FCC MAIL SECTION

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FCC 00M-37

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

JUN 15 3 34 PM '00

In re Applications of	)	MM Docket No. 99-153
	)	
READING BROADCASTING, INC.	)	File No. BPCT-940407KF
	)	
For Renewal of License of	)	
Station WTVE(TV), Channel 51	)	
Reading, Pennsylvania	)	
	)	
and	)	
	)	
ADAMS COMMUNICATIONS CORPORATION	)	File No. BPCT-940630KG
	)	
For Construction Permit for a New	)	
Television Station to Operate on	)	
Channel 51, Reading, Pennsylvania	)	

ORDER

Issued: June 8, 2000 Released: June 9, 2000

Background

Documents were delivered on June 2, 2000, for in camera review on claims of attorney-client privilege ("A/C") and the work product exception ("WP") that have been asserted by Telemundo Network Group, Inc. ("Telemundo"), a non-party which was served with a subpoena for documents at the request of Reading Broadcasting, Inc. ("Reading").[1] Responsive documents were produced by Telemundo and made available to Reading on May 19 and 26, 2000.

Counsel also submitted a Memorandum of Telemundo Regarding Privileged Documents Produced in Camera in Response to Subpoena submitted by Telemundo on June 2, 2000. A Response was submitted by Reading on June 5, 2000. Both briefs were considered in connection with these rulings.

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[1] The Telemundo documents sought are those believed to be relevant to an abuse of process issue that was added in this case against Adams Communications Corporation ("Adams"). See Memorandum Opinion and Order FCC 00M-19, released March 6, 2000.

Legal Standards

Telemundo was required to submit documents that it had listed on a Privileged Documents Log (the "Log"). See Order FCC 00M-36, released May 30, 2000. The subject of in camera review and the limitation of such a review to the documents described in the Log were the subject of much discussion at a Prehearing Conference held on May 25, 2000. (Tr. 1479-1539.)

The principals for application of the A/C privilege and the W/P exceptions were explicated by the Commission in WWOR TV, Inc., 5 F.C.C. Rcd 6261 (1990).[2] The seminal cases relied on by both Telemundo and Reading are In re Sealed Case, 737 F.2d 94 (D.C. Cir. 1984) (A/C) and In re Sealed Case, 146 F.3d 881 (D.C. Cir. 1998) (W/P). There are narrow legal standards gleaned from those two cases that are applied in this review. First, with respect to A/C, the lawyer's communication must appear facially to rest in "significant and inseparable part" on the client's confidential disclosure. Second, communications from attorney to client are shielded by A/C only if they rest on confidential information obtained from the client. Third, with respect to W/P, the anticipated onset of litigation must apply to Telemundo and not just to this comparative renewal hearing. Fourth, Reading has shown a substantial need for documents that are claimed to be W/P and which relate to a possible settlement involving Adams Communications Corporation ("Adams").

It is established from a preliminary review of all of the documents that Ms. Gaulke is a Telemundo principal who is in regular contact with Ms. M. Anne Swanson, ("Swanson") a member of the firm of Dow, Lohnes & Albertson and outside counsel to Telemundo. Thus, communications between Ms. Swanson and Ms. Gaulke are attorney-client communications.

Telemundo's In Camera Production

On June 2, 2000, Telemundo produced six separate file folders of documents: Litigation Strategy, Renewal Proceeding, Appraisal and Settlement, Facilities, Acquiring Interest, and Miscellaneous. The rulings below are made with respect to those categories.

Litigation Strategy

This file contains a single one page document dated July 16, 1999 (TG00141). It is a fax from Ms. Ann Gaulke, a Telemundo principal, to Mr. Alan Sokol, Telemundo's COO.

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[2] Cf. also current decisions, Swidler & Berlin v. United States, 524 U.S. 399 (1998), and In re Lindsey, 158 F. 3rd 1263 (D.C. Cir. 1998).

The document is identified as one of five pages that were transmitted. A copy of the fax was directed to Mr. Cary Meadow ("Meadow"), another attorney working with Ms. Swanson on Telemundo matters at Dow, Lohnes & Albertson.

The Log describes the document as "fax cover sheet discussing Anne Swanson, Esq. legal advice." Telemundo asserted both A/C and W/P.

It is only the one page "cover sheet" that was produced for review. There must be an explanation provided as to why the fax was not produced for inspection in its entirety.[3] The "cover sheet" contains hearsay information from Ms. Gaulke to Mr. Sokol. She was not transmitting any new facts or advice to attorney Meadows. The last sentence recites the course of action that was agreed to by Ms. Gaulke and Ms. Swanson. That one sentence is protected by A/C since it involves legal advice on what was in the best legal interest of Telemundo in view of a possible lawsuit involving Telemundo. But the rest of the document has no application to anticipated litigation involving Telemundo, has no reference to legal advice, and is relevant to the added issue. Therefore, the one page document dated July 16, 1999 (TG00141) **must be produced** with the last sentence redacted.

Renewal Proceeding

This file contains eight documents and five duplicate documents. Six are letters on the firm stationary of Dow, Lohnes & Albertson from Ms. Swanson to Ms. Gaulke. These are letters dated May 19, 1999, July 14, 1999 with an attached fact summary memo on the first prehearing conference, and letters dated July 22, 1999, August 10, 1999, September 15, 1999, and September 29, 1999. The last document is a transmittal letter to the FCC.

Document TD00269-270 is a letter dated May 19, 1999. The Log describes document TD00269 as "letter discussing FCC renewal proceeding." The letter describes a prehearing conference order and gives subjective insights about the presiding judge. Those subjects are not entitled to protection as legal advice from the lawyer to the client. Three paragraphs describe information received by Ms. Swanson from a third party about an appraisal involving Reading with no advice given. There is also a one-line paragraph on personal-social matters that does not impart any sensitive information. There is no advice on any legal consequence of Telemundo's action, past or contemplated. See In re Sealed Case, supra, 737 F.2d at 98 (facts learned from third person conveyed by counsel to client not protected). The letter dated May 19, 1999 (TD00269) **must be produced.**

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[3] Counsel for Telemundo must produce the document or an explanation for its omission **by 12 noon on June 9, 2000**.

The letter dated July 14, 1999 (TD00339-344), is from Ms. Swanson to Ms. Gaulke, reporting on a prehearing conference and providing a memo of the conference that was prepared from notes taken by another attorney who was assisting Ms. Swanson. The Log recites "letter discussing FCC renewal proceeding." Only A/C is claimed. There was no legal advice given to Telemundo based on information provided by Telemundo. The commentary on the comparative proceeding included the scope of relevant evidence, methods of discovery, renewal dates and procedural calendar. There was no advice to Telemundo. There is no basis to protect this document as A/C. See In re Sealed Case, supra (advice must rest in significant and inseparable part on the client's confidential disclosure). Document TD00339-344 **must be produced.**

Substantially the same analysis applies to the letters dated July 22, 1999 (TD00569-570), August 10, 1999 (TD00026-29), September 15, 1999 (TD00378-379)[4], and September 29, 1999 (TD00403-404). The Log identifies all as discussing the FCC renewal proceeding and only A/C is claimed. All were letters from Ms. Swanson to Ms. Gaulke and all described developments in this comparative proceeding. There was no advice given based on information that Telemundo had provided. There are no circumstances presented by Telemundo (which has the burden) to warrant the conclusion that there was legal advice in the attorney's communications or that the client's disclosures were the basis for the attorney's communications concerning the renewal proceeding or of perceived circumstances that might be discussed later. Therefore, these four letters (July 22, August 10, September 15, and September 29) **must be produced.**

The copy of a Holland & Knight (Reading's counsel) transmittal letter (TD00151) dated July 22, 1999, addressed to the Commission Secretary in connection with filing a motion to enlarge issues has no relation to A/C or W/P. It is not accounted for on the Log and may have been inadvertent. There is a handwritten reference that offers no advice for a client. Therefore, the one-page Holland & Knight transmittal letter dated July 22, 1999, **must be produced**.

Appraisal and Settlement

The following documents are transmittal or third person documents that do not contain information from Telemundo on which advice was given or advice from counsel to Telemundo.

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[4] The last paragraph of the September 15 letter also recites circumstances that might engender settlement. Ms. Swanson requests that Ms. Gaulke consider those circumstances for future discussion. But the set of circumstances are furnished to Telemundo by the attorney and there is no present advice being given on which Telemundo would take action or refrain from action. Under applicable case law, supra, there is no showing that the letter rested on Telemundo's inseparable confidential disclosure.

Documents TD00206 to 210 are stapled together. The Log recites that Telemundo has claimed A/C for each of the documents in the packet on the grounds that the documents are "discussing WTVE appraisal." Documents TD00206 to 209 are fax transmittal cover sheets from Dow Lohnes & Albertson dated may 3, 1999. The first fax contains no information. (TD00206-207). It was sent to Mr. Meadow by Ms. Swanson. The second fax (TD00208-209) is from Ms. Swanson to Ms. Gaulke. The second fax transmits a copy of a letter dated April 22, 1999, from Mr. Howard N. Gilbert, a principal of Adams, to Ms. Swanson on the subject of contributing to the cost of an appraisal of WNET (TV). There is no separate claim of privilege for the Gilbert letter. The transmittal fax from Ms. Swanson to Ms. Gaulke contains advice on a recommended course of action. But it is not legal advice. The letter from Mr. Gilbert is not privileged because there is no legal advice that flows from that letter to Telemundo. See In re Seal Case, supra. Therefore, the packet of documents marked TD00206 to 210 **must be produced**.

Document TD00240-241 is a letter from Ms. Swanson to Ms. Gaulke dated May 11, 1999. The letter relays information on an appraisal firm and a proposed template for consideration. The Log identifies this letter as "fax cover sheet discussing WTVE appraisal" and only A/C is claimed. In the letter, there is no legal advice offered and the facts are all related to a third person. There are no facts provided by the client upon which advice is given by its attorney. The privilege does not apply. See In re Seal Case, supra. The documents **must be produced**.

Documents TD00285-286 are fax transmittal sheets that are stapled together. The fax transmittals are from Ms. Swanson to Ms. Gaulke. There is a note to the effect that a valuation document is being transmitted. That valuation is not attached.[5] The Log identifies the documents as "fax cover sheet discussing WTVE appraisal." Only A/C is claimed. There is no protection afforded to transmittal correspondence. See WWOR-TV, Inc., supra. The documents **must be produced**.

Document TD00333 is a one page letter from Ms. Swanson to Ms. Gaulke dated June 18, 2000. The Log identifies it as "letter discussing FCC renewal proceeding." Only A/C is claimed. The letter encloses a fax message from Adams' counsel that forwards a copy of the Federal Register publishing the hearing designation order. Procedural time lines were mentioned and circumstances that might engender settlement. None of these matters were facts learned from the client on which advice was being given. External information from a third person was merely forwarded to the client for consideration. The privilege does not apply. See In re Seal Case, supra. The document **must be produced**.

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[5] Counsel for Telemundo must produce the appraisal document for in camera review or an explanation for its omission **by 12 noon on June 9, 2000**.

Documents TD00623-624 are stapled together. The first document is a downloaded e-mail dated October 15, 1998, to Ms. Gaulke from Ms. Elizabeth McGeary of Dow, Lohnes & Albertson. The second document is from Ms. Gaulke to Ms. McGeary requesting unspecified information on WTVE. (The sequence of the documents should be reversed.) The Log identifies the documents together as "e-mail re legal issues" and claims only A/C. The message from Ms. McGeary states the subject of a meeting and suggests a time. There is no information provided by the client that serves as a basis for legal advice and there is no legal advice given. The privilege does not apply. See In re Seal Case, supra. The documents **must be produced.**

Facilities

Document TD00174-175 is a letter from Ms. Swanson to Ms. Gaulke dated April 26, 1999. The Log identifies the document as "letter discussing WTVE Fancy Hill permit" and cites A/C. It concerns opinion on prospects for a prospective antenna site for WTVE and related procedures. Of the letter's six paragraphs, only the last two give advice. The other paragraphs recite facts that were obtained from non-Telemundo sources by Ms. Swanson and were relayed to Ms. Gaulke in a factual status report. Those paragraphs are discoverable. See In re Sealed Case, supra. The paragraphs containing attorney opinion based on those facts are equally discoverable. Id. Therefore, the letter in its entirety **must be disclosed**.

Document TD00635-640 contains the handwritten notes of either Ms. Swanson or Ms. McGeary[6] pertaining to factual and legal issues concerning Reading. The Log identifies the document as "handwritten notes re: legal issues involved in Fancy Hill permit and FCC Renewal Proceeding" for which Telemundo asserts only W/P. None of the legal commentary appears to be based on information that Ms. Swanson received from Telemundo, although the full subject matter of the legal commentary was not described in the Log. None of the facts or advice appear to be in anticipation of any present or potential litigation involving Telemundo which is a prerequisite for W/P protection. See In re Sealed Case, 146 F.3d 881, 883 (D.C. Cir. 1998). There is no basis for protecting these notes as W/C because no circumstances are shown that the notes were prepared in anticipation of litigation and there was no advice given about risks of potential litigation in which Telemundo might be a party. Compare Id. at 887–888. The only litigation mentioned or alluded to is the renewal proceeding involving Reading, Adams and the Enforcement Bureau. Telemundo is not a party to the proceeding. The document **must be produced**.

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[6] It is impossible to tell which attorney authored the notes. The Log identifies Ms. Swanson as the author. Telemundo's brief at page 7 identifies Ms. McGeary as the author.

Document TD00641-642 is a fax transmittal sheet dated October 21, 1998, to Ms. McGeary from Ms. Gaulke. The faxed document is a letter dated October 21, 1998, from Micheal L. Parker, President, Reading Broadcasting, Inc. to Ms. Gaulke. The letter provides Telemundo with a factual status report on local litigation regarding a transmitter site. The Log recites "fax cover sheet forwarding letter discussing Fancy Hill permit." Only A/C is claimed. There is factual information furnished from a third party and there is no legal advice presented that was based on that information. The information was merely transmitted by the client to the attorney. The elements of A/C are not met and the document **must be produced**.

Acquiring Interest

Document TD00167 is a typed note from Ms. Swanson to Kevin Reed advising that Ms. Swanson had finished typing her thoughts and research. The Log recites "note re: questions, draft." Both the A/C privilege and the W/C exception are claimed. The typed note to Kevin Reed (TD00167) is merely a transmittal stating subject matter. It is not protected. WWOR-TV, Inc., supra. The note **must be produced**.

Document TD00168-173 appear to be Ms. Swanson's typed notes as indicated in the note to Kevin Reed (TD00168-170). There also are two pages attached that appear to be part of a letter to Ms. Gaulke dated October 7, 1998, from Mr. Parker. (TD 00171-173) The Log cites "notes re Telemundo questions and claim both A/C and W/P. The three typed pages of Ms. Swanson's thoughts and research are her product but only with regard to unspecified Telemundo questions. There is an indication that information cited in the notes came from third persons and not from Telemundo. The legal thoughts and opinions are directed toward the comparative renewal hearing to which Reading, Adams and the Enforcement Bureau are the only parties. The elements of neither A/C nor W/P apply to Ms. Swanson's notes and thoughts on the comparative case. See In re Seal Case, supra at 737 F.2d 94 (A/C) and In re Sealed Case, supra at 146 F.3d 881 (W/P). Documents TD00168-170 **must be produced**.

The two pages of Mr. Parker's letter to Ms. Gaulke dated October 7, 1998, have no protection under A/C or W/C. Neither are lawyers and the information and opinions of Mr. Parker are not those of Ms. Swanson's client. Documents TD00171-173 **must be produced**.

Miscellaneous

There are two miscellaneous fax transmittals in this file: fax dated April 30, 1999 from Ms. Gaulke to Ms. Swanson regarding "articles" on the Monroe overfiling (TD00199); and fax dated April 8, 1999 from Ms. Gaulke to Mr. Reed transmitting "document sent to us by WTVE for your review." (TG00028) The log recites "redaction

of comments on cover sheet [and] document otherwise produced" (199) and "fax cover sheet forwarding document for review" (28). The Log claims A/C redaction for Document 199 and AC for Document 28.

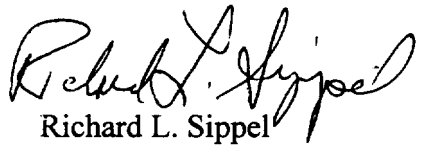
There was no document submitted for in camera inspection that was included in the "Miscellaneous" file group.[7] None of these documents warrant protection under A/C or W/P and all of these "miscellaneous" documents **must be produced**.

Conclusion

The documents that have been ordered to be produced will be delivered by hand to counsel for Reading Broadcasting, Inc. by **noon on June 12, 2000**.

SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION[8]



Richard L. Sippel
Administrative Law Judge

[7] Counsel for Telemundo must produce the document for in camera review or an explanation for its omission by **12 noon on June 9, 2000.**

[8] Copies of this Order were e-mailed to all counsel, including Telemundo's counsel, on the date of issuance. Counsel for Telemundo was also notified by telephone that the e-mail was sent and that there would be a short turnaround for production.