

FCC MAIL SECTION

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

FCC 97M-177
80022

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)

O R D E R

Issued: October 23, 1997 ; Released: October 24, 1997

This is a ruling on a Motion To Place Documents In Evidence, To Take Additional Discovery And To Compel Discovery Responses that was filed on October 1, 1997, by Time Warner Cable of New York City and Paragon Communications (collectively "Time Warner"). On October 15, 1997, an Opposition was filed by Liberty Cable Co., Inc. ("Liberty") and Comments were filed by the Wireless Telecommunications Bureau ("Bureau"). A Reply pleading was filed by Time Warner on October 22, 1997.

On September 16, 1997, Liberty provided the parties with a copy of the long awaited internal audit report ("Report") which had been furnished to the Bureau in August 1995 as a comprehensive accounting for 19 unauthorized activations of microwave service. Until recently, the Report was the subject of collateral litigation with respect to Liberty's assertion of the attorney-client privilege. An appeal of the Commission's ruling to the Circuit Court of Appeals was resolved against Liberty. Bartholdi Cable Co., Inc. v. Federal Communications Commission, 114 F.3d 274 (D.C. Cir., 1997).¹ The parties universally agree that the Report is relevant to the issues in this proceeding. There is no objection by Liberty to its receipt into evidence.

¹ A petition for rehearing was denied on September 10, 1997. The Court of Appeals did not find it necessary to address the merits of the privilege claim. The decision went against Liberty because the right to assert the privilege before the Commission was found to have been waived. Id. There was no issue before the Court on waiver of the privilege with respect to the underlying documents. Liberty has expressed its intention to assert privilege where a privilege applies as to those documents.

Time Warner also seeks discovery with respect to matters that relate to the Report. First, Time Warner asks that its earlier discovery requests that were denied because the issue of privilege was sub judice now should be granted. The Bureau agrees. Second, Time Warner seeks to depose Mr. Stern again because the Report contains two relevant documents which he authored in 1992 regarding "flaws" in Liberty's license applications and significant "hand-over responsibilities" that were assumed by Mr. Nourain, the newly hired engineer. The Bureau agrees. Liberty argues that there should be no further discovery even though "five witnesses testified differently from the lawyer's conclusions contained in the Report." Liberty also argues against further inquiry because the Report contains no evidence that Liberty's "principals"² knew of any illegal activations until late April 1995 and there now is assurance of no further repetition.

It is concluded that Time Warner and the Bureau have shown sufficient cause for limited additional discovery in light of the recent production of the highly relevant Report. See Discovery Procedures, 11 F.C.C. 2d 185, 187 (1968) (discovery permitted in discretion of presiding judge). The Presiding Judge is particularly concerned about the reference in the report to an attorney at Pepper & Corazzini "appearing" to have become aware of unauthorized activations in April 1993. (Report at 11, 15-16.) A similar concern is noted with respect to the Report's finding that Mr. McKinnon "appears" to have been aware in 1993 that Mr. Nourain was prematurely activating paths. (Report at 11.) Those findings by the auditing group seem to be directly contra to the crux of Liberty's defense that principals of Liberty and Liberty's outside counsel were unaware of the activations until late April 1995. All documentation and transcripts of interviews that were relied on for those conclusions are needed in order to make a reliable finding on the issue of when Liberty first had knowledge of the offending events.³

Accordingly, IT IS ORDERED that Time Warner's Motion To Place Documents In Evidence, To Take Additional Discovery And To Compel Discovery Responses IS PARTIALLY GRANTED in accordance with further instruction.

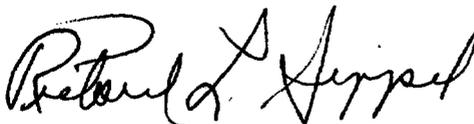
² The "principals" are not identified. It is expected that the term includes at a minimum the executive officers, Messrs. Howard and Edward Milstein and Messrs. Price and McKinnon. Liberty's counsel should clarify this at the Prehearing Conference.

³ Fact documents and recorded interviews underlying a report submitted to an agency that are needed for a focused inquiry on a key factual issue are discoverable in this jurisdiction. In re Sealed Case, 676 F.2d 793, 809, 817-18 (D.C. Cir. 1982). See also Permian Corp. v. United States, 665 F.2d 1214, 1221 (D.C. Cir. 1981) (privilege cannot be waived and reclaimed selectively). Mental impressions of counsel conducting or reviewing the audit may be excised.

IT IS FURTHER ORDERED that Liberty should immediately produce (or prepare) a privileged document log which includes: (1) a descriptive explanation of the subject matter and the reason for asserting privilege as to each document or taped interview; and (2) a separate list of each non-privileged document (e.g. prepared in the course of business by or under direction of Mr. Stern) that will be produced in response to outstanding discovery requests.

IT IS FURTHER ORDERED that there will be a Prehearing Conference on October 27, 1997, at 10:00 a.m. to receive the Report in evidence⁵ and to set a schedule for limited discovery.

FEDERAL COMMUNICATIONS COMMISSION⁶



Richard L. Sippel
Administrative Law Judge

⁵ Time Warner will offer the Report as the next exhibit (TWCV Exh. 67) after it is properly identified, marked and offered into evidence. The Bureau may join in the motion but the exhibit will be marked as a TWCV exhibit for purposes of identification.

⁶ Copies of this Order were faxed or e-mailed to counsel on the date of issuance.