week of
4 testimony -- well, let me rephrase that. Monday we're going
5 to start at 10:00 with Mr. Milstein and we'll go until --
6 this is roughly now -- we'll go until about 12:15. We'll
7 come back at 1:30, and that's affirmed. And then we'll go
8 until about 3:00, and then from 3:15 until 4:30. I don't
9 want to go beyond 4:30 unless the situation is -- unless
10 it's -- it becomes necessary.

11 I don't want to put the witnesses through that
12 much. I don't want to put counsel through that much to go
13 beyond that. On the other hand, if we have to stay until
14 5:00 or 5:30 to finish somebody up so that they can get a
15 plane, we'll do that.

16 The second day then we're going to start at 9:30.
17 We'll go from 9:30 to 11:00 give or take a little. At 11:15
18 to 12:15, break for lunch and come back at 1:30 to 3:00, and
19 then 3:15 to 4:30 give or take a little. That's essentially
20 the schedule that I want to follow. It's -- I can't
21 anticipate and I don't think counsel really can anticipate
22 how long each individual witness is going to take. But --
23 and I don't want to even make any suggestions with respect
24 to the amount of time, and see how it goes.

25 There will be a -- this is a mechanical concern of

1 mine. But it gets to be very disconcerting for witness
2 sometimes. There's a jug of water up here. And I'm going
3 to ask counsel to try and remember to come up and pour the
4 water for the witness before the witness gets to the stand
5 or before the witness gets to the water jug. What happens
6 sometimes is the top falls off while the water is trying to
7 be poured, and it makes a mess and we have to recess. A
8 little tip from -- it's not a big thing, but it's important.

9 Exhibits should be before the witness at all
10 times. This can probably be done by just leaving them. If
11 you've got them in books, just leave them in the book up
12 there on the stand so that the witness has ready access so
13 you don't have to be walking back and forth handing the
14 witness exhibits.

15 With respect sequestration, the sequestration
16 order is in effect. And my instruction to counsel is that
17 counsel is not to perform a relay service to the witness. I
18 don't mean to say this in a way that I'm -- I'm trying to be
19 as specific about this as I can. Certainly, you deal with
20 your witnesses as trial attorneys deal with witnesses. I
21 just don't want a verbatim account going from the second --
22 from the first witnesses to the second ones.

23 And my other -- my other limitation is that the
24 witnesses are not to talk to each other about their
25 testimony until after the session is completed. The reason

1 I'm making that requirement is because if it becomes
2 necessary to recall a witness, I want to be sure that to the
3 -- to the best that I can, that I'm getting fresh -- still
4 getting fresh testimony. Then once we're completed with
5 this session which will be certainly by the end of next
6 week, then they're free to talk to each other and whatever.
7 And so that's it as far as some -- my instructions are
8 completed with that.

9 Does anybody have anything on a preliminary basis
10 now that you want to raise? Mr. Beckner?

11 MR. BECKNER: Yes. I just have a question, Your
12 Honor, about sort of the mechanics of handling the exhibits.
13 Would you like us to supply you with an additional set of
14 copies of exhibits so that while the witness is looking at
15 the exhibit, you have a copy of your own to look at?

16 JUDGE SIPPEL: I've got them right here.

17 MR. BECKNER: Okay. So --

18 JUDGE SIPPEL: Thank you very much. No, you've
19 all provided me with advanced copies of the exhibits. And
20 I've been through them. And you don't have to give me
21 anything. Just be sure that the Reporter is -- the Reporter
22 is the focus of today's session -- really is the focus of
23 all sessions to be sure the Reporter is getting everything
24 down.

25 MR. WEBER: Your Honor, does not the witness

1 typically have one of the Court Reporter's copies? I
2 believe the rules require two copies to the Court Reporter.
3 That way during testimony the Court Reporter will have one
4 copy of the exhibits available to him and the other one that
5 will go before the witness.

6 JUDGE SIPPEL: Well, that would be -- yes, that
7 would be the preferred method. But on the other -- look,
8 unless there's some concern which -- that the witness is
9 being given doctored copies of the exhibits, I'm willing to
10 go along with whatever you all have agreed to. I mean,
11 really, if you want to come up and check from time-to-time
12 whether or not anybody -- Mr. Beckner wants to come up and
13 look at an exhibit while the witness is reading it, that's
14 fine. But whatever is the easiest for you all and the
15 Reporter.

16 The Reporter gets these marked and gets these
17 logged in. The one thing I don't want to happen is having
18 some kind of a disunity caused by passing these things back
19 and forth. These things have already been pre-marked. I
20 mean, really, there shouldn't -- there shouldn't be any need
21 to move these -- these exhibits around the room. So let me
22 answer your question by saying I'm going to -- if a party
23 insists that one of the marked copies be given from the
24 Reporter to the witness, I will do that. If I get concerns
25 about that, I will do that myself.

1 But I'm going to leave it up to -- with the broad
2 instructions that I've given, I'm going to leave it up to
3 counsel to decide how they want to do this because I want to
4 do it in the way that's more comfortable for the witness.
5 And that's why we're in here today, to do this this way
6 rather than having the witnesses sitting around waiting for
7 this to happen. Anything else, Mr. Beckner?

8 MR. BECKNER: No, sir.

9 JUDGE SIPPEL: Anybody else have anything else?
10 No. All right. Then the -- Liberty has the burden. And so
11 Liberty goes first with their exhibits.

12 MR. BEGLEITER: Your Honor, as a preliminary, let
13 me just say that most of our exhibits are shared by the
14 opposition. So it's -- it's a matter of how Your Honor
15 wants to -- wants to have two -- two exhibits that are the
16 same or just -- or just rely on one party's. And I leave
17 that up to the Court.

18 JUDGE SIPPEL: Well --

19 MR. BEGLEITER: A good example is the first one.
20 I believe that's -- I know that's also one of Mr. Beckner's
21 exhibits.

22 JUDGE SIPPEL: That's true. That's true. And it
23 certainly isn't necessary to have two copies of the same
24 document in the record. But on the other hand, you set
25 these up in a certain way. I don't want to -- what's your -

1 - what's your view on that, Mr. Beckner?

2 MR. BECKNER: Well, I'd just assume not -- I mean,
3 I agree with Mr. Begleiter that there's no need to have two
4 copies of the same thing. And, for instance, I'm looking at
5 Liberty/Bureau Exhibit 1. I think perhaps the easiest thing
6 would be for us to simply not offer as exhibits the ones
7 that Liberty and the Bureau have already offered and have
8 come in. And we -- and that way we don't end up referring
9 to the same document by two different names.

10 JUDGE SIPPEL: That's good.

11 MR. BEGLEITER: It's really going to be most of
12 the -- most of the documents, Your Honor, overlap.

13 JUDGE SIPPEL: I see that.

14 MR. BEGLEITER: There is I think three or four
15 that don't.

16 JUDGE SIPPEL: Well, I didn't know -- I didn't get
17 that close on my --

18 MR. BEGLEITER: Of ours. They have many more than
19 we do.

20 MR. BECKNER: Yes, we have more.

21 MR. BEGLEITER: Of ours, there are three or four
22 that don't overlap with theirs.

23 JUDGE SIPPEL: Well, then let's do it that way.
24 What we can do is let's get Liberty's in. Let's get theirs
25 on the record. You can make a very -- you know, you're

1 tracking these as they come in, Mr. Beckner. We'll see
2 which of yours are duplicative. Just strike it and then we
3 can take a break and you can get your re-numbering done.
4 We'll work something out off the record with the Reporter,
5 and then we can move yours in.

6 MR. BEGLEITER: If I may, Your Honor, as
7 discussed, Number 1.

8 JUDGE SIPPEL: Let's do it.

9 MR. BEGLEITER: Okay. Number 1, which again is
10 one of the exhibits that Mr. Beckner has as one of his, is
11 the inventory of February 24 which -- which the opposition
12 is asserting would have or in fact did inform our client
13 that there was premature activation. We, of course, deny
14 it, but it's a highly valuable document.

15 JUDGE SIPPEL: This is the February 24 --

16 MR. BEGLEITER: Right. Yes.

17 JUDGE SIPPEL: -- memorandum.

18 MR. BEGLEITER: It's a highly relevant document
19 and I know that Mr. Beckner, if I may speak for him, does
20 have no objection.

21 JUDGE SIPPEL: That's coming in.

22 (The document previously
23 marked for identification as
24 Liberty/Bureau Exhibit Number
25 1, was received in evidence.)

1 Liberty/Bureau Exhibit 1 was already identified
2 and received. Liberty/Bureau Exhibit 3 is what?

3 MR. BEGLEITER: Is a -- is a letter from Peter
4 Price to Michael Hayden, the chief of the microwave branch,
5 which contains what you might want to consider to be Mr.
6 Price's confession and acceptance of responsibility. We'd
7 like to use this with Mr. Price's testimony to show that Mr.
8 Price, when he realized that there was something that was in
9 error, attempted forthrightly to deal with the problem.

10 JUDGE SIPPEL: Any objection to that, Mr. Beckner?

11 MR. BECKNER: No, Your Honor. Can I have a
12 moment?

13 JUDGE SIPPEL: Oh, I'm -- Mr. Holt, I'm not trying
14 to cut you out of this. When I say -- I'll just say any
15 objection and either one or both of you can answer it.

16 MR. HOLT: Thank you, Your Honor.

17 MR. BECKNER: Your Honor, I'll just note for the
18 record with respect to Liberty/Bureau Exhibit 3, we had also
19 designated a companion letter that I believe was sent as an
20 enclosure to this letter from Mr. Howard Barr. And we had -
21 - we had numbered it 27(b).

22 JUDGE SIPPEL: What's your number on that?

23 MR. BECKNER: 27(b).

24 JUDGE SIPPEL: Oh, yes. Oh, yes. Well, I think
25 what I'm going to do on that one, Mr. Beckner, I'm going

1 to -- unless you have a reason to object to this, I'm going
2 to let it come in as -- as their exhibit, that is a Liberty
3 exhibit to the limited extent that it is. It's not a -- I -
4 - I don't view that as being a complete document because
5 there were -- there are enclosures that are mentioned to it.

6 MR. BECKNER: Your Honor, as I say, I'm not
7 objecting to the offer of the exhibit in its present form.
8 But I just thought I would mention that at least one of the
9 other pieces of that -- of this -- that were included with
10 this document, our intention is to offer that, as well.

11 JUDGE SIPPEL: Is this -- yes, this -- let me just
12 go right to the first sentence. This is -- again, we're
13 talking about Liberty/Bureau Exhibit 3 for identification.
14 This says, "Attached to this letter is Liberty's response by
15 counsel to the questions asked in your letter dated June
16 1995." And that's not -- that's not with this exhibit. Was
17 there a reason why it wasn't put with this exhibit?

18 MR. BEGLEITER: Well, we didn't -- we just didn't
19 think that it was relevant. You know, as a matter of fact,
20 we're going to object on relevance grounds to Mr. Beckner's
21 offer of the companion letter. That was -- that was simply
22 the reason. I mean, we wouldn't hide anything. On that
23 one, they've had that letter for a long, long time.

24 JUDGE SIPPEL: No, I'm not suggesting that there's
25 anything hidden on it. I didn't it that way. You've

1 answered the question.

2 MR. BEGLEITER: Yes, the only reason is --

3 JUDGE SIPPEL: You don't think it's relevant.

4 MR. BEGLEITER: We don't think -- we don't think
5 the answers are relevant that were given. But Your Honor
6 will decide.

7 MR. HOLT: Your Honor, I would be concerned about
8 the admission of a partial document like that. And I would
9 suggest that for purposes of completeness to make sure that,
10 you know, the document's integrity is preserved, that it be
11 received into evidence as a -- as a complete document with a
12 companion letter.

13 JUDGE SIPPEL: Well, they're not -- I'm going to -
14 - to the extent that that's an objection, Mr. Holt, I'm
15 going to overrule the objection. I'm going to let Liberty
16 put it in the way they want as long as I've got an
17 explanation on the record as to why it's not complete. I
18 know it's not complete. And I'm going to have an
19 opportunity to make it complete before we finish here today.
20 So --

21 MR. BEGLEITER: Your Honor, it's just that we --
22 in light of the nature of the inquiry here, we didn't think
23 it added to it. But we would have no objection if Your
24 Honor deems it relevant obviously. We're going at -- we
25 don't feel strongly on the issue.

1 JUDGE SIPPEL: All right. Well, we'll clean it up
2 then when --

3 So Exhibit 4 -- I'm sorry, Exhibit 3 for
4 identification is -- again, it's Liberty/Bureau Exhibit 3
5 which is a letter dated June 16th, 1995 to Mr. Hayden from
6 Mr. Price, is received in evidence at this time as your
7 Exhibit 3.

8 (The document referred to,
9 previously marked for
10 identification as
11 Liberty/Bureau Exhibit Number
12 3, was received in evidence.)

13 Now, we have a series of deposition transcripts
14 following this as I read my list. Is that correct?

15 MR. BEGLEITER: That's right. They all overlap
16 with Mr. Beckner's.

17 JUDGE SIPPEL: All right. Now, there's no problem
18 with these, Mr. Beckner, Mr. Holt?

19 MR. BECKNER: No, Your Honor.

20 JUDGE SIPPEL: All right.

21 MR. BECKNER: I assume this is the complete
22 transcript and that these are not --

23 MR. BEGLEITER: I assume so, too.

24 MR. BECKNER: Okay.

25 MR. SPITZER: They were intended to be -- whether

1 the xerox machine did it properly.

2 JUDGE SIPPEL: All right. Well, these -- let me -
3 - let just go down this list then to try and just move this
4 along. I'm not trying to undercut what you're doing at all,
5 Mr. Begleiter. But these are -- these are -- these are --
6 this evidence that is going to speak for itself.

7 And this is Liberty/Bureau Exhibits Number 4 for
8 identification is the deposition of Mr. Howard Milstein of
9 May 30th, 1996; Number 5 for identification is the
10 deposition transcript of Mr. Lehmkuhl dated May 22, '96;
11 Exhibit Number 6 is the deposition transcript for Mr.
12 Lehmkuhl of August 7, 1996; Exhibit 7 is the transcript of
13 the deposition of Mr. Nourain, dated May 29th, 1996; Exhibit
14 8 is the condensed transcript of Mr. Nourain, dated August
15 1, 1996; Exhibit 9 is the transcript of the deposition of
16 Mr. Price of May 28th, 1996; Exhibit 10 is the transcript of
17 the deposition of Mr. Price, dated May 31, '96; Exhibit 11
18 is the deposition transcript of Mr. Price, dated August 1,
19 1996; and Exhibit 12 is the deposition transcript of Mr.
20 Price's deposition of August 2, 1996.

21 And that's the completion of -- for identification
22 purposes of all the deposition testimony that's being
23 offered by Liberty and the Bureau, is that correct?

24 MR. BEGLEITER: That's correct, Your Honor.

25 MR. BECKNER: Yes.

1 that Your Honor can actually -- Your Honor would actually
2 have a license in front of him.

3 JUDGE SIPPEL: All right. This is -- this is then
4 for illustrative purposes?

5 MR. BEGLEITER: Yes. I mean, it's also -- it's
6 also evidence in chief in the sense that Mr. Nourain and
7 that Liberty got this and this is their license. I don't
8 think there was any issue about this. I think everybody can
9 see that we got this license. But I think it shows that a
10 license was there. And it is -- but it was primarily for
11 illustrative purposes.

12 MR. HOLT: Your Honor --

13 JUDGE SIPPEL: Mr. Holt?

14 MR. HOLT: If this is being offered for
15 illustrative purposes, then I would suggest that it could be
16 used -- it could be marked for identification and used for
17 illustrative purposes. But if it's not providing any
18 substantive evidence, then it shouldn't be received into
19 evidence.

20 JUDGE SIPPEL: Well, I don't have -- I don't think
21 it's going to confuse the record. I really don't. If it
22 were a -- you know, if it were some kind of a facsimile or a
23 chart, some kind of a demonstration model that was prepared
24 to -- to offer the explanation, I think you'd have a point.
25 But this is -- this is the document. This is it.

1 MR. HOLT: Your Honor, I would suggest that
2 perhaps you could reserve ruling on the document until it's
3 been linked up to a testimony offered during the hearing
4 because I'm not sure whether counsel intends to use this --
5 when drafting proposed findings, use this as substantive
6 evidence. And I won't know that until I hear the witness'
7 testimony about the document. So I would -- I'm reluctant
8 to have a document come in for the purpose of drafting
9 substantive findings without testimony showing the relevance
10 of the document.

11 JUDGE SIPPEL: Well, what could -- how could you
12 be -- how could you be prejudiced by that? Well, let me
13 answer you. Let me answer one point that you've raised, an
14 issue that you've raised. If something comes into evidence,
15 it's into evidence for all purposes. Of course I'm going to
16 give differing weights to it depending on the purpose for
17 which it was offered. But it's in the record. It's in as
18 evidence. It's evidence.

19 If it's going to be used in proposed findings
20 beyond what Mr. Begleiter has explained to me, then it's
21 probably not going to be given much weight unless -- again,
22 as you say, unless it's tied in with a witness in a certain
23 way in which case you all are going to be here. Nothing's
24 going to happen without you being here to see it happen. So
25 I don't see the harm in doing it this way and I don't want