

1 know -- which, frankly, was never privileged, and was never
2 work product.

3 And then we asked for whatever the underlying
4 documents were that underlay the report so that when the
5 report says, as it says here, "Pepper & Corazzini became
6 aware in April 1993 that Liberty had in certain instances
7 initiated microwave serve prior to obtaining licenses," we
8 knew what it was that -- you know, to use Mr. Spitzer's
9 term, you know, what the lawyers had to come to that
10 conclusion. I mean, I could grab a guy off the street and
11 he might say this same sentence, and that will be worthless.

12 On the other hand, if the author of the report
13 wrote this sentence after having interviewed the principal
14 players, maybe he had signed statements by them, maybe he
15 had tape recordings of the interviews, then this is a much
16 more significant conclusion and entitled to much more
17 weight.

18 And we don't know as we sit here today what is
19 behind this. We don't know if there are signed statements
20 from any of these people. It's not uncommon in an
21 investigation to get such statements. We don't know if
22 there are tape recorded interviews with these people that
23 were done. And what this report is really about is that
24 it's a classic prior inconsistent statement of a witness
25 about a material matter.

1 So that's why we approached this in this step-by-
2 step manner. You haven't heard us ask you to take anybody's
3 deposition except Mr. Stern's, because of these two really
4 interesting documents which we never had and which he
5 apparently forgot about when we did depose him because he
6 made no reference to them.

7 You haven't heard us ask you to bring back Mr.
8 McKinnon and Mr. Price and Ms. Richter and Mr. Barr for one
9 more deposition or one more session in the witness chair
10 here. In fact, frankly, I'm not interested in having them
11 back. You know, they have made their statements, and they
12 are going to have to live with them, whatever they are.

13 What I am interested in is this report, what is
14 behind it, because as I understand it when you are going to
15 have to do is to sit down and decide when Mr. McKinnon or
16 Ms. Richter, or Ms. Richter, as you said, was asked five
17 different ways by you and by me and maybe by Mr. Weber, I
18 can't recall, you know, about what she knew in April of '93,
19 and gave a pretty consistent answer, you have got to decide
20 whether or not that was a truthful statement.

21 And the point is, is that there are more people
22 who are running around at Liberty or at Liberty's law firm,
23 and this includes say Mr. Ontiveros, who do know about
24 unlicensed operations before 1995, the less likely it is
25 that someone like Mr. Price, who is running the show,

1 doesn't know about it, as he says he doesn't know.

2 And the final point I want to make with respect to
3 Mr. McKinnon, Mr. Pettit says he's not a principal. Well,
4 that's true, he is not an owner. But he was described by, I
5 believe, both one of the owners and by himself as the chief
6 operating officer of the company at the time that he was
7 there. He was the guy running the show. I mean, he wasn't
8 just changing the light bulbs. He was running the entire
9 company.

10 And that essentially Mr. Price's role was to be
11 kind of the outside salesman, sort of the PR guy, and Mr.
12 McKinnon's role was to make it all work. And, in fact, Mr.
13 Milstein, Mr. Howard Milstein testified at deposition that
14 on reflection he thought he had made a mistake by not
15 replacing Mr. McKinnon because Mr. Price was not
16 particularly suited to running the company. His strength
17 lay in being a salesman.

18 So I think Mr. McKinnon's role is, you know, much
19 higher than Mr. Nourain's or Mr. Ontiveros's, and, you know,
20 quite frankly, and he was asked at his deposition, he never
21 said anything like, oh, yeah, we had Hughes licenses that we
22 relied on to justify, you know, our operation of various
23 microwave paths. His answers were unequivocal.

24 And so what we are proposing to do is to just
25 sweep all that underneath the rug so we can all get out of

1 town. You know, as we said in our papers and I'll say it
2 again, I think it's inappropriate for any party to threaten
3 a delay of proceedings by interlocutory appeals. We all
4 know what the rules provide. And if Liberty or Bartholdi
5 believes it has a privilege claim, it's entitled to assert
6 that, including to appeal to the Commission.

7 But, you know, in terms of delay the proceeding,
8 if an initial decision comes out and on review it's decided
9 that that decision was in error because this report was just
10 left on the table without exploration or inquiry, that's a
11 big waste of time too.

12 I mean, the only reason I raise that, Your Honor,
13 is to say I don't think we should look at that either way.
14 I don't think -- I mean, I don't honestly think that we
15 should say that if we had gotten this report a year ago, and
16 I understand Liberty is entitled to pursue their appeal
17 which they did, I'm not suggesting anything wrong about
18 that. You know, if we had gotten this report a year ago,
19 that we would have gone in and done the things that Time
20 Warner, you know, asked you to let us do, and the Bureau, at
21 least in their papers, seemed to think was a good idea, but
22 now because time has passed we are going to say, well, we
23 won't do that, we will just pass it up.

24 I mean, frankly, Your Honor, you know, my client
25 has no interest in prolonging this proceeding. Bartholdi

1 has sued my client in antitrust in New York, and we would
2 probably be better off with a resolution of this proceeding
3 because I'm sure, based solely on what Liberty has agreed to
4 with the Bureau in terms of, you know, a forfeiture, that
5 whatever comes out of it is probably going to be helpful to
6 my client in defense of the antitrust suit in New York. So
7 we are not interested in delaying this thing.

8 We would like to have a decision, but we think
9 this is too important, this report and what's behind it is
10 too important to just walk away from, and to have Liberty
11 says as -- you know, I'm not surprised to hear Mr. Spitzer
12 say, well, this was our impression that we had as of August,
13 and I'm not suggesting that there was any -- you know, any
14 deception or anything like that, but, in effect, to minimize
15 the report.

16 And bear in mind that Mr. Constantine, who has
17 never been here, told the Commission in September of 1996
18 that this report was better, it was a better investigation
19 than the Bureau could ever do; that we got to do things that
20 nobody else could ever do.

21 JUDGE SIPPEL: Well, I hear you, and, you know, I
22 am not at all happy with the situation.

23 MR. BECKNER: I mean, I strongly suggest, Your
24 Honor, that we follow a step-by-step procedure as we had
25 asked for. You know, we are not asking you to commit to a

1 huge amount of work, that we take one step at a time. And
2 if we get to a step where it makes no more sense to go
3 beyond that, then we quit. But I think to quit now before
4 we even know what's behind this report is just too soon.

5 JUDGE SIPPEL: Mr. Spitzer?

6 MR. SPITZER: I don't have much to add to what has
7 been said except to say there are neither signed statements
8 nor tape recorded -- I'm sorry? Nor were there ever,
9 obviously, I mean. We are not either Nixon or any other
10 White House.

11 (Laughter.)

12 There never were such documents. So I just throw
13 that out so that the scope of what -- there is not a sense
14 that that is -- there is a repository there waiting to be,
15 you know, the holy grail in terms of the evidence.

16 JUDGE SIPPEL: Well --

17 MR. SPITZER: What is there is just attorney/work
18 client.

19 JUDGE SIPPEL: I was going to say would you be
20 prepared -- would you be willing, I mean, if I asked you the
21 question here today, would you -- would you state for the
22 record an overview of exactly what the methodology was in
23 that? I mean --

24 MR. SPITZER: Sure.

25 JUDGE SIPPEL: How was the investigation conducted

1 and the report put together?

2 MR. SPITZER: The -- what we did was interview
3 those individuals whom one is likely to presume that we
4 interviewed.

5 JUDGE SIPPPEL: You said 20, the report says there
6 are 20, about 20 interviews.

7 MR. SPITZER: That -- which is -- hold on one
8 second.

9 (Pause.)

10 MR. SPITZER: We conducted a brevity of
11 interviews. Let me just leave it at that, of the people, or
12 people were interviewed which led us to the conclusions that
13 are in the report. We also assimilated a vast array of
14 documentation. That document, those underlying documents
15 were subjected to the document requests and were produced
16 pursuant to the document requests propounded by both the
17 Bureau, Time Warner and Cablevision as well.

18 The documentation that we needed to go through to
19 generate the charts was the -- by and large, the largest set
20 of documentation, and it took us literally weeks to try to
21 understand how the documents fit together to generate the
22 dates that are in those charts, in terms of activation
23 dates, STA dates.

24 It was, as I think Mr. Beckner, I think has
25 realized because I think he went and tried to go through

1 some of the process, it is a very difficult thing to take
2 all of these documents and these licenses and these STAs and
3 desegregate them to understand when each path was applied
4 for and an STA acquired, and even intrude to determine when
5 service was initiated because, as we know, billing and
6 service are not necessarily initiated at the same moment,
7 and the records we sifted through to try to generate those
8 reports were voluminous, and it took weeks of work to
9 generate that, the vast majority of the documents related to
10 the charts, and then we collectively interviewed many
11 witnesses, generating attorney/work product that was
12 ultimately reflected in the report.

13 JUDGE SIPPEL: And so -- okay. I mean, you said
14 there are no written statements, no signed statements.

15 MR. SPITZER: No, sir.

16 JUDGE SIPPEL: And no --

17 MR. SPITZER: No, sir.

18 JUDGE SIPPEL: -- tape recordings?

19 MR. SPITZER: No, sir.

20 JUDGE SIPPEL: All right. I just -- I still am --
21 this has me -- obviously, this is very disturbing for me,
22 because the circumstances of time, I think, has just crept
23 up to the point where it's going to affect -- it's going to
24 affect some judgment here on my part.

25 And if there were some -- you know, something

1 specific that I could put my hand on, I would say, you know,
2 I would want to take a look at the list. I would like to
3 take a look at the documents in camera. I would like to do
4 a lot of things. But I just don't see it going anywhere.

5 I mean, maybe it would, but it would be
6 speculative. It would be speculative. I think that the
7 witnesses have been grilled ad infinitum, the key witnesses
8 in this case both in depositions and at hearings before me.
9 And I think there certainly is relevance and some use that
10 can be made of this audit report since it was submitted --
11 it was a best effort made to submit something in response,
12 information in response to a 308 request.

13 But to use that as a fulcrum to try and go after,
14 you know, "smoking gun" type of evidence at this stage of
15 the case, it just -- I just can't justify it.

16 Go ahead, Mr. Holt.

17 MR. HOLT: If I may. I don't think Cablevision
18 would be inclined, nor I could probably fairly speak for
19 Time Warner, although I am sure Mr. Beckner will disagree,
20 to ask for any materials that were otherwise publicly
21 available documents, or to seek attorney/work product
22 materials at this point of the game.

23 But what I am interested in knowing is whether
24 there are documents similar to this April 20, 1993, letter,
25 the Richter letter, which was appended to the internal audit

1 and was never provided to us until the end of the
2 proceedings here.

3 There are other similar documents that were
4 gathered during the course of the internal investigation
5 that could be provided to us, or at a minimum, given to us
6 in a list. And there may be internal, you know, Liberty
7 documents that reflect knowledge of activations or knowledge
8 of the lack of authorization that would be directly material
9 to the concerns you have about what this internal audit
10 says.

11 So, you know, if internal Liberty documents were
12 gathered during the course of the investigation and used, in
13 part, to prepare these charts that Mr. Spitzer referred to,
14 I think it would be very helpful to have those documents, or
15 at a minimum, a list so that we can ask for additional
16 documents.

17 MR. SPITZER: Your Honor, I can --

18 JUDGE SIPPEL: Wait. Wait a minute.

19 Are you finished?

20 MR. SPITZER: I'm sorry, I thought he had.

21 MR. HOLT: So that we can ask for additional
22 documents should it appear from the list that they are
23 necessary.

24 MR. SPITZER: I can respond only by saying that if
25 there were any similar documents, they would have been

1 incorporated into the report. I think the fact that that
2 document was incorporated into the report and was rather
3 central to the reasoning and conclusions of the report
4 indicates that that document was there, it stood out, it was
5 somewhat of a unique, significant. There are no other
6 similar such documents.

7 MR. HOLT: Your Honor, I would suggest that that
8 would depend on the interpretation that the lawyers gave to
9 the document. The documents were gathered originally, and
10 then the lawyers determined that, you know, they weren't
11 going to include it in the report for whatever reason. I
12 mean, that's a judgment that they may have made.

13 But the bottom line is we have here appended to
14 the report an April 20, 1993, letter that has turned out to
15 be a pivotal document in this case that existed and was not
16 provided to us until the very last days of discovery, or the
17 hearings in this case.

18 And I think also it's important to bear in mind,
19 if I recall correctly, that there was a cutoff agreed to
20 early on before this internal audit report was made publicly
21 available between the Bureau and Liberty on the date for
22 production. Documents generated prior to a certain date
23 were not produced during discovery. So it's unlikely that
24 those documents existed that were provided to us in the
25 earlier phase of discovery in this case.

1 JUDGE SIPPPEL: Well, now, of course, I remember
2 the situation with the Richter letter, and you are
3 absolutely -- everything you say is absolutely right, but we
4 did permit Ms. Richter's deposition be taken, and she was
5 brought here from Colorado and testified for a day on the
6 stand.

7 It's not that -- I mean, I don't feel that the
8 case has been neglected. The difficulty is is that it's a
9 quandary here, and I am looking for -- everything that you
10 say makes eminent sense and it's very well argued and it's a
11 great advocacy position to take. But I just can't get -- I
12 can't see anything tangible that would warrant taking that
13 next step because once we take that next step I have to be
14 prepared, the Commission has to be prepared to take the
15 next, the next, the next and the next step. It's not just,
16 you can't do this incrementally unless you are willing to go
17 much further down the road. And I just am -- I mean, I just
18 don't think that it's -- I don't think that this situation
19 merits that.

20 You know, I mean, Liberty, they know that. I
21 mean, the document production in this case has been in
22 certain circumstances absolutely abominable, and people have
23 been embarrassed and people have been this and people have
24 been that, and, you know, as a result of that history am I
25 supposed to presume that we are going to go through that,

1 that we're going to find that again?

2 I think it reaches a point where I -- you know, I
3 just have to say, look, enough is enough, and if I am wrong
4 on that call, I'm wrong on it. But if I had some good reason
5 to believe that we were going to be able to make some
6 significant headway in finding more facts about this case
7 that are very significant to the decision-making process, I
8 would run that risk, but I just haven't been convinced it's
9 there. It might be there but I haven't been convinced that
10 there is a reason to believe that it's there, and that's the
11 standard that I'm looking for, and I don't have it.

12 I had asked, I guess it was more than asked, but
13 Mr. Beglieter was going to put together some kind of list or
14 start the process of putting together some kind of a list of
15 documents that were --

16 MR. BEGLIETER: What we did, Your Honor, is we
17 have gone through the records of the law firms. I think we
18 have one more law firm that has to be completed, which can
19 be done in a few days. We have done that. We have not yet
20 gone through documents that were at Liberty and are now with
21 RCN.

22 But, yes, we are well into the process that I
23 discussed with you. What we have come up with, Your Honor,
24 is really attorney/work product, and some other documents
25 that are nonprivileged that I would say are of dubious

1 value.

2 JUDGE SIPPEL: Well, you know, I just -- I hate to
3 cut it off on this basis, but I just -- I really, I just
4 feel that this case has been litigated to a -- properly so
5 it's been litigated to the point that it's been litigated,
6 but I just can't -- I can't justify pushing it any further.

7 What I am going to do, for better or for worse,
8 I'm going to set down two dates, next Friday, November 14,
9 for further proposed findings and conclusions regarding the
10 audit report. And then a week after that, November 21, for
11 a reply to that submission. And the first one, for November
12 14th, I'm going to limit that to 20 pages, and November 21st
13 will be 15 pages; no more than 15 pages.

14 I don't know if I did -- I better do this right
15 now before I close the record. I think I have received into
16 evidence TWCV Exhibit 67. Did I? Sometimes I get them
17 identified and we start talking and I forget.

18 I mean, I really am sorry to close the record on
19 this note because at a minimum you like to think that you
20 got -- that everybody got their fair shot at the case, and I
21 know that -- I wouldn't expect that Time Warner and
22 Cablevision are going to walk away feeling that way, but I
23 feel that the best has been done to bring this case to a
24 head, and again it's -- I just feel that taking that next
25 step is fraught with -- it's almost inviting significant

1 delay; not just a couple of weeks delay; I mean -- I'm
2 talking about months delay. I just can see it coming, and I
3 don't think that there is that much to gain from it.

4 If it means finding that certain people,
5 particularly attorneys, might have made poor judgments, you
6 know, that's -- as a general proposition the Commission
7 doesn't take licenses away from principals because --
8 principles -- they don't take licenses away from
9 licenseholders simply because an attorney has made a
10 miscalculation. And I'm not talking about disclosure now.
11 I mean, disclosure is a whole different kettle of fish. But
12 some judgment calls that were made here, and there were lots
13 of judgment calls that were made along the line. And, you
14 know, to try to pin a license denial or revocation on a
15 judgment call made by an attorney, it is -- the Commission
16 standard is a very tough one on that. They are very much
17 opposed to doing it. That's the Commission's policy.

18 MR. HOLT: Your Honor, just for purposes of the
19 record, I wanted to clarify. I don't believe that Liberty
20 has licenses for the paths at issue. I think that they are
21 operating under interim authority. The licenses haven't yet
22 been granted, so it's not a revocation per se. It's
23 actually a denial, and it's an assessment of whether they
24 possess the qualifications to receive a license in the first
25 instance, and they had been operating and receiving revenues

1 under this interim authority for quite some time. So they
2 have got the benefit of these authorizations over a long
3 period of time.

4 JUDGE SIPPEL: No, I understand that, but I think
5 the standard is going to be the same. I mean, you are
6 right, there is a distinction there, but the fact remains is
7 that, you know, to take away somebody's right to operate,
8 whether it's a -- the interim authority is there with the
9 intent that if Liberty ends up with a clear bill of health
10 after all this is over, that they are going to get something
11 that's permanent. So I mean, the Commission is willing to
12 accept that risk in the interim, that they have got at least
13 a responsible agent to that extent.

14 And if you are going to start lifting licenses or
15 authorizations under those circumstances, I will just
16 reiterate what I said, I mean, misjudgments by attorneys and
17 calling shots over the phone and whatnot is -- it's going to
18 be a difficult one to serve as a basis for denying a right
19 under that situation.

20 Again, I immediately draw the line at disclosure.
21 When attorneys are putting together disclosure documents and
22 were you have time for reflection and there are definitely
23 reasons why attorneys pick certain words to say at certain
24 times, that's a whole different kettle of fish, and the
25 clients are going to have to run the risk of the legal

1 advice they get on that one.

2 And what we are talking about here really, I mean,
3 what we are talking about here going into this audit report
4 and into the areas that you and Mr. Beckner have so well
5 delineated is more, as I see it, with respect to the former
6 than latter. And so where we come out on this, I just don't
7 see -- what do we call this cost benefit analysis? I just
8 don't see it paying off down at the end, and I know it's
9 going to be a very expensive road to go down. I mean, I
10 just know that.

11 So to the extent that they have given me
12 discretion to make these judgment calls, I am going to make
13 it here, and as I say, I'm sorry to close the record on this
14 note because both counsel on both sides -- all counsel here
15 have worked extremely hard in this case, but it's got to get
16 up to the next level fairly soon.

17 MR. WEBER: Your Honor, may the Bureau request
18 that the replies to the further proposed findings be filed
19 on the 26th of November, which would be the Wednesday before
20 Thanksgiving, as opposed to the 21st?

21 Ms. Power and myself will be out of town the
22 entire week of the 16th of November taking depositions in
23 another proceeding, so we will not be here on the 21st, and
24 we will be gone that entire week, so we won't be able to
25 work on any proposed findings. We can have Mr. Keam working

1 on them in our absence, but --

2 MS. POWERS: And he's going to be out of --

3 MR. KEAM: I am going to be out of town about five
4 days as well.

5 JUDGE SIPPEL: Well, why don't you give me some --
6 you want to --

7 MR. WEBER: Well, I just said --

8 JUDGE SIPPEL: -- call with some dates later on?

9 MR. WEBER: Well, I just said the 26th of
10 November, which is the Wednesday before Thanksgiving unless
11 we -- in other words, we will now be having a lot more time
12 for the replies than we actually have for the findings
13 themselves.

14 JUDGE SIPPEL: Well, that's a Friday. We can move
15 the findings up to the following Monday if that's a help,
16 and then -- I mean, if you want to get more time on the
17 other end.

18 MR. WEBER: I mean, I don't have a problem with
19 the 14th date. We won't be here on the 16th anyway. That's
20 when we have to leave to go take depositions in another
21 proceeding.

22 JUDGE SIPPEL: I see.

23 MR. WEBER: Or the 17th, rather. So the 14th is
24 fine. It's just we won't be here on the 21st or any time
25 that week.

1 JUDGE SIPPEL: And the 26th would be the Friday of
2 that week?

3 MR. WEBER: The Wednesday of the following week.

4 JUDGE SIPPEL: Oh, yes, okay. I'm sorry. I'm
5 sorry.

6 MR. WEBER: I mean, you can make it on the Friday
7 if you want, but that's just the Friday after Thanksgiving,
8 and I don't think anybody will be around then.

9 JUDGE SIPPEL: No, that's true.

10 Is this all right with everybody else, though? Is
11 the 26th --

12 MR. PETTIT: Don't have an objection.

13 MR. BEGLIETER: I have no objection to it coming
14 in after Thanksgiving so you have a few days to work on it.
15 You said you would be out the whole week, so that only gives
16 you three days.

17 JUDGE SIPPEL: Well, if it's going to come in --
18 wait a minute, let's go off the record. Let me go off the
19 record. Let's go off the record.

20 (Discussion off the record.)

21 JUDGE SIPPEL: Those dates have been changed. The
22 proposed findings will come in on the 19th of November, and
23 the reply pleadings will come in on December 2nd, which is a
24 Tuesday, and, again, they don't have to be filed until the
25 end of the day on that Tuesday. So hopefully that will

1 accommodate everybody's concerns.

2 That's it. Again, counsel worked very hard and
3 diligently in this case, and we will see what happens.

4 The record is closed. Thank you.

5 (Whereupon, at 3:06 p.m., the prehearing
6 conference was concluded.)

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HEARING DATE: November 5, 1997

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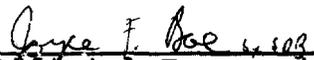


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