

1 happening because of the new rules is that you're getting, you
2 know, written questions instead, you're getting exactly the
3 type of focusing of interrogatories on just let's see who the
4 witnesses are that you've asked us to do here. So, what
5 you've done is really very consistent with what's happening in
6 the federal courts in civil-rights cases generally and we
7 don't object to it.

8 JUDGE STEINBERG: Mr. Zauner, do you want to
9 comment?

10 MR. ZAUNER: No. I think that's fine what I'm
11 hearing. It's -- that's all I'll say.

12 MS. SCHMELTZER: If I may comment?

13 JUDGE STEINBERG: Sure.

14 MS. SCHMELTZER: I think the problem with the
15 interrogatories, and I just got these this morning. I don't
16 think they're appreciably different from the prior drafts but
17 I haven't had a chance to look at everything. But Mr. Honig
18 told us on the phone that he had drafted these interrogatories
19 as though this were a Title 7 case and it's our position that
20 this is not a Title 7 case. Indeed, the Court of Appeals said
21 in the bilingual case that a license renewal proceeding is
22 neither an EEOC proceeding or a Title 7 case. And our concern
23 is with the scope of some of these interrogatories. We think
24 that they're objectionable. So, you know, I guess I want to
25 be cooperative here but we are going to have objections to

1 | some of them that we think go beyond the pale of the issues in
2 | this case.

3 | MR. ZAUNER: I wonder if Ms. Schmeltzer would tell
4 | us whether that objection would lie in light of what I seem to
5 | be hearing here which is that you really don't have to answer
6 | the interrogatories per se, but what you have to do is provide
7 | just the names of the persons --

8 | JUDGE STEINBERG: Well, Mr. Honig says he wants
9 | answers.

10 | MR. ZAUNER: Are you saying that you -- I thought
11 | Mr. Honig --

12 | JUDGE STEINBERG: No.

13 | MR. HONIG: -- at the end turned around and came
14 | back.

15 | JUDGE STEINBERG: No. He said he wants answers
16 | because --

17 | MR. ZAUNER: What you were suggesting was in line
18 | with the -- with what was happening in the courts and I
19 | thought that he was then acquiescing in that.

20 | MR. HONIG: No. There are three or four
21 | interrogatories that -- such as number nine and such as I
22 | think number -- for example, number 13, that don't ask for
23 | names but nonetheless ask for material that we thought it
24 | would be nonetheless be helpful to get now if we could. If as
25 | to those few interrogatories the church wanted to respond by

1 | saying these are the names of the people who know, ask them at
2 | their deposition, that won't stall the case at all and that's
3 | fine.

4 | JUDGE STEINBERG: Is there any way that you can get
5 | together and see if you can work it out and if you can't we'll
6 | have another conference? I mean, Mrs. Schmeltzer is seeing
7 | these for the first time. I guess they were filed yesterday.
8 | I don't have to do anything with it because they're not filed
9 | before me. But if there are any objections or whatever, then
10 | I get involved with it. Can you see if -- you all know how I
11 | feel about this and I think it's eminently fair for you to ask
12 | questions concerning -- you ought to have somebody at the
13 | deposition that's knowledgeable and can answer your questions
14 | on certain subject matter and I think it's fair you to tell
15 | the church in advance the questions you -- I think it's more
16 | than fair for you to tell them the questions you want answered
17 | so that they can have somebody there to answer them, and just
18 | -- why don't we see if we can work in that direction? If
19 | there are things that go beyond that, so be it and then you
20 | can -- but --

21 | MS. SCHMELTZER: May I ask that Mr. Honig review
22 | both these interrogatories and his motion for these documents
23 | in light of the documents that the Bureau has requested and
24 | strike those things that he doesn't need in this pleading?
25 | Because I think that will get more to the guts of --

1 JUDGE STEINBERG: Any problem with that?

2 MR. HONIG: Yes. Your Honor, a cursory review of
3 the Bureau's draft did identify two items that the Bureau
4 asked for that we did not ask for, probably should have. All
5 of the other requests of the Bureau seemed to track although
6 in somewhat different words various of the requests that we've
7 made but we've made a number that the Bureau didn't have and
8 we can I think maybe agree on harmonizing those.

9 JUDGE STEINBERG: Yeah, I think that would be --

10 MR. HONIG: Ms. Schmeltzer's point regarding the
11 scope of discovery I think was very well taken. I don't know
12 that we would agree that the scope of discovery on an
13 affirmative action 2080(b) issue is different from the scope
14 of discovery on a 2080(a) discrimination issue. Nonetheless,
15 reasonable people might think so. And if it turns out that
16 the scope is different then it's going to be perhaps unfair to
17 the church to have to respond before ruling on the motion to
18 modify.

19 JUDGE STEINBERG: Well, right now we don't have a
20 2080(a) issue, we have a 2080(b) issue. If we get a 2080(a)
21 issue you can supplement your discovery.

22 MR. HONIG: The difficulty is that suppose, for
23 example, the losing party on that motion goes to the
24 Commission with -- assuming that there is permission to do so
25 -- and the Commission issues a ruling the effect of which is

1 to potentially expand the scope of discovery but by then we're
2 in the middle of depositions.

3 JUDGE STEINBERG: Do you think you're going to get a
4 ruling that quickly?

5 MR. HONIG: No, but that, that's, that's an even --

6 JUDGE STEINBERG: And would you go to the Commission
7 or would you go to the Review Board?

8 MR. HONIG: It's an even bigger -- we'd go to the
9 Review Board. But it's an even bigger nightmare if it's June
10 20th, we're in trial, then there is a ruling saying oh, you
11 really should try this other issue also and if the scope of
12 discovery is different we're got to start all over again.

13 JUDGE STEINBERG: Well, let's not worry about it.
14 Right now we've got a 2080(b) issue and if we get a 2080(a)
15 issue we'll worry about it then. We may have another
16 conference or may not and -- but if the issue is modified then
17 of course you'd be able to supplement, and if it's necessary
18 to change the procedural dates to accommodate that we'll have
19 to do it. I mean, I concur that if we have an expansion of
20 the issues we don't want to have two hearings if we can help
21 it. But, okay. So, see if you can work out the
22 interrogatories. You know, my definite preference is for the
23 use of depositions. Now, the request for production of
24 documents, you're going to take a look at that in light of the
25 Bureau's and perhaps modify yours? I just wanted to remind

1 everybody that under Section 1.325 of the Commission's rules
2 you don't file the request with me, you serve them on the
3 church. If the church objects, they have to do so in writing,
4 and I just want to tell you that your objection should contain
5 your entire argument. Don't hold anything back because you're
6 not going to get another opportunity to object. Then if
7 there's an objection then the party filing the request for
8 production has to file a motion to compel with me and attach
9 the original request and the objection. And let me just say
10 if privilege is claimed for any document and if a motion to
11 compel is filed with respect to that document, I would like to
12 have that document submitted to me for in camera inspection
13 the business day after you receive the motion to compel, on
14 the same day or the next day, so that I can do it. I'm not
15 going to issue an order saying provide me with these
16 documents. If privilege is claimed and if there's a motion to
17 compel, send them over to me as expeditiously as you can.

18 MS. SCHMELTZER: Well, what if there is a category
19 of documents for which we claim privilege because they're
20 proprietary and it's not just one single document?

21 JUDGE STEINBERG: Then you object, you move to
22 compel and give me all the documents.

23 MR. HONIG: Your Honor, it might be helpful to know
24 your view on objections based on privilege other than lawyer,
25 client and attorney work product. If for example there's an

1 objection based on privacy interests of third parties no
2 longer under the control of the church, or --

3 JUDGE STEINBERG: I don't know what my position is
4 until I see the documents and the arguments.

5 MR. HONIG: The question I'm asking goes to a matter
6 of procedure and I thought perhaps if there are those types of
7 objections, business records objections, trade secret
8 objections and the like which often do arise in civil rights
9 litigation, often the way that in the federal courts the NAACP
10 handles this is by agreeing that certain material can be
11 submitted under seal the parties here would be able to have it
12 and see it and use it and -- but that we would file if
13 necessary, we'd have to make reference to it, separate sets of
14 pleadings so that the general public and competitors --

15 JUDGE STEINBERG: Do you remember this came up in
16 "Vancouver" with Mr. Henry's stuff?

17 MR. HONIG: That's right.

18 JUDGE STEINBERG: It was a mess, and I don't want to
19 do that. We were speculating up the gazoo, that's G-A-Z-O-O.
20 Am I right?

21 MR. HONIG: You are right.

22 JUDGE STEINBERG: And the ultimate -- the upshot of
23 it was everybody got to see what everybody wanted to see,
24 there were no exhibits under seal, there were no findings
25 under seal, there was nothing under seal. And I thought about

1 that afterwards and I said that's -- because it's an idiotic
2 way of doing things. How can you have -- I have to write a
3 decision. I'm going to write a decision and I'm going to say
4 you can publish this paragraph and not that paragraph?
5 Anybody wants to look at that paragraph you got to go to the
6 secretary's office? There are protective orders. You can
7 move for a protective order. If it's a situation like that
8 and the document is relevant you can move for a protective
9 order and maybe use fictitious names or hypothetical this
10 to -- if there's privacy interests we can call people Mr. X,
11 Mr. Y, Mr. Z. The Commission has done that. I forget in --
12 there was some case that was orally argued before the
13 Commission, this was when the Commission still did oral
14 arguments, where they had a whole bunch of lists of fictitious
15 names that they used because -- was it a payola thing? -- I
16 forget what it was, and Commissioner Lee was reading the real
17 names when he was asking the questions. It was bizarre. But
18 let's worry about that when we get to it. But I don't want to
19 do things under seal. For an FCC case it doesn't work.
20 Mrs. Schmeltzer, you understand what I'm talking about in
21 terms of getting me privileged -- documents in which privilege
22 is claimed?

23 MS. SCHMELTZER: Within one day of the motion to
24 compel?

25 JUDGE STEINBERG: Yeah. I mean, if you get the

1 motion today, you know, see if you can get the documents to my
2 office tomorrow. I mean, if the motion is filed today, if the
3 motion is filed today but you don't receive it until tomorrow
4 or the next day, obviously, you know, you can't --

5 MS. SCHMELTZER: Arguably, because our client is in
6 Clayton, Missouri it might take more than one day. If I could
7 have three days or two days or -- to get the stuff.

8 JUDGE STEINBERG: Okay, three days. How about three
9 days from the filing?

10 MS. SCHMELTZER: Right.

11 JUDGE STEINBERG: And then have Mr. Honig -- if you
12 can notify them or fax them, whatever. Even though your
13 service might be technically in the mail, just let them know
14 so that it gives him an opportunity to gather the material and
15 get it to me. And again, I'm not going to sit on this stuff.
16 I was going to give you a little speech about cooperating in
17 discovery and don't come to me unless you hit a brick wall,
18 but you seem to be doing that. I don't mean hitting the brick
19 wall, but I've seen cooperating and I would urge you to
20 cooperate. I think everyone here is experienced enough to
21 know what they're entitled to get and what they're not
22 entitled to get. And basically, if you think that I'm going
23 to give it to your opponent over your objection, just give it
24 to him and, you know, skip the middle step. If you absolutely
25 hit a brick wall and you can't cooperate then come to me.

1 Basically, in terms of a deposition schedule, is the Bureau
2 going to participate in depositions?

3 MR. ZAUNER: We don't know at this point.

4 JUDGE STEINBERG: Okay. Are you going to do
5 interrogatories or --

6 MR. ZAUNER: We're going to have to look at David's
7 before we make that determination.

8 JUDGE STEINBERG: Okay.

9 MR. ZAUNER: Right now we don't have any in the
10 works.

11 JUDGE STEINBERG: Okay. With respect to
12 depositions, I basically have one schedule. And to the extent
13 that it's possible, I don't want anybody deposed more than
14 once. If you're in the deposition and you ask a question and
15 the individual says I don't know without checking my records
16 and he's got to go back and check his records, maybe you can
17 have a sworn answer to supplement the -- instead of deposing
18 the individual twice, have a sworn answer or maybe you can
19 pick up the phone and do it informally and then stipulate as
20 to what the testimony was, like if you have follow-up. You
21 get a conference call, you ask the witness, the witness says
22 -- gives you the answers instead of, you know -- and then
23 everybody stipulates that these were the answers and that way
24 you don't have any worries about was he sworn, was he not
25 sworn. If everybody stipulates then we'll stipulate. Does

1 | that sound practical? But I don't think it's fair to depose
2 | these people -- to inconvenience these people more than once
3 | so if you can depose them one time that would be preferable.
4 | Any other discovery things we have to talk about?

5 | MS. SCHMELTZER: As far as depositions, we may be
6 | willing to bring some people here to Washington. I just
7 | wanted to mention -- I assume the rest of the depositions
8 | would either be in Clayton, Missouri or the town in which that
9 | person resides if they are no longer affiliated with --

10 | JUDGE STEINBERG: Right. If you can't agree on the
11 | place of a deposition, I'm going to rule it's going to be held
12 | in the city that's most convenient for the deponent. Again,
13 | this is another matter that you can agree on.

14 | MS. SCHMELTZER: I have one more question about
15 | discovery. And that is I want to make sure that I'm aware of
16 | any time frames in connection with these interrogatories and
17 | the motion that David just filed, are you going to withdraw
18 | these and refile after you'd had the chance to look at the
19 | Bureau's pleading?

20 | MR. HONIG: What I would propose to do is when the
21 | Bureau files its pleading perhaps there would be requests in
22 | common and what I would suggest we do is if in the next few
23 | days we can stipulate that these requests are in common and
24 | are a response to Bureau request number three will be deemed
25 | sufficient insofar as respond to NAACP request number

1 | seventeen and vice versa. If we get back to you in a few days
2 | I think it might be appropriate to adjust the dates
3 | accordingly so that you don't have to do two searches. We're
4 | not inflexible at all about the date of the response.

5 | JUDGE STEINBERG: According to the rules 1.323(b),
6 | basically, the answers or objections are due 14 days after
7 | service of the interrogatories. I would say that when you
8 | have an opportunity to perhaps edit your interrogatories and
9 | get Mrs. Schmeltzer a copy of the final version or whatever,
10 | just start the 14 -- you know, send a copy to me and notify me
11 | and just start the 14 days running again. As far as the
12 | request for production, don't -- I guess that has to be within
13 | 10 days. Again, work with the Bureau, come up if you can with
14 | a common request and then start the 10 days rolling from the
15 | common request.

16 | MR. HONIG: We put the same date, March 30th, on
17 | both motions because --

18 | JUDGE STEINBERG: Okay. That's more than the 10
19 | days.

20 | MR. HONIG: Yeah, following the procedure that is
21 | referred to in the new federal rules, if a party wishes to
22 | respond to an interrogatory -- do so completely by producing
23 | documents, they can do that and then that triggers the
24 | instructions and definitions in the other motions so we've got
25 | to have the same date.

1 MS. SCHMELTZER: Well, I just want to make sure
2 we're going by the Commission's rules.

3 JUDGE STEINBERG: Well see, the Commission's rules
4 are different from federal rules.

5 MS. SCHMELTZER: Right.

6 JUDGE STEINBERG: And if you want to agree
7 informally among yourselves to make the responses due to both
8 March 30th, that's -- even though it's beyond the Commission's
9 rules, that's fine with me. That's something that I'll give
10 you leave to do. Let me see, March 30th we get let's say
11 answers and objections or objections to certain document
12 requests, then I think you got five days to do a motion to
13 compel. Is March 30th a weekday?

14 MR. HONIG: Yes.

15 JUDGE STEINBERG: Okay. Is that agreeable to the
16 church?

17 MS. SCHMELTZER: Yes.

18 JUDGE STEINBERG: Okay. See, that gives you more
19 time.

20 MS. SCHMELTZER: Right.

21 JUDGE STEINBERG: And it also gives everybody time
22 to get together and work things out. I'm very much in favor
23 of harmony. Anything more on discovery? Okay. Let's go to
24 -- I know the answer to this, but I asked in the order prior
25 to prehearing conference whether KFUD has considered the

1 possibility of a distress sale of one or both of the stations,
2 the answer is probably no, otherwise you wouldn't be here.
3 Well, you would be here, but we'd be talking about something
4 different.

5 MS. SCHMELTZER: Right. The church is not
6 interested in a distress --

7 JUDGE STEINBERG: Okay. Has settlement been
8 discussed? I don't know that it's possible to settle cases of
9 this nature, but I included it in my prehearing order knowing
10 that one, two, three, four -- seven heads are better than one
11 and that there might be a possibility that seven heads could
12 figure out something that one can't.

13 MS. SCHMELTZER: We did meet on March 1, as you
14 know, with Bureau counsel as well and Mr. Honig and we
15 discussed the possibilities for settlement and the church was
16 interested in an attempt to settle this case. Mr. Honig
17 indicated at that time that he was in a position to entertain
18 settlement because the NAACP had not been through discovery.
19 So, we certainly can -- settlement after settlement.

20 JUDGE STEINBERG: Okay. I know in many cases of
21 this nature the NAACP reaches private agreements with the
22 licensee and I suggest that as a possibility. Of course,
23 that, that would not obviate the need for a hearing if the
24 Bureau thinks a hearing is still necessary. But basically I'm
25 throwing these ideas out to put things on the table.

1 MR. ZAUNER: Of course, the problem here is that we
2 have a misrepresentation issue against the church and that
3 that --

4 JUDGE STEINBERG: I know. I can see a distinction
5 being made between issue A and issue B where -- we cannot have
6 a consent agreement pursuant to Commission rules because the
7 consent agreement would not resolve the entire matters pending
8 before us. But I think it may be possible to resolve issue A
9 and issue B separately. This would all be pursuant to --
10 obviously, you can't do it by taking a vote and two people
11 vote yes and one party votes no, you can't do it that way.
12 But I can picture in my mind where there might be some
13 resolution of issue A but we have a hearing on issue B, or
14 something on issue B after discovery. It might be a summary
15 decision, it might be a limited hearing, might be -- I mean, I
16 don't know. Lots of things are discovered during discovery
17 that the Commission doesn't know about when they designate
18 cases for hearing, but I throw these possibilities out to let
19 seven minds work on them.

20 MR. HONIG: Your Honor, Ms. Schmeltzer has correctly
21 stated our position on discovery and I would add that as to
22 the misrepresentation issue we don't intend to take a very
23 active part in this trial. As a civil rights organization
24 we're interested in it primarily for the impact that any
25 findings might be made as to the subject matter of the alleged

1 misrepresentations on the 2080(b) or if it's modified 2080(a)
2 question. The national headquarters takes the position that
3 if at the conclusion of discovery there are still substantial
4 remaining questions going to whether there was intention
5 class-based or individually-targeted discrimination, or the
6 violations of affirmative action were so severe that even
7 under Commission cases where this seldom happens it would
8 justify denial of renewal, then my instructions are to take it
9 to trial.

10 JUDGE STEINBERG: So, I guess we'll have to wait
11 until after discovery on that. And the next subject is the
12 stipulation of uncontested facts. I guess that too will have
13 to wait until after discovery. Am I correct? Because if we
14 can have a big stipulation of uncontested facts and then just
15 have testimony concerning matters in dispute that would
16 obviously be a lot more efficient. I think when I read the
17 HDO I kind of made -- the HDO refers to a lot of documents.
18 The licensee's renewal applications, five FCC letters of
19 inquiry, licensee's responses to those letters, NAACP's
20 petition to deny, the licensee's opposition to that, the
21 NAACP's reply to the licensee's July 13th, '92 response to the
22 FCC's letter and the licensee's response to the NAACP's reply.
23 I think all of those documents or the relevant parts of them
24 ought to be in the record.

25 MS. SCHMELTZER: Along those lines, I spoke to

1 Mr. Zauner as to whether the Bureau had any other documents
2 other than the pleading and it's been represented to me that
3 the Commission has no other documents that pertain to this
4 case, no other records. So, if we can stipulate to that then
5 it's not necessary for us to pursue any discovery insofar as
6 the Commission is concerned.

7 JUDGE STEINBERG: So, why don't you put the
8 representation on the record and --

9 MR. ZAUNER: Well, Your Honor, the way Kathy has
10 stated it, we don't know whether -- that the Commission
11 doesn't have any other documents that might be relevant to the
12 issues in this proceeding, we don't know whether the
13 Commission does. We know that, you know, we don't, we have
14 not come across such documents, at least in this point in what
15 we've done.

16 JUDGE STEINBERG: Who else would have them?

17 MR. ZAUNER: I don't know offhand whether the EEO
18 branch may still have documents some place, but we have
19 everything from the EEO branch. I don't think anybody else
20 would, but perhaps we ought to think about that before --

21 JUDGE STEINBERG: Okay. Why don't we leave it like
22 this? You don't know of any other documents --

23 MR. ZAUNER: At this point --

24 JUDGE STEINBERG: -- other than those mentioned in
25 the hearing designation order. But you will undertake to find

1 any other such documents if there are any and if you do find
2 them you'll exchange copies of them with the church and the
3 NAACP? Is that okay?

4 MR. ZAUNER: Yeah, that's fine.

5 JUDGE STEINBERG: Okay.

6 MR. ZAUNER: We just don't know what another office
7 may have that we have not seem or misfiled. Or maybe a
8 complaint filed some place that someone has that has some
9 document that might prove to be relevant.

10 JUDGE STEINBERG: Okay. So why don't you go see if
11 you can look in the obvious places? Round up all the usual
12 suspects and I'll wait for Ms. Laden -- okay, why don't you,
13 you know, round up all the usual suspects, ask in the obvious
14 places and if you find anything then exchange it with the
15 other parties expeditiously?

16 MS. SCHMELTZER: And I assume if you know of any
17 prospective witnesses that you will let us know that as
18 well --

19 MR. ZAUNER: Correct.

20 MS. SCHMELTZER: -- witnesses for the FCC.

21 MR. ZAUNER: Yeah, I'm just nervous about
22 stipulating that, you know, within the whole Commission there
23 isn't a document some place that we may ultimately discover
24 that proves itself relevant to the issues in this proceeding.

25 JUDGE STEINBERG: Well, as of this moment you don't

1 know of any?

2 MR. ZAUNER: As of this moment we don't know
3 anything.

4 JUDGE STEINBERG: But if you find --

5 MR. ZAUNER: We think we have everything from the
6 EEO branch which is where we think everything would be because
7 they're the ones who --

8 JUDGE STEINBERG: Okay, and then just ask again just
9 to be sure and if you find anything in the future just
10 exchange it immediately.

11 MR. ZAUNER: That would be fine.

12 MR. HONIG: If I could add, Your Honor, I looked
13 through our files also to see whether there was anything that
14 we hadn't already provided the Commission before the hearing
15 designation order was issued and there is nothing.

16 JUDGE STEINBERG: Okay, and the next thing is
17 submission of direct cases in writing. The church has both
18 burdens so they would be -- well, I guess there wouldn't be
19 anything preventing anybody from exchanging a direct case.
20 Has any discussion been had on submitting direct cases in
21 writing?

22 MS. SCHMELTZER: I think we did have a discussion
23 about that at our March 1 conference and the church has agreed
24 to submit its direct case in writing.

25 JUDGE STEINBERG: Okay.

1 MS. SCHMELTZER: We think that any other -- if
2 anybody else has anything to submit, that that should be in
3 writing as well.

4 JUDGE STEINBERG: Okay.

5 MR. HONIG: It's possible that we may want to
6 present, you know, written documents and possibly the
7 testimony of witnesses. But we won't know until we see the
8 direct case whether we would need to and I don't want to
9 burden the record with material that's going to be unnecessary
10 because there's no direct case to which to respond.

11 JUDGE STEINBERG: Okay. Well, that would be --
12 would it be in a direct case or in rebuttal?

13 MR. HONIG: It would be rebuttal.

14 JUDGE STEINBERG: Okay.

15 MR. HONIG: But is Your Honor's preference to have a
16 date on which rebuttal evidence would be exchanged in advance
17 of trial?

18 JUDGE STEINBERG: Usually rebuttal is discretionary,
19 but I think it's also a fair thing to have. And my
20 inclination is that when the direct cases are completed the
21 rebuttal witnesses ought to be basically out in the hall ready
22 to come in and testify. If you can reduce their testimony in
23 writing and exchange it then obviously I think it's only fair
24 to let the opposing parties review it before they have to
25 cross-examine. So, I would say I would want the rebuttal

1 testimony in writing ready to be exchanged at the completion
2 of the direct case. If you want to do it earlier that's fine.

3 MR. HONIG: At the completion of --

4 JUDGE STEINBERG: At the completion of their direct
5 case.

6 MS. SCHMELTZER: I would urge that it be done
7 earlier simply because we don't want to have a surrebuttal and
8 if we --

9 JUDGE STEINBERG: I'm not going to let surrebuttal
10 --

11 MS. SCHMELTZER: Well, if we have someone here
12 testifying who could address matters raised -- that are going
13 to be raised in rebuttal then we could like to be able to do
14 that.

15 JUDGE STEINBERG: Well, I'll give you leave to move
16 for surrebuttal but I usually don't let surrebuttal.
17 Certainly not sur-sur, if that's the right word for it. Yeah,
18 if you can reduce your rebuttal to writing, exchange it with
19 the church as soon as you can -- I won't require you to do it
20 because I don't know that -- well --

21 MS. SCHMELTZER: Can he do it at some point after
22 the direct case?

23 JUDGE STEINBERG: Upon the conclusion of the
24 direct --

25 MS. SCHMELTZER: No, I mean after -- he's going to

1 get our direct case in writing.

2 JUDGE STEINBERG: I see, I see, your entire direct
3 case in writing.

4 MR. HONIG: May 27th.

5 MS. SCHMELTZER: So, sometime before the hearing
6 could he give us any rebuttal he might have?

7 JUDGE STEINBERG: I see, I see what you mean. What
8 do you think about that, Mr. Honig?

9 MR. HONIG: It's hard to know how much we'd have to
10 have until we see the direct case.

11 JUDGE STEINBERG: Right.

12 MR. HONIG: I would certainly be willing to indicate
13 that if at all possible we would try to get rebuttal testimony
14 in writing before the trial begins. If we can do it earlier
15 we certainly will.

16 MS. SCHMELTZER: Can we pick a date for that,
17 sometime between our direct case and --

18 JUDGE STEINBERG: Okay. We'll do that when we set
19 dates. Okay. I see what you mean. I was misunderstanding.
20 Okay. The last thing that I have is again something that came
21 up on March 1st during the informal talk that we had and that
22 was the first time that I heard reference to it and it took my
23 by surprise and I think I expressed surprise, and that was the
24 question of public witnesses. Has any more been thought about
25 that? Under the Commission's rule 73.3594(e)(2) which is the

1 public notice -- local public notice of designation for
2 hearing rule, the licensee has to tack onto its notice a
3 notification that public witnesses can come testify. However,
4 the caveat is that the testimony must be relevant to the
5 specified issues. And what they're supposed to do is write to
6 the Commission and I suppose then that will get filtered down
7 to Mr. Zauner or Ms. Laden and they will determine whether the
8 -- I think the public notice is if the Commission determines
9 that your testimony is relevant and material you'll testify.
10 So, I guess they have to determine that and then they put them
11 on, not that they're the sponsors, but that's what the rule
12 contemplates. Have any of you given any further thought to
13 the question of public witnesses?

14 MS. SCHMELTZER: Not since our discussion.

15 JUDGE STEINBERG: Okay.

16 MR. HONIG: We have, Your Honor. David and I have
17 had some experience in a case before Judge Chachkin, the
18 Trinity hearing, which might be illuminating. That is a
19 comparative renewal and there were two categories of witnesses
20 other than principals of the parties and so on that turned out
21 to be -- that we had to decide what to do with. One was so-
22 called public witnesses who were individuals who had evidence
23 relevant to the renewal expectancy issue. As to those people,
24 there was a limit of 30 that was put on them and ultimately no
25 one had to show up for the hearing which was in Washington.

1 All -- some depositions and then the direct written sworn
2 statements went in on stipulation, it was very easy. There
3 were also individuals who participated in the church
4 activities, liked the programming, supported the programming
5 and there was a videotape and so on, over 100 of those
6 declarations. None of them got in. We are somewhat fearful
7 that because the applicant here has access to the radio
8 facilities and also is a membership organization with
9 enumerable people who will have strong feelings that may or
10 may not be relevant to the issues, that especially if there is
11 a hearing in St. Louis that very great care be given to how to
12 handle persons who may or may not be sponsored by the church
13 who nonetheless want to come before you and testify. Our
14 inclination is that we can't possibly come up with, nor would
15 we want to, individuals who say we don't like the programming
16 or we don't think that it promotes diversity.

17 JUDGE STEINBERG: Okay. Well, clearly, if an
18 individual notifies the Commission that they want to testify
19 and it is determined that they have information that's
20 relevant and material to the issues, they're entitled to
21 testify and they would probably be put on by the Bureau. Then
22 of course you can go through the cross-examination and
23 determine whether -- how they got there. Maybe they heard an
24 announcement on the radio and they said okay, I want to do
25 this, that's one thing. First of all, the greatest

1 programming in the world can't mitigate a misrepresentation
2 issue and there's case law on that. I don't know if
3 meritorious programming or listeners' opinions of programming
4 can mitigate an adverse finding on issue A. I don't know. I
5 haven't done the research. But I don't anticipate having a
6 parade of public witnesses saying we love their programming
7 because I don't think that's relevant and material to the
8 issues. If there are cases that exist that say this type of
9 testimony can be received in mitigation of issue A, I would
10 expect the church to find it and if it's not any good I would
11 expect the opponents to point that out to me. So, let me
12 leave it that way. I don't know that it exists, I don't know
13 that it doesn't exist. I just haven't done the research. But
14 I know you can't mitigate misrepresentation testimony. And
15 then there's another question, and that is -- well, I'm not
16 going to say what the other question is because I don't want
17 to put ideas in anybody's head.

18 MS. SCHMELTZER: I assume if there are people that
19 call the Bureau about testimony that you will let us know
20 their identities.

21 MR. ZAUNER: I presume that if there are people who
22 call the Bureau about testifying that we will interview them
23 and ascertain whether or not they have relevant information.

24 JUDGE STEINBERG: See if you can reduce it to
25 writing too.