

1 of '97 --

2 MR. SPITZER: Precisely.

3 JUDGE SIPPEL: -- when testimony was coming.

4 MR. SPITZER: That's correct.

5 JUDGE SIPPEL: All right. Okay.

6 Is Martin September, is he still the chief
7 engineer?

8 MR. BEGLIETER: No. Well -- no, no. That was for
9 a brief period, Your Honor.

10 JUDGE SIPPEL: Well, who is it now? Well, tell me
11 who -- well, the chief engineer -- Mr. Nourain is now with
12 Freedom as an employee.

13 MR. BEGLIETER: That's correct, Your Honor.

14 JUDGE SIPPEL: Does Liberty have a need now for an
15 engineer? I mean, is this a --

16 MR. BEGLIETER: He's a sub -- he is not an
17 employee of Bartholdi. He is an employee of --

18 JUDGE SIPPEL: But is he doing that work? I am
19 trying to think of --

20 MR. BEGLIETER: Yes.

21 JUDGE SIPPEL: So he is back doing it.

22 MR. BEGLIETER: As part of a subcontract
23 agreement.

24 JUDGE SIPPEL: Right. But he's the one that's
25 doing the work?

1 MR. BEGLIETER: Right.

2 MR. SPITZER: That's correct.

3 JUDGE SIPPEL: Mr. Sterber is no longer doing it?

4 MR. SPITZER: That's correct.

5 JUDGE SIPPEL: All right.

6 MR. BEGLIETER: You would have to bring in someone
7 from RCN or Freedom's counsel to explain to you what kind of
8 control there are on Mr. Nourain.

9 JUDGE SIPPEL: No, I really wasn't looking for
10 that. I just wanted to -- the name Martin Sterber was in
11 that report, and I wanted to get it clear in my mind and
12 perhaps for the record just where is whereabouts are right
13 now.

14 When I say "his whereabouts," I mean what is
15 really -- what his connection is now with the operations.

16 I was going through the lists, and I'm on the
17 report now, tab B, can someone direct me as to -- from the
18 tab B information can it be determined how many paths were
19 activated as to which there had been no applications filed?

20 MR. SPITZER: Your Honor, tab B was -- is that the
21 beginning of the charts, the copy that was --

22 JUDGE SIPPEL: Yes, that's right.

23 MR. SPITZER: And can it be determined how many
24 paths there were for which there was --

25 JUDGE SIPPEL: There had been no application

1 filed. is there such a category?

2 MR. SPITZER: No applications before the
3 activation?

4 JUDGE SIPPEL: That's right.

5 MR. BEGLIETER: I think you can determine it by
6 looking at the -- at chart -- I don't want to misspeak, but
7 I think you can determine it from looking at the charts.

8 JUDGE SIPPEL: All right. Well, we can come back
9 to that. I don't mean to -- this is not a test. I have
10 this and I'm trying to keep these categories straight in my
11 mind as I'm going through the report.

12 MR. SPITZER: I think the answer is that you can,
13 Your Honor, by comparing service date with license
14 application date, and this would be Chart 3.

15 In other words, Chart 1 -- this is now from the
16 best of my recollection -- building 1, Chart 1 is buildings
17 that were in compliance when activated. So there are either
18 no buildings that satisfy -- that fall into the category you
19 just asked about on Chart 1. Okay?

20 JUDGE SIPPEL: Okay.

21 MR. SPITZER: Chart 2 is buildings that were
22 activated with licenses pending. So, again, by license by
23 definition had been filed.

24 If you go to Chart 3 -- if you go to Chart 3, it
25 will say buildings activated without authorization that are

1 now in compliance with license. And there you would compare
2 license applications filed with first service date. And so,
3 in theory, buildings where the service date preceded the
4 license application date would be in the category you are
5 discussing.

6 JUDGE SIPPEL: Compare file date with first
7 service date.

8 MR. SPITZER: Correct.

9 JUDGE SIPPEL: Is that the idea?

10 MR. SPITZER: That is correct, Your Honor.

11 JUDGE SIPPEL: And how many of those -- would it
12 take too much time to just tick them off to check the ones?
13 There aren't too many, are there?

14 MR. SPITZER: Well --

15 JUDGE SIPPEL: There are quite a few.

16 MR. SPITZER: Unfortunately, the chart is kind of
17 lengthy.

18 JUDGE SIPPEL: Yes.

19 MR. SPITZER: Now, how many, at one point we may
20 have known offhand how many buildings actually fell into
21 that category. And then you have 2(b), which are the four
22 buildings discovered during the investigation where -- and I
23 think --

24 JUDGE SIPPEL: Right, I followed that. That
25 one I -- that one is broken out very clearly.

1 MR. SPITZER: Right. So then you would have to
2 just merely compare those two columns in Part 3. I think
3 then that would complete the --

4 JUDGE SIPPEL: All right. Well, is there some --
5 has there been some filing or some submission with me where
6 that's pulled together? Am I asking for something that has
7 already been done two or three times?

8 If not, maybe you could do that when you submit
9 those -- when you give me what was left out of the
10 compliance report, maybe you could pull that together in
11 your letter for me too.

12 MR. PETTIT: Again, Your Honor, the information
13 you are after is those stations that were activated before
14 applications were filed?

15 JUDGE SIPPEL: That's correct.

16 MR. PETTIT: That's what you are looking for?

17 JUDGE SIPPEL: That's correct. That's the
18 category, that is what I am interested in knowing. And I'm
19 looking for a number, but obviously I need to have a number
20 related to the actual stations themselves. And if that can
21 be pulled together from these charts, that's what I would
22 like to get.

23 MR. PETTIT: Well, I believe they can be except
24 that that compilation has not been made, but I think it's
25 readily done from this chart.

1 JUDGE SIPPEL: All right. Okay.

2 Now, let me write that down.

3 (Pause.)

4 JUDGE SIPPEL: Oh, yes, here is the next question.
5 Has the Hughes test license, has that been found?

6 MR. SPITZER: No. In other words, other than the
7 copy that's here, I don't think so, Your Honor.

8 JUDGE SIPPEL: I mean, it seemed to me that that
9 was kind of a -- it was kind of a -- well, to that extent,
10 it was a weakness in the report in that the report was
11 coming up with this theory of Mr. McKinnon, and it was based
12 on this license, the Hughes license, and it never -- that
13 never showed up. But you say that --

14 MR. SPITZER: Well --

15 JUDGE SIPPEL: That's how I read the report.

16 MR. SPITZER: -- let me say this. The report --
17 I'm going to quibble a bit with your language.

18 JUDGE SIPPEL: That's all right. No, clarify it.

19 MR. SPITZER: The report didn't come up with the
20 theory. It was Mr. McKinnon's theory with respect to the
21 test license, and there was correspondence about the test
22 license, and there were some documents relating to the test
23 license that were found; correspondence back and forth with
24 Hughes and with others. So that there was no question there
25 had been some form of a test license that he believed he

1 could rely upon.

2 So, yes, we would agree that we did not find an
3 actual document that said this is a test license that covers
4 A, B and C. But there was sufficient correspondence about a
5 test license, and discussion of it with people from Hughes
6 and elsewhere such that it was clear there had been some
7 such document at some point.

8 JUDGE SIPPEL: All right.

9 MR. SPITZER: It was a belief that there had been
10 such document and it was clearly -- it appeared to be a
11 legitimate belief. It was not a post hoc creation.

12 JUDGE SIPPEL: Did the Bureau ever pursue that,
13 Mr. Weber, in terms of when you -- when you received that
14 information in August of '95.

15 MR. WEBER: To my recollection, no, Your Honor, we
16 did not.

17 JUDGE SIPPEL: There was no follow up on that or
18 did you just -- did you just not believe it?

19 MR. WEBER: I'm not sure if it was a matter of not
20 believing it, but it was not anything that we pursued
21 further.

22 MR. PETTIT: Your Honor, I think perhaps in part
23 because -- I won't speak for the Bureau, but it seems to
24 have been an incorrect assumption on the part of Mr.
25 McKinnon, or largely incorrect assumption on the part of Mr.

1 McKinnon.

2 JUDGE SIPPEL: All right. You mean incorrect in
3 the fact that there was no -- that there was no test
4 license, or incorrect --

5 MR. PETTIT: No, sir.

6 JUDGE SIPPEL: -- in the sense that his
7 conclusion was incorrect?

8 MR. PETTIT: His conclusion was incorrect. In
9 other words, that there had been, and this is certainly
10 typical of manufacturers, a test license for equipment, but
11 it would not have permitted the use that Liberty's engineers
12 at that time were putting it to.

13 JUDGE SIPPEL: All right. Again, I am just trying
14 to get some clarification on some things here.

15 Are the customers for the 19 paths, are they still
16 receiving free service?

17 MR. SPITZER: No. Well, Your Honor, we don't know
18 what RCN -- how RCN is doing, but I would be somewhat
19 surprised. We know that at some point Liberty began to bill
20 when the authorizations under the interim operating
21 authority or otherwise were obtained.

22 JUDGE SIPPEL: So Liberty began to bill when you
23 received the interim authorities?

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

25 JUDGE SIPPEL: Okay.

1 MR. BEGLIETER: Within the next month or so, the
2 next billing cycle.

3 MR. SPITZER: That's right.

4 MR. BECKNER: Was there an STA in September?

5 MR. BEGLIETER: It's been awhile, but I think so.

6 JUDGE SIPPEL: Was the Bureau aware of that, and
7 is that consistent with what the Bureau expected to see
8 happen?

9 MR. WEBER: I mean, I knew at some point they
10 started to bill, and I believe we learned that through the
11 discovery of this proceeding. I am trying to remember when
12 we exactly learned that they commenced billing the
13 customers.

14 And the Bureau never requested that they provide
15 free service to the people who were receiving unauthorized
16 service. That was purely Liberty's idea to, I think, try to
17 soften the impact of the fact that they were providing
18 unauthorized service.

19 JUDGE SIPPEL: All right. So that at least my
20 bottom line question is that there was -- there was nothing
21 inconsistent between any of the conditions on the interim
22 authority and Liberty beginning to start assessing charges
23 to their customers?

24 MR. WEBER: No, Your Honor. Nothing in the
25 interim authority that dealt with their billing procedures.

1 MR. SPITZER: Your Honor, I don't want to misstate
2 -- I want to put this right.

3 It was our understanding, I believe based upon our
4 conversations with the Bureau, that the interim operating
5 authority was akin to or identical to an STA. And when you
6 have an STA, you are permitted to bill, and it was therefore
7 our belief that upon acquisition of the interim operating
8 authority commencement of billing was permissible.

9 JUDGE SIPPEL: But the obtaining of the interim
10 authority was -- I mean, that was kind of a unique procedure
11 designed for this case, was it not?

12 MR. SPITZER: I don't know if it was designed for
13 this case, but I know that it was the result of
14 communications back and forth with the Bureau, and prior to
15 our having received it the Bureau knew we were not billing.

16 JUDGE SIPPEL: All right. But that's a different
17 question.

18 MR. SPITZER: But I don't know if it's been used
19 in other cases.

20 JUDGE SIPPEL: The Bureau has answered -- Mr.
21 Weber has answered my question. There was nothing expressed
22 or implied in granting the interim authority with respect to
23 billing --

24 MR. SPITZER: No.

25 JUDGE SIPPEL: -- one way or the other. I mean,

1 that was just not a condition, and the Bureau doesn't feel
2 that anything connected with the interim authority has been
3 violated because billing was renewed. So that answers my
4 question.

5 But an interim authority is different than an STA.
6 In my understanding, the STA, there is a specific procedure
7 for getting an STA. I mean, it's right there in the rules
8 on what you do to get one.

9 MR. BECKNER: Your Honor.

10 JUDGE SIPPEL: Interim authority can mean -- you
11 know, it depends. It's kind of one of these ad hoc
12 situations.

13 MR. BECKNER: I just want to note for the record
14 that Liberty received STAs on September of 1995 for all
15 these paths, and an STA is good for six months, and then can
16 be renewed. And then -- and that was a true STA which
17 they -- you know, which they applied for. I mean, a bunch
18 of them were applied for in the previous May.

19 And then when the hearing designation order in
20 this case came out, the Commission then granted interim
21 authority; in effect, replacing the STAs that had been
22 granted in September. They granted interim authority for
23 the paths that are the subject of this hearing, and the
24 other paths they granted, in effect, conditional licenses,
25 the paths that were not part of this hearing. I think I am

1 stating correctly exactly what happened and when, if that is
2 any assistance to you.

3 JUDGE SIPPEL: It is. So that the interim
4 authorities were in connection with the initiation of this
5 proceeding, so that there wouldn't be the need to run back
6 every six months and trying to get an STA renewed.

7 MR. BECKNER: Yes. And I think that is --

8 JUDGE SIPPEL: I mean, that's the long and short
9 of it.

10 MR. BECKNER: That's the way I look at it.

11 JUDGE SIPPEL: Okay, so that was really to
12 facilitate the prompt resolution of this case, huh?

13 (Laughter.)

14 MR. BECKNER: Well, you know, if Your Honor
15 recalls, I mean, it's -- I mean, back in the old days when
16 broadcast licenses were more easily challenged, it was quite
17 common that if a license was set, or, you know, if a renewal
18 license was set for hearing, that the licensee whose license
19 was up for renewal would be granted interim authority to
20 operate, you know, while the hearing was going on.

21 And, in fact, I think those -- that practice
22 predated the existence of STA because STA was a creature of
23 the statute. Interim authority is something the Commission
24 kind of made up.

25 JUDGE SIPPEL: All right.

1 MR. PETTIT: And it was typically in effect for
2 years, which I hope is not the model.

3 JUDGE SIPPEL: All right. I just wanted to get it
4 into context here. Thank you.

5 Is the compliance program that's reflected in tab
6 A, is that -- is that being honored now? I mean, is that in
7 effect and is that the compliance program that is being --
8 that is presently being implemented in the firm, in the
9 company?

10 MR. BEGLIETER: To the -- the answer is -- the
11 answer is that there are no, or there have not been in the
12 last period, probably since 1995, any new paths. All the
13 paths that Liberty have has -- I will state it for Your
14 Honor that that's the point.

15 Since this -- since what happened in 1996 at the
16 time in which STAs were being granted, and then throughout
17 whatever authority was granted, it certainly was in effect.
18 But since then there have been no new paths. So I would be
19 overstating the case if I was to say that that -- you know,
20 it's an active program. However, if Liberty or Bartholdi
21 were to get new paths, it certainly would -- would be in
22 effect.

23 JUDGE SIPPEL: It would be in accord, they would
24 act in accord --

25 MR. SPITZER: Right.

1 JUDGE SIPPPEL: -- with that compliance rule.

2 MR. BEGLIETER: Right.

3 MR. SPITZER: Right.

4 MR. BEGLIETER: There haven't been any.

5 JUDGE SIPPPEL: All right, I hear you.

6 Now, I want to go back to that first point, the
7 first question that I had raised that Mr. Spitzer responded
8 to, and that is I am now in a position where I can accept
9 Exhibit 67 as being Liberty's representation to the
10 Commission as of August of 1995, with respect to what
11 happened and who knew what in connection with these
12 unauthorized activations.

13 Is that a fair general restatement of what we
14 concluded?

15 MR. SPITZER: it was the attorney's assessment of
16 what had happened, yes.

17 JUDGE SIPPPEL: Well, is there any -- is there any
18 doubt that Mr. Price had other thoughts when he submitted
19 the affidavit with the report?

20 He wasn't acting as an attorney in that capacity,
21 was he?

22 MR. SPITZER: No, the affidavit certainly is his,
23 and he submitted the report as a statement of the attorney's
24 understanding. And I am not trying to fudge, but I just
25 don't want the Court to misinterpret.

1 It's not as though Mr. Price put up his hand and
2 swore that the lawyer's assessment factually was true. He
3 presented it as a result of any -- as anybody would, of an
4 internal investigation which was an effort to distill and
5 determine what had happened.

6 In other words --

7 JUDGE SIPPEL: I -- I --

8 MR. SPITZER: Let me put it another way.

9 I would not -- since candor is so central to this
10 hearing, I would not want to see a line of argument that if
11 in fact, as I now believe many in this room would now think
12 that the facts as they occurred are not perfectly
13 represented in this report, that somebody would then say Mr.
14 Price, by submitting the report with an accompanying
15 affidavit was misrepresenting to the Court or to the Bureau,
16 because this was presented as an accurate assessment and
17 best effort to distill what was known at that time.

18 JUDGE SIPPEL: All right, I heard what you said.

19 Now, the report in two places, at least two
20 places, I'm going to leave Mr. Ontiveros out of this
21 question because the reference to him in the report seems to
22 be even broader than with respect to the two points that I
23 am concerned with right now.

24 And that is, Mr. McKinnon and his rationalization
25 about the test license, and the reference to an attorney

1 from Pepper & Corazzini in April of '93, having knowledge of
2 unauthorized activations in 19 -- I mean, that's got to be
3 Ms. Richter because it refers -- in that part of the report
4 refers to her letter, which is the last tab in the report.

5 So, again, as of -- I take it that as of April
6 of -- I'm sorry. As of August of '95, that was the belief
7 of the attorneys that did the audit, that taking -- you
8 know, following through on your thought, Mr. Spitzer that
9 that was the -- that was the honest, sincere belief of the
10 attorneys who had prepared the report that Ms. Richter had
11 known about unauthorized activations in April of '93.

12 MR. SPITZER: If you would give us a moment, Your
13 Honor.

14 (Pause.)

15 MR. SPITZER: The easy answer, Your Honor, and I
16 don't mean to say it isn't the proper answer, the easy
17 answer is obviously at the time the report was written it
18 was an absolutely honest assessment of our belief.

19 What we are tripping over is the decisional
20 significance of the report because the significance of what
21 we thought that we as attorneys may have believed in August
22 of '95 is unclear to me.

23 And I agree with you. The answer -- the short
24 answer to your question is, yes, that is what we absolutely
25 believed.

1 Now, how does that bear on a decision that needs
2 to be rendered from this Court based upon testimony and the
3 record that is more complete in many respects.

4 JUDGE SIPPEL: Well, that's -- of course, and
5 that's my job in the final analysis.

6 MR. SPITZER: Right.

7 JUDGE SIPPEL: At this level, at this level.

8 MR. SPITZER: Correct.

9 JUDGE SIPPEL: But let me say that there appears
10 to be -- there appears to be an inconsistency with respect
11 to what was said in that report as opposed to Ms. Richter,
12 and what she testified to here in court.

13 Now, I don't want to delineate, but I think she
14 testified to something that is different from what -- and,
15 again, there was not a finding in the report.

16 MR. SPITZER: Right.

17 JUDGE SIPPEL: But this is what you had inferred
18 in the report.

19 MR. SPITZER: That inconsistency is there, and
20 it's quite clear.

21 JUDGE SIPPEL: All right.

22 MR. SPITZER: The next question becomes what does
23 the Court wish to do with it. I mean, that -- you know, the
24 inconsistency is there. There is no question.

25 JUDGE SIPPEL: Well, what it leads me to think at

1 this point is that Ms. Richter was asked this question in a
2 number of ways, including by myself. I don't know whether
3 she was asked the question that way in connection with this
4 audit report, and that gets into the sticky wicket of the --

5 MR. SPITZER: Indeed it does, Your Honor. And
6 there are many things we would like to say that we are not
7 free to say without, you know.

8 JUDGE SIPPEL: All right. All right, well, I
9 would -- I would certainly think that it would be fair to
10 conclude from that report, even though it is, as qualified
11 as you stated, it's the work product, basically the work
12 product of the attorneys after you did a heck of a lot of
13 work to find out what was going on, and it speaks as of
14 August of '95.

15 MR. SPITZER: Right.

16 JUDGE SIPPEL: But it certainly instructs me that
17 there were unauthorized activations back in -- prior to this
18 time of the 19 -- that we are talking about in this case.
19 In '93, there were some activations.

20 MR. SPITZER: Absolutely.

21 JUDGE SIPPEL: All right.

22 MR. SPITZER: The charts are --

23 JUDGE SIPPEL: The charts are going to show that.

24 MR. SPITZER: Yes.

25 JUDGE SIPPEL: All right.

1 MR. SPITZER: There were multitudes of such
2 activations.

3 (Laughter.)

4 JUDGE SIPPEL: Multitudes of -- not my word, not
5 my word.

6 MR. SPITZER: Multitude can be two, Your Honor,
7 before the client gets upset.

8 JUDGE SIPPEL: All right. Now, I'm going to skip
9 down now to what I have on the relevance of what's -- what I
10 see the relevance of this report, and, again, this is in the
11 nature of what my preliminary thoughts on it, but I have
12 spent a lot of time developing it, so it's not just -- I am
13 not just winging these.

14 There might be some impeachment value to the
15 report, and we have just gone over, I think, the most
16 significant of that. But it's an impeachment value of a
17 limited type, and the question that I have is do we go back
18 and drag these witnesses back in again to see if they can be
19 impeached -- if the testimony -- not them personally maybe,
20 but if the testimony or the story that's being presented
21 here can be impeached even better, in better ways, or
22 different ways. And I am just disinclined to do that.

23 It's -- I mean, exactly how much -- how much could
24 be done to undercut the testimony of the witnesses in this
25 case, the witnesses being Mr. Ontiveros, Mr. Nourain,

1 perhaps -- I hesitate to say that there would be any value
2 at all in -- even if we were able to get everything that's
3 privileged and go back and take Mr. Nourain on the stand. I
4 can't see really any value of that at all, and Ms. Richter,
5 and Mr. Price, I mean, that would be -- that would be highly
6 speculative because something else would have to kick in
7 with respect to getting Mr. Price back on the stand and
8 going down this same line of questioning with him.

9 Again, these comments are only directed towards my
10 review of the report, and where I am coming out in terms of
11 further proceeding, further discovery, further proceedings
12 here on this case.

13 The report -- well, I have got this in several
14 categories, but I have come to the conclusion, I and Mr.
15 Beckner, I don't see any reason why this report has to be
16 scrutinized for completeness and accuracy, and I have read
17 very carefully the portion of Liberty's brief with respect
18 to, again, this issue of the privilege and how Liberty
19 intends to pursue the privilege, and I know the Bartholdi
20 case goes to the report. Bartholdi's case does not go to
21 the underlying documents, and I would say at a different
22 time in this case, if the theory had -- if the theory or the
23 reasons for more discovery were laid out by the Bureau and
24 by Time Warner, I would be -- I would be basically in your
25 corner. But I think that this has just gone too far now,

1 and I have got two problems.

2 First of all, if we spend the next couple of
3 months taking testimony and depositions, getting documents
4 and bringing people back into the courtroom here, it's still
5 speculative as to what good that is going to do.

6 And, secondly, I am taking Liberty at its word,
7 there is going to be some documents that are going to become
8 contested, and the issue is going to go right up to the
9 Commission, and then the case gets put on hold. And for
10 what benefit, I have no idea. I mean, I really don't.
11 Nobody is going to know until you see the documents, if you
12 ever do see the documents.

13 So I am inclined to take this report and permit
14 the parties to submit limited proposed findings on the use
15 of that report in this case, and shut this case down, and
16 let us all get on to other things.

17 If anybody has a -- I mean, I will listen, I will
18 listen to, because this obviously means I am revisiting what
19 I wrote back on October in my order of 97-M177, and I
20 revisited that, but you notice I was very careful there in
21 terms of saying the limited discovery would have to be --
22 there would have to be further instruction on it. And as I
23 tried to go down, mentally to go down the road in terms of
24 what that would be, those instructions would be, this is
25 where I come out.

1 Now, let me first ask Mr. Weber what -- I mean,
2 how strongly does the Bureau feel about, or maybe you can
3 react to my -- this is my take on where we are.

4 Can you see it any differently? Do you think you
5 have something specific that you would want to go after?

6 MR. WEBER: No, Your Honor, and I think that's why
7 we purposely kept our comments a little more innocuous. We
8 were keeping it more general in the sense that we always
9 believe that discovery, if it can lead to new evidence, is
10 certainly a good tool. However, here, you know, we may end
11 up tending to agree with you that there probably is no new
12 evidence down that road to be discovered. And if there is
13 reasonably new evidence, then we certainly support
14 discovery. But here we --

15 JUDGE SIPPEL: But you are not going to know until
16 you get -- until you get at the documents which underlie
17 this report. And it's not that I am squeamish about going
18 down that road if I had -- if I had a good reason to believe
19 that there was really something there that would
20 substantially impact the direction of this case, the
21 evidentiary direction of this case. And I just -- nothing
22 has been raised, and I don't think anything can be raised.
23 I mean, this is not a failing of counsel at all.

24 I think, you know, Mr. Beckner and Mr. Holt have
25 done everything to bring it to a point where, you know, it

1 would justify trying to go after that evidence, but I just
2 can't see it.

3 I know Mr. Beckner isn't going to agree with me on
4 this, but what about you, Mr. Holt? I haven't been trying
5 to cut you out of this, but do you see where I am going on
6 this?

7 I mean, I just -- this case has been around much
8 longer than it was supposed to be, and I don't think that's
9 anybody's fault, but the fact is that it has, and I have to
10 have some very good reasons shows to me as to why I should
11 keep the record open further.

12 MR. HOLT: Your Honor, for a good portion of the
13 proceeding we have been essentially following Time Warner's
14 lead on discovery efforts. So I wouldn't want to say
15 anything inconsistent with what Mr. Beckner may be desire.
16 But I would say that certainly at a minimum I understood
17 from this order that you had anticipated that Liberty would
18 be responding to earlier discovery requests that have been
19 propounded that they had objections to based on the
20 privileged financial report, and that you expected that they
21 were going to produce a privilege log as well as a list of
22 documents that they deem would not be privilege.

23 And I figured that after reviewing those documents
24 and that privilege leg, we might have a better sense for the
25 universe of documentary material that might be subject to

1 additional testimony.

2 And I think that it might make a lot of sense to
3 at least proceed with that stage before making a decision
4 about the need to call back witnesses.

5 JUDGE SIPPEL: Well, let me hear from Mr. Beckner.
6 I will say you are perfectly proper in making that argument
7 because it's true. That's what I did. I was even -- I
8 reacted to the round of pleadings, the briefs in this case
9 on this report, and I felt convinced after going around the
10 first time on them that that's exactly what should take
11 place.

12 But I am not seeing it that way today after
13 further reflection and trying to come up with a list of
14 instructions as to what to do with respect to discovery,
15 because once we -- once we open that door, and start
16 insisting upon a list being produced, and then going after
17 certain select documents -- even if there are certain select
18 documents, the chances are there is going to be a contest
19 over at least one, and probably many, by virtue of the work
20 product nature that there must be involved in these
21 documents, and there we go.

22 I mean, it just ties the case up interminably on a
23 very narrow, I think, on really very narrow issues of
24 witness credibility, and I think that I have seen enough of
25 the witnesses that I can pretty much assess credibility at

1 this stage. I mean, unless you just want to keep going
2 after records in hopes of maybe destroying them. But I mean
3 that's -- I don't look upon this as being a search and
4 destroy mission.

5 What about it, Mr. Beckner? I know you're not
6 happy, but what about it?

7 MR. BECKNER: Well, Your Honor, when we originally
8 put the motion together, you know, obviously I anticipated
9 your concern with the amount of time this case has taken,
10 and I made a conscious decision. In fact, if I'm not
11 mistaken, the original motion was -- asked for more than the
12 version that you saw, and we made a decision to pull a bunch
13 of stuff out because I anticipated that you would want to
14 have a very good reason visible for every step that we were
15 going to ask you to take.

16 And so initially for me to come in and say, "Well,
17 Judge, we need a bunch of documents, we need depositions of
18 five people, we need more hearings and so on," you would
19 say, "Wait a minute, you know, you're talking about a major
20 commitment of time, and we don't even know whether this is a
21 trip worth making."

22 So what we did is we pared the request down to
23 simply requiring discovery that had been propounded back in
24 the beginning of the case to be responded to, and that was
25 simply who wrote the report and who was interviewed so we