

ORIGINAL

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

In re Applications of)
)
READING BROADCASTING, INC.)
)
For Renewal of License of)
Station WTVE(TV), Channel 51)
Reading, Pennsylvania)
)
and)
)
ADAMS COMMUNICATIONS CORPORATION)
)
For Construction Permit for a New)
Television Station to Operate on)
Channel 51, Reading, Pennsylvania)

MM Docket No. 99-153

File No. BRCT-940407KE

File No. BPCT-940630KG

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: Magalie Roman Salas, Secretary
for direction to
The Honorable Richard L. Sippel
Administrative Law Judge

**MEMORANDUM OF NON-PARTY TELEMUNDO
NETWORK GROUP, LLC REGARDING PRIVILEGED
DOCUMENTS PRODUCED IN CAMERA IN RESPONSE TO SUBPOENA**

INTRODUCTION

Pursuant to the Order of this Court dated May 26, 2000 ("Order"), non-party Telemundo Network Group, LLC ("Telemundo") hereby provides this memorandum regarding the application of the attorney-client privilege and work product doctrine to the documents on the privilege log submitted to the Presiding Officer on May 25, 2000 as Exhibit 1 to Telemundo's Response To Reading Broadcasting, Inc.'s Opposition To Objections To Subpoena. Those documents are submitted herewith for in camera inspection by the Presiding Officer.

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List A B C D E

ARGUMENT

A. Elements For The Application Of The Attorney-Client Privilege.

“The attorney client privilege is one of the oldest recognized privileges for confidential communications [and] is intended to encourage ‘full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.’” Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998) (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)). “The attorney-client privilege protects confidential communications from clients to their attorneys when the communications are for the purpose of securing legal advice or services.” In re Lindsey, 158 F.3d 1263, 1267 (D.C. Cir. 1998). See also Tax Analysts v. Internal Revenue Service, 117 F.3d 607, 618 (D.C. Cir. 1997). The privilege is applicable when “the person to whom the communication was made is ‘a member of the bar of a court’ who ‘in connection with th[e] communication is acting as a lawyer’ and the communication was made ‘for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding.’” In re Lindsey, 158 F.3d at 1270 (quoting In re Sealed Case, 737 F.2d 94, 98-99 (D.C. Cir. 1984)).

Communications from a lawyer to a client with respect to legal representation are likewise protected. See United States v. Amerada Hess Corp., 619 F.2d 980, 986 (3rd Cir. 1980) (“Legal advice or opinion from an attorney to his client, individual or corporate, has consistently been held by the federal courts to be within the protection of the attorney-client privilege.”); Mead Data Cent., Inc. v. United States Dep’t of the Air Force, 566 F.2d 242, 254 n.25 (D.C. Cir. 1977) (“As applied in the federal courts, however, the [attorney-client] privilege has consistently included communications of the attorney to the client as well as vice versa.”).

Limitations on the attorney-client privilege have been narrowly drawn to remove the privilege only when the privileged relationship is abused. Martin v. Lauer, 686 F.2d 24, 32 (D.C. Cir. 1982). “Absent such abuse, or a waiver of the privilege, our legal system jealously protects the confidential status of attorney-client communications.” Id. at 32-33.

B. Elements For The Application Of The Work Product Doctrine.

The work product doctrine protects “against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” Mervin v. Federal Trade Commission, 591 F.2d 821 (D.C. Cir 1978). A three-factor test is used to determine whether the work product privilege applies, stating that the material in question must:

- (1) be a document or tangible thing,
- (2) which was prepared in anticipation of litigation, and
- (3) was prepared by or for a party, or by or for its representative.

Taylor v. Travelers Insurance Co., 183 F.R.D. 67, 69 (N.D.N.Y. 1998).

The work-product doctrine is even broader than the attorney-client privilege. In re Sealed Case, 737 F.2d at 808. “At the very least, [the work product doctrine] applies to material ‘obtained or prepared by an adversary’s counsel’ in the course of his legal duties, provided that the work was done ‘with an eye toward litigation.’” Id. at 809 (quoting Hickman v. Taylor, 67 S. Ct. 385, 393 (1947)).

In order to qualify as work-product, it is not essential that a suit or litigation have been commenced at the time the materials were prepared, or that it ultimately commenced. A potential claim is sufficient. See In re Sealed Case, 146 F.3d 881 (D.C. Cir. 1998). Moreover, documents prepared in connection with possible settlement negotiations are considered to have

been prepared in anticipation of litigation. See, e.g., Cities Service Co. v. FTC, 627 F. Supp. 827 (D.D.C. 1984).

“[T]o the extent that work product reveals the opinions, judgments, and thought processes of counsel, it receives some higher level of protection, and a party seeking discovery must show extraordinary justification.” In re Sealed Case, 737 F.2d at 809-10. The justification for overcoming the work product privilege is even greater in regards to attorney’s notes and memoranda. United States v. Paxson, 861 F.2d 730, 736 (D.C. Cir. 1988).

While the Supreme Court in Upjohn did not adopt a rule of absolute protection for an attorney’s notes and memoranda [t]he Court simply found . . . instead that discovery of such material required ‘a far stronger showing of necessity and unavailability by other means.’

Id. (quoting Upjohn, 449 U.S. at 402).

C. The Documents On The Privilege Log Are Covered By The Attorney-Client Privilege And Work Product Doctrine And Should Not Be Disclosed To Reading.

As described below, each of the documents contained on the Privilege Log are covered by the Attorney-Client Privilege and/or Work Product Doctrine and should not be disclosed to Reading. Pursuant to the Court’s direction at the Hearing on May 25, 2000, the documents will be treated by category.

The great majority of documents listed on the privilege log consists of communications from lawyers at Dow, Lohnes & Alberston, principally M. Anne Swanson, to Ann Gaulke, a principal of Dow, Lohnes’ client, Telemundo. Each of these documents on its face satisfies the following elements for the application of the attorney-client privilege. Each (1) consists of a communication between an attorney and her client; (2) was intended to be kept confidential; and (3) was for the purpose of securing or providing legal advice or services. See United States v. Amerada Hess Corp., 619 F.2d at 986; In re Lindsey, 158 F.3d at 1267.

Similarly, each of these documents on their face satisfies the elements of the work product doctrine. Each consists of: (1) a document or tangible thing; (2) which was prepared in anticipation of litigation; and (3) was prepared by or for a party, or by or for its representative. Tayler v. Travelers Insurance Co., 183 F.R.D. 67, 69 (N.D.N.Y. 1998).

Finally, in determining whether to provide Reading with access to these documents, the Presiding Officer should balance Telemundo's assertion of privilege and the clearly confidential nature of these documents against Reading's need to review these documents to prosecute its case. Indeed, since the documents "reveal[] the opinions, judgments, and thought processes of counsel," Reading is not entitled to obtain access to these documents unless it meets its burden of showing "extraordinary justification." In re Sealed Case, 737 F.2d at 809-10. None of these documents is remotely relevant to the designated issue regarding "greenmail" and provides no support for Reading's position. Thus, Reading cannot make the requisite showing of "necessity" that would entitle it to view these documents. United States v. Paxson, 861 F.2d at 736.

An analysis of the documents follows:¹

Litigation Strategy. TG00141. This document is protected because it clearly reflects confidential attorney-client communications and deliberations between Ann Gaulke and Anne Swanson and was also prepared in anticipation of litigation.

Renewal Proceeding. TD00026-29, TD00269-70, TD00339-344, TD00378-79, TD00403-04, TD00569-70, TG00142-45, TG00684-85, TG00782-83, TG00834-35, TS00030-33, TD00151. Each of these documents reflects attorney-client communications and constitutes attorney work product. These communications of Telemundo's counsel provide confidential

¹ For the Presiding Officer's convenience, the documents have been placed collated in folders according to the categories set forth below. Within each folder, the documents are arranged, not in chronological order, but by reference to "Bates-Stamped" numbers.

legal advice and analysis on the status of the renewal proceedings and were designed to protect Telemundo's interests under the affiliation agreement between Telemundo and Reading. Telemundo had a continuing interest in the renewal proceeding because, among other things, of the possibility of Reading losing its license and thereby being unable to comply with its obligations under its affiliation agreement to deliver Telemundo programming in the Philadelphia market. Accordingly, these communications are clearly privileged. Moreover, these documents constitute attorney work product and were made in anticipation of litigation because Reading's loss of its license could lead to litigation between Telemundo and Reading regarding the affiliation agreement. In addition, Telemundo has certain additional contract rights, including an option and right of first refusal, under the affiliation agreement that could have been implicated by the outcome of the renewal proceeding. Finally, many of these documents (such as TD00379) contain confidential attorney-client advice on settlement.

Appraisal and Settlement. TD00206-10, TD00240-41, TD00285-86, TD00333, TD00623-24, TG00050, TG00157. These documents reflect attorney-client communications regarding appraisal and settlement. For example, TD00240 and TG00050 (the same document) reflect Ms. Swanson's legal analysis of the adequacy of the appraisal technique.

Facilities. TD00174-75, TD00625-26, TD00635-40, TD00641-42, TG00038, TS00055. These documents reflect attorney-client communications regarding Ms. Swanson's and other lawyer's legal analysis of Reading's facilities authorizations and pending applications, which is relevant under certain provisions of the affiliation agreement providing termination rights with respect to certain facilities changes. These documents also bear relevance to the analysis at issue in the attorney-client communications in the previous two categories. Many of these documents (such as TD00174-75) contain explicit attorney advice on issues that might result in a dispute.

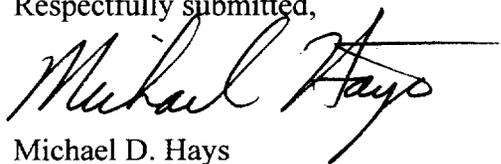
Therefore, they are not only attorney-client privileged, but were made in anticipation of possible litigation. For example, TD00635-40 is the analysis and review of proposed facilities changes of Reading by Elizabeth McGeary, another Dow, Lohnes lawyer.

Acquiring Interest in Channel 51. TD00167, TD00168-73. These documents reflect confidential legal analysis of Telemundo contract rights, including Telemundo's right of first refusal and option right. As reflected in TD00167, the memorandum (TD00168-73) was prepared for purposes of discussion with the client and providing the client with legal advice. Moreover, attempted exercise of some of those rights might result in litigation, thereby providing work product protection as well.

Miscellaneous. TD00199, TG00028. Both of these documents are communications by Ann Gaulke to Dow, Lohnes lawyers. They clearly are client communications reflecting information and requested legal services that are confidential.

WHEREFORE, Telemundo respectfully requests that the Presiding Officer decline to produce any of the foregoing privileged, confidential attorney-client communications and work-product to Reading.

Respectfully submitted,



Michael D. Hays
DOW, LOHNES & ALBERTSON, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036
Tel: (202) 776-2711
Fax: (202) 776-2222
Counsel for Telemundo Network Group, LLC

Date: June 2, 2000

CERTIFICATE OF SERVICE

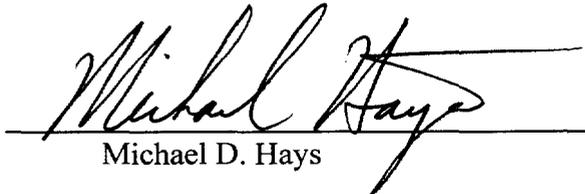
I hereby certify that, on this 2nd day of June, 2000, I caused a copy of the foregoing
“Memorandum Of Non-Party Telemundo Network Group, LLC To Regarding Privileged
Documents Produced In Camera In Response To Subpoena.,” to be delivered (as indicated
below), addressed to the following:

The Honorable Richard L. Sippel
Chief Administrative Law Judge
Federal Communications Commission
445 12th St., S.W. – Room 1-C864
Washington, D.C. 20554
(BY HAND and TELECOPY)

Norman Goldstein, Esquire
James Shook, Esquire
Enforcement Bureau
Federal Communications Commission
445 12th Street, N.W. – Room 3-A463
Washington, D.C. 20554
(BY TELECOPY and MAIL)

Thomas J. Hutton, Esquire
Holland & Knight, L.L.P.
2000 K Street, N.W.
Suite 200
Washington, D.C. 20037-3202
Counsel for Reading Broadcasting, Inc.
(BY TELECOPY and MAIL)

Harry F. Cole, Esquire
Bechtel & Cole, Chartered
1901 L Street, N.W.
Suite 250
Washington, D.C. 20036
Counsel for Adams Communications Corp.
(BY TELECOPY and MAIL)


Michael D. Hays