

FEDERAL COMMUNICATIONS COMMISSION

RECEIVED

NOV 18 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

Volume: 16
 Pages: 2340 through 2408
 Place: Washington, D.C.
 Date: November 5, 1997

Thomas A. Bradshaw
7

HERITAGE REPORTING CORPORATION

Official Reporters
 1220 L Street, NW, Suite 600
 Washington, D.C.
 (202) 628-4888

RECEIVED

NOV 18 1997

FEDERAL COMMUNICATIONS COMMISSION 2340
OFFICE OF THE SECRETARY

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

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

Wednesday,
November 5, 1997

The parties met, pursuant to the notice of the
Judge, at 1:34 p.m.

BEFORE: HON. RICHARD L. SIPPEL
Administrative Law Judge

APPEARANCES:

On behalf of Liberty Cable:

ELIOT L. SPITZER, ESQUIRE
ROBERT L. BEGLIETER, ESQUIRE
Constantine & Partners
909 Third Avenue
New York, New York 10022
(212) 350-2736

Heritage Reporting Corporation
(202) 628-4888

APPEARANCES: (Continued)

On behalf of Liberty Cable:

ROBERT L. PETTIT, ESQUIRE
Wiley, Rein & Fielding
1776 K Street, Northwest
Washington, D.C. 20006

On behalf of Cablevision:

CHRISTOPHER A. HOLT, ESQUIRE
Mintz, Levin, Cohn, Ferris, Glovsky and
Popeo, P.C.
701 Pennsylvania Avenue, Northwest
Washington, D.C. 20004
(202) 434-7300

On behalf of Time Warner Cable:

R. BRUCE BECKNER, ESQUIRE
DEBRA MCGUIRE, ESQUIRE
Fleischman and Walsh, L.L.P.
1400 16th Street, Northwest
Washington, D.C. 20036
(202) 939-7913

On behalf of the Agency:

JOSEPH PAUL WEBER, ESQUIRE
MARK L. KEAM, ESQUIRE
KATHERINE POWERS, ESQUIRE
Enforcement Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, Northwest
Washington, D.C. 20554
(202) 418-1317

I N D E X

<u>WITNESSES:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VOIR DIRE</u>
(None.)					

E X H I B I T S

<u>TWCV:</u>	<u>IDENTIFIED</u>	<u>RECEIVED</u>	<u>REJECTED</u>
67	2353	2357	

Hearing Began: 1:34 p.m. Hearing Ended: 3:06 p.m.

P R O C E E D I N G S

1
2 JUDGE SIPPEL: This is a prehearing conference,
3 and the reporter advises me that she has all the
4 appearances, so there is no need to go around the table and
5 do that.

6 I would like to take up as the first order of
7 business the identification marking and receipt into
8 evidence of the audit report, and then I would intend to go
9 from there. I have my own itinerary, but I will be open to
10 hearing discussion and argument, of course.

11 MR. BECKNER: Your Honor, we have a number of
12 copies of the report. And if it's alright with you, I would
13 like to approach and give a couple to the court reporter.

14 JUDGE SIPPEL: Please do that. Please do.

15 We can go off the record while you do that.

16 MR. BECKNER: And just before we go off the
17 record, I would just note that the copy that we are offering
18 is the one that was produced pursuant to your earlier order.
19 It does not have the legend on the bottom that says
20 "Confidential" or whatever.

21 If you recall, the initial version that was
22 delivered to you and to us had a legend on the bottom of
23 every page that said, "Confidential, Attorney/Client" or
24 something like that.

25 JUDGE SIPPEL: That's correct.

1 MR. BECKNER: And this is a production of one
2 without that, and that is what we are offering.

3 JUDGE SIPPEL: All right. Then there is no
4 identification as this being a confidential document; is
5 that what you are saying?

6 MR. BECKNER: That's correct, Your Honor.

7 JUDGE SIPPEL: Okay, thank you. That's the
8 appropriate form.

9 We will go off while you bring those up to the
10 reporter.

11 MR. BEGLIETER: Your Honor, if I may, when you say
12 there is no indication, the cover letter is, as I see is
13 still appended to it, and the cover letter does indicate
14 it's confidential.

15 JUDGE SIPPEL: Well, let's see what we have.
16 Let's see what we have.

17 MR. BECKNER: Your Honor, I'll give this copy to
18 you. And you need two, right? This is the one that I want
19 to hand you.

20 JUDGE SIPPEL: Okay, let's keep the conversation
21 to a minimum while we are doing this.

22 I don't see any -- I mean, I am going to permit
23 this certainly to be offered in the form that you have
24 prepared it. You are going to offer it as your exhibit, Mr.
25 Beckner; is that correct?

1 MR. BECKNER: That's correct, Your Honor, and to
2 tell you the truth, I didn't double check your numeration in
3 your previous order, but I'm going to accept that 67 is the
4 next number, and so I would offer this as TWCV Exhibit 67.

5 JUDGE SIPPEL: Well, let's first -- let me first
6 take a check around the table.

7 Does anybody else have a different count than that
8 on the exhibit numbers?

9 MR. BECKNER: I believe that that is the correct
10 next number.

11 JUDGE SIPPEL: All right. Well, I am going to
12 rely on what I have on my list, and we will have this
13 marked, and the reporter will mark this for identification
14 as TWCV Exhibit No. 67.

15 MR. BECKNER: I will note for the record that it
16 consists of actually copies of two letters dated August 14,
17 1995, addressed to Regina Keeney, Chief of the Wireless
18 Bureau here at the FCC; as well as the audit report itself
19 and a declaration from Mr. Peter Price, which appears to be
20 signed by him.

21 I was hoping that given that this document was
22 tendered to us by counsel for Liberty, that we can dispense
23 with the formalities of identifying the signature, Mr.
24 Price's signature, and so on; and that there would be no
25 issue about the authenticity of the document.

1 JUDGE SIPPPEL: Well, I will ask if there is any
2 objection. I don't see that happening.

3 Are there any objections?

4 MR. SPITZER: Well, Your Honor, there is no issue
5 with respect to the authenticity. Obviously, the documents
6 are what they are, and there is no issue with respect to
7 that.

8 The issue that I think Mr. Beckner now is raising
9 for the first time relates to introducing documents other
10 than the report itself into evidence, and, frankly, we
11 have -- the cover letters, the request for confidentiality,
12 for instance, which is -- I am not clear -- it's not clear
13 to me initially why that is relevant to this hearing.

14 JUDGE SIPPPEL: All right, that's a good question.
15 Why do we need that cover letter?

16 MR. BECKNER: Well, Your Honor, I would agree that
17 the first cover letter, the one that's on the very top which
18 is styled "Request for Confidentiality" concerns exclusively
19 a matter that's now been decided by the D.C. Circuit. And I
20 agree with Mr. Spitzer with respect to that letter.

21 The second letter, which is -- which is different,
22 and was actually part of what was confidential until the
23 D.C. Circuit's decision, really addresses the substance
24 of -- it make statements about the scope of the
25 investigation and so on, and so I would suggest that that

1 letter, as well as Mr. Price's supporting declaration, in
2 fact should be, you know, part of the record because it is
3 the substantive response to the 308(b) request, which was
4 made of Liberty in August of 1995.

5 JUDGE SIPPEL: Let me ask the question then of Mr.
6 Spitzer. He has already -- to the extent that is an
7 objection, I am granting the objection on relevancy grounds
8 as to the first letter of August 14.

9 What about the second letter?

10 MR. SPITZER: The second letter, again, Your
11 Honor, I don't think the second letter is relevant. The
12 second letter appears to be -- I would have to read it again
13 more carefully, but in capsulation perhaps by lawyers of the
14 substance of the report, and the record itself, if I am
15 correct, is relevant because of what it reveals about the
16 knowledge of certain witnesses; not what certain lawyers may
17 say about it in summary form.

18 Now, I am not objecting to the Peter Price
19 affidavit, which would be the next document, which was
20 submitted to the Bureau. That is fine. But in terms of the
21 second letter, which is merely a lawyer's letter which to
22 some extent summarizes the report which we have before us, I
23 don't think the lawyer's letter is relevant.

24 JUDGE SIPPEL: All right. Well, let me see
25 what -- Mr. Beckner?

1 MR. BECKNER: Well, Your Honor, the report itself
2 was written by lawyers. I mean, I think the distinction
3 between the lawyers' letter and the report is one that's
4 essentially meaningless. You know, they are both
5 compilations of information gathered in this investigation.
6 You know, I think that there is substantive information in
7 the letter that, you know, was signed by Mr. Rivera and Mr.
8 Pettit and Mr. Constantine or someone on his behalf, and it,
9 in effect, should be considered part of the report.

10 JUDGE SIPPEL: Well, what does the Bureau think
11 about this, Mr. Weber?

12 MR. WEBER: Well, Your Honor, when I heard Mr.
13 Beckner first make his arguments, I believe the Bureau would
14 have been inclined to agree with him that the cover letter
15 is sort of -- gives the context in which the Bureau
16 initially received a copy of the report.

17 However, hearing Mr. Spitzer's argument, I really
18 do have to go along with Liberty on this; that the manner in
19 which or the context in which the Bureau received a copy of
20 the report is not at issue here. What's really at issue is
21 really the knowledge that certain witnesses had and when
22 they came about that knowledge. And the cover letter of
23 August 14th really sheds no light on that issue, and it adds
24 nothing to this proceeding.

25 JUDGE SIPPEL: You're talking about the second

1 letter?

2 MR. WEBER: The second letter, yes.

3 JUDGE SIPPEL: The second cover letter of August
4 14th.

5 MR. WEBER: Right.

6 MR. BECKNER: Well, let me respond to that if I
7 might, Your Honor.

8 JUDGE SIPPEL: Sure.

9 MR. BECKNER: Just by reading from page 2 of the
10 letter, and I am reading here. It says, "Additionally, the
11 record reflects that Liberty secured permission from Hughes
12 Aircraft to use Hughes' experimental 18 gigahertz
13 authorization for noncommercial testing purposes, and the
14 manager charged with supervising the engineering functions
15 believed that the Hughes' authorization covered Liberty's
16 initial activation of paths, even if those paths had not
17 been specifically authorized by an FCC license or STA."

18 I think that -- I mean, I'm not going to go
19 through every sentence of the letter, but I think the point
20 is, is that the letter, you know, makes specific statements
21 about what people, managers believed, and what they thought,
22 and so on. And in that sense it is not really different
23 than the report, albeit it's in a different piece of paper.

24 JUDGE SIPPEL: Well, first, I have a question, and
25 then I have -- let me give you my view about this. I will

1 make the ruling, obviously, when we get finished here. But
2 wouldn't there be something in this letter, other than the
3 acknowledgement of the fact that it's, you know, being sent
4 to Ms. Keeney and it's in response to Mr. Davenport's letter
5 of August 4th, but is there anything in this letter other
6 than that that would be -- on which findings could be made,
7 additional findings could be made?

8 MR. BECKNER: Well, that -- I mean, that sentence
9 that I just read is one that, you know, somebody might want
10 to use as a basis for a finding where it talks about a
11 manager's belief. And as I recall from the report, there is
12 sort of a further suggestion that maybe that belief was
13 mistaken or whatever. But I mean it directly concerns
14 whether or not Liberty was authorized to activate certain
15 facilities, and whether or not Liberty knew or its managers
16 knew that they had authorization, what the basis for their
17 belief was that they had authorization and so on.

18 JUDGE SIPPEL: Well, but to the extent that it's,
19 to the extent that the letter, attorney's letter is
20 summarizing or paraphrasing what is actually in the report,
21 I would be more inclined to look to the report. Not that
22 there is -- it's not a question really of the competency
23 here so much; it's just a question of what is the -- you
24 know, the report was prepared for one purpose and the letter
25 was prepared for another purpose. i.e., the second letter

1 being prepared to facilitate the forwarding and the receipt
2 of the report.

3 But, again, I think this is getting to be kind of
4 a quibble. You know this goes to weight when you come right
5 down to it, and the reason I think there is significance to
6 the letter, this is again the second letter of August 14th,
7 is the fact that is responsive to Mr. Davenport's letter,
8 which I believe is -- I believe it's TWCV 28. It's
9 somebody's 28, which asks for this report under Section 308.

10 And I think, as I prepared for this conference
11 today, I find that to be a very significant linkage based on
12 some of the arguments that were in the opposition with
13 respect to how significant this report is as a piece of
14 evidence in this case.

15 So I mean, those are my -- that's the basis for
16 which I would want to receive this report with the August
17 14th letter. Now, anything over and above that, that you
18 have advanced, Mr. Beckner, let's see how it comes out in
19 the briefing or in proposed findings. But that's my --
20 that's the basis for my receiving the report with that
21 letter.

22 Now, what I want to do is we'll go off the record
23 and have everybody take off that first letter, all right,
24 and help the reporter on this so that we get the exhibit
25 numbered without the first cover letter.

1 Do you follow me?

2 MR. BECKNER: Yes, I do, Your Honor.

3 JUDGE SIPPEL: Let's go off the record.

4 MR. BECKNER: Well, Your Honor, before we go there
5 is one thing I just want to note for the record just so it
6 doesn't come up later without having been addressed.

7 The pagination of the report is a little odd in
8 that if you look at the -- and I'm talking now about the
9 report itself. It's continuously paginated through page 17.

10 JUDGE SIPPEL: Yes, I've got that on my list.

11 MR. BECKNER: And then the next page in the
12 document --

13 JUDGE SIPPEL: Is 31.

14 MR. BECKNER: -- has 31.

15 JUDGE SIPPEL: All right.

16 MR. BECKNER: And then it's continuously paginated
17 from 31 until we get to the license checklist, which is not
18 paginated at all. And I would note that it appears that the
19 last paginated page, which is 34, looks like it breaks in
20 mid sentence.

21 JUDGE SIPPEL: All right. Yes, I follow
22 everything you say. I have that on my list.

23 MR. SPITZER: What breaks in mid sentence? I'm
24 sorry.

25 JUDGE SIPPEL: I was just saying before we do that

1 I want to have --

2 MR. BECKNER: Page 34, Eliot, at the bottom.

3 JUDGE SIPPEL: Yes, but I want to get this marked.

4 MR. BECKNER: Okay.

5 JUDGE SIPPEL: I want to get the mechanics done
6 first. We are going to get to this.

7 MR. BECKNER: Okay.

8 JUDGE SIPPEL: Let's go off the record for just a
9 minute.

10 (Discussion off the record.)

11 JUDGE SIPPEL: All right, the reporter tells me
12 now that she has marked the document as modified; that is,
13 modified by removing the first cover letter. It is now
14 marked for identification as TWCV Exhibit 67.

15 (The document referred to was
16 marked for identification as
17 TWCV Exhibit No. 67.)

18 JUDGE SIPPEL: And you had questions, Mr. Beckner,
19 with respect to the completeness of the report, and Mr.
20 Pettit and Mr. Beglieter have had a chance to figure this
21 out while we were off the record.

22 Could somebody give us the answer?

23 MR. SPITZER: Sure. As I understand it --

24 JUDGE SIPPEL: Mr. Spitzer, I mean.

25 MR. SPITZER: That's all right. I'm always happy

1 to pass the buck.

2 (Laughter.)

3 MR. SPITZER: With respect to page 34, the
4 sentence that appears to break, there obviously is a page
5 35. I don't -- the compliance program must continue to a
6 next page. That's all I can tell you. The training program
7 was meant to not end in mid sentence.

8 So I don't know if page -- there was page 35 as
9 submitted to the Bureau, or if it's just somewhere in the
10 copying process somewhere along the line somewhere got lost.

11

12 JUDGE SIPPEL: Shall we --

13 MR. SPITZER: We can pursue that. I mean, clearly
14 the training program, the description of it continued beyond
15 this point. That is all that continues beyond that piece of
16 it.

17 With respect to the gap between 17 and 31, page 17 is
18 the end of the report, Your Honor. What happened was that
19 the compliance program was put into the system as a final
20 piece, as a last document early on in the generation of the
21 report, and the computer paginates as you do these things.
22 It was printed out as a discrete piece, and it was just held
23 as a separate document. And so there is not something
24 between 17 and 31.

25 MR. BEGLIETER: Your Honor, if there is any

1 question about the completeness of it --

2 MR. SPITZER: The Bureau has it.

3 MR. BEGLIETER: -- the Bureau has the complete
4 copy because by definition they have what we submitted.

5 MR. SPITZER: Right.

6 JUDGE SIPPEL: All right.

7 MR. SPITZER: So either the compliance program was
8 generated as a separate unit, it was at the end, and it was
9 paginated and it was printed out.

10 JUDGE SIPPEL: All right. Then maybe somebody
11 can -- I mean, certainly get to Mr. Beckner and myself what
12 is missing from the compliance report, and I can make a
13 determination as to whether or not we need to bring it into
14 the record.

15 You think that what it is is just a -- Mr.
16 Spitzer, it's just a training, it's just the description of
17 a training, in-house training?

18 MR. SPITZER: That is my recollection, Your Honor,
19 that that's what continued --

20 JUDGE SIPPEL: All right.

21 MR. SPITZER: -- from page 34 on. We will get it
22 for the Court and for all the parties.

23 JUDGE SIPPEL: I understand. Well, I will take a
24 look at it, and I will make a determination as to what
25 significance it has in terms of need to bring it into the

1 record. If it's just a training report, I don't -- you
2 know, I personally think that certainly this explanation of
3 what was involved in the compliance program goes far beyond
4 anything else that was put in the motion papers, the summary
5 decision motion, and that was always something that was in
6 my mind. I said, what is this compliance program that was
7 kind of just described as that being a compliance program
8 that one man was going to check on things before they were,
9 before the stations were activated. But this is a much more
10 detailed description of it, and I think it's going to be
11 helpful in that respect.

12 All right, then, is there any objection to
13 receiving Exhibit 67 into evidence?

14 MR. WEBER: None, Your Honor.

15 MR. SPITZER: None that continues past the D.C.
16 Circuit's opinion.

17 (Laughter.)

18 MR. SPITZER: We have already in the October 15th
19 submission to you, Your Honor, indicated we would have no
20 objection.

21 JUDGE SIPPEL: All right, thank you.

22 Well, on all those authorities I'm going to
23 receive it into evidence at this time as TWCV Exhibit 67.

24 MR. BEGLIETER: Your Honor, I would be remiss if I
25 were to say that we think it should be given very little

1 weight, and that it's cumulative.

2 JUDGE SIPPEL: Well, I am curious about that. I
3 want to pursue that a bit in terms of the weight and its
4 cumulative nature.

5 (The document referred to,
6 having been previously marked
7 for identification as TWCV
8 Exhibit No. 67.)

9 JUDGE SIPPEL: I have got some preliminary
10 questions that I want to ask, and also these questions are
11 going to go to the Liberty side of the table.

12 The first question I have is who are these -- who
13 are Liberty's principals that keep getting referred to in
14 the opposition without being identified?

15 MR. PETTIT: Your Honor, I would like to apologize
16 for my voice here. I have the latest third grade contagion.

17 JUDGE SIPPEL: Okay, so we are no notice.

18 MR. PETTIT: All right. The four principals that
19 are referred to in the opposition, or the principals
20 referred to in the opposition are four people; the three
21 Milstein owners of Bartholdi Cable Company, the current
22 owners; and Peter Price, the president of Bartholdi Cable.

23 JUDGE SIPPEL: Okay.

24 MR. PETTIT: And I think we have used that -- I
25 understand that we have used the term "principals" without

1 defining it, but I think we have used it fairly consistent,
2 or is consistently -- consistently, consistently, as far as
3 I know, Your Honor.

4 JUDGE SIPPEL: Well, what about Mr. -- what about
5 Mr. McKinnon, why does he not fall into that category? He's
6 an executive -- executive vice president was his title.

7 MR. PETTIT: Well, it was a title but not an
8 office. He was never an officer of the corporation, Your
9 Honor. He's not an owner, and was not a director of
10 Bartholdi. Of course, he had no association with Bartholdi,
11 but not an officer or director or owner of Liberty Cable.

12 JUDGE SIPPEL: Now, what is Mr. Price? He's not
13 an owner, but he is what? He's an officer?

14 MR. PETTIT: He is an officer. He is the
15 president, and which is literally a corporate officer.

16 This, by the way, was reported, I think, in the
17 very first -- our answer to the very first interrogatory was
18 who were the owners, the directors, the officers, and we
19 reported these four people. So that's -- as I say, I think
20 we have used it fairly consistently throughout this.

21 JUDGE SIPPEL: Now, is that your position, that --
22 I'm going to try and put this in its most fundamental form,
23 so bear with me on this.

24 But is that really what it's all about? I mean,
25 if it gets as high as -- if the information gets as high as

1 McKinnon, it doesn't count. It's got to get up to Price or
2 one of the Milsteins before it counts.

3 When I say "counts," I mean in terms of it being a
4 serious violation of the -- of the activation, of the path
5 activation laws of the FCC.

6 MR. PETTIT: Well, Your Honor, I am not going to
7 tell you I have done a lot of research on that precise
8 question. But I think generally that is the precedent of
9 the Commission; that in terms of candor determinations, the
10 Commission looks primarily at the principals rather than the
11 employees of licensee corporations in this instance.

12 JUDGE SIPPEL: But Mr. McKinnon was a pretty -- I
13 mean, he was a pretty responsible employee, wasn't he? The
14 only person with a title of executive vice president, and
15 given those kinds of supervisory responsibilities is having
16 some significance in the company.

17 MR. PETTIT: Well, I wouldn't doubt that he had
18 some significance in the company, but I don't think either
19 consistent Commission precedent that a non-officer, non-
20 director, non-owner would be considered a principal of the
21 company.

22 It's not to say that he did not play a role in the
23 company. I think he testified in his deposition that he
24 supervised the answering of telephones, the actual
25 construction of projects, and those sorts of things. But

1 this, you know, is a small corporation, as we know, a
2 closely held corporation, and he never held the sort of
3 executive function that I think is consistent with being a
4 principal of the company.

5 JUDGE SIPPEL: Well, I hear your position. I'm
6 not going to say one way or the other at this point what --
7 you know, where I am coming out on that. But I want to get,
8 really I was trying to get the question clarified more than
9 I was trying to get too deep into the discussion part of it.

10 MR. PETTIT: Well, that, in short, is the answer.

11 JUDGE SIPPEL: Thank you.

12 MR. PETTIT: We have consistently used
13 "principles" of Bartholdi to be those four individuals, and
14 I'm sorry for any confusion about that. So I really
15 appreciate the opportunity to clarify it.

16 JUDGE SIPPEL: All right. Well, now, you've
17 clarified your position. Let me ask this follow-up
18 question.

19 Is there any hesitation, or any reluctance, I
20 should say, on the part of Liberty on my relying upon that
21 kind of information in what is now Exhibit 67?

22 MR. SPITZER: Relying on what -- which
23 information, Your Honor?

24 JUDGE SIPPEL: The information that's in the
25 report with respect to the principals.

1 MR. SPITZER: In terms of who the principals are?

2 JUDGE SIPPEL: In terms of what --

3 MR. SPITZER: Or state of knowledge of principles?

4 JUDGE SIPPEL: State of knowledge.

5 MR. SPITZER: Well, it depends how you define it.

6 In other words, and, again, we have not relied upon the
7 report.

8 JUDGE SIPPEL: I know. You keep telling me that,
9 but can I rely on it?

10 MR. SPITZER: No, not in terms of presuming that
11 it is a fair statement of the evidence, or fair statement of
12 what people note. And I assume we can get to that later if
13 you were to ask. Your necessary question is going to be why
14 not.

15 (Laughter.)

16 JUDGE SIPPEL: Well, I might hold that one.

17 MR. SPITZER: Okay. Yeah, that might be
18 problematic for us to answer it. But I cannot say yes, Your
19 Honor, you can -- we are acquiescing in your reliance upon
20 any of the specific conclusions in here about knowledge that
21 is perhaps attributed to Mr. McKinnon.

22 JUDGE SIPPEL: Well, let me ask the question
23 straightforward.

24 The report was given to the Bureau in response to
25 a Section 308 request.

1 MR. SPITZER: Right.

2 JUDGE SIPPEL: And you told the Bureau that Mr.
3 McKinnon had knowledge.

4 MR. SPITZER: That's -- no, no, no. What it says
5 is it appears that he supervised construction, was aware
6 that some paths had been initiated without authorization,
7 and he appears to have believed such operation was covered
8 by test license.

9 JUDGE SIPPEL: All right.

10 MR. SPITZER: Now, why --

11 JUDGE SIPPEL: So as far as that goes, as far as
12 that goes, would I be entitled to rely on that?

13 MR. SPITZER: Not without considering all the
14 other testimony that was been elicited thus far.

15 JUDGE SIPPEL: All right, I --

16 MR. SPITZER: Then you can make your
17 determination.

18 JUDGE SIPPEL: I grant that. I certainly would do
19 that. What I am trying to do is I'm trying to get the -- I
20 am trying to see in what context Liberty stands behind this
21 report.

22 MR. SPITZER: Oh, we stand behind it absolutely as
23 a fair statement of the understanding of the lawyers who
24 prepared this report as of the date it was submitted. And
25 what I am suggesting is that since that date there have been

1 questions raised, there have been a multitude of
2 depositions, additional documents produced and discovered.
3 Therefore, the state of knowledge not only -- the state of
4 knowledge of those who prepared this report may have
5 changed. Therefore, when Your Honor reads this report, it
6 should be read in the context and in the setting in which it
7 was prepared.

8 In other words, we are not backing away from this
9 as an accurate statement of what we knew and believed as of
10 that date.

11 But as Your Honor has seen, since then there has
12 been testimony from people whose credibility we may differ
13 about, but credibility of some witnesses whom we may agree
14 about, which, as we all know, is not directly squared with
15 what's in this report. And it is not because we would now
16 sit here and say those witnesses have perjured themselves.
17 it's because perhaps other facts have come forward which
18 would perhaps change our conclusions, because we prepared
19 this report in a given time having done an investigation as
20 thorough as we could at that time.

21 JUDGE SIPPPEL: You are saying -- and, of course, I
22 mean, this is really asking the obvious, but this is a
23 document that speaks as of August 14, 1995.

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

25 JUDGE SIPPPEL: And it doesn't speak as of January