

FCC Received September 19, 1994 @ 2:05 p.m.

*Anna P. Bradshaw*

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**TRANSCRIPT OF PROCEEDINGS**

**SEP 26 1994**

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

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**IN THE MATTER OF:**

**SCRIPPS HOWARD BROADCASTING COMPANY**  
For Renewal of License of Station  
**WMAR-TV, Baltimore, Maryland**  
and  
**FOUR JACKS BROADCASTING, INC.**  
For a Construction Permit for a  
New Television Facility on  
Channel 2 at Baltimore, Maryland

**MM DOCKET NO. 93-94**

**DATE OF HEARING: September 8, 1994**

**VOLUME: 19**

**PLACE OF HEARING: Washington, D. C.**

**PAGES: 1553-1746**

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1 Before the  
2 FEDERAL COMMUNICATIONS COMMISSION  
3 Washington, D.C. 20554

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SEP 26 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

4 ----- )  
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6 )  
7 SCRIPPS HOWARD BROADCASTING COMPANY )  
8 For Renewal of License of Station )  
9 WMAR-TV, Baltimore, Maryland )  
10 Baltimore, Maryland )  
11 and )  
12 FOUR JACKS BROADCASTING, INC. )  
13 For a Construction Permit for a New )  
14 Television Facility on Channel 2 at )  
15 Baltimore, Maryland )  
16 ----- )

MM DOCKET NO. 93-94

17 The above-entitled matter came on for hearing  
18 pursuant to Notice before Judge Richard L. Sippel,  
19 Administrative Law Judge, at 2000 L Street, N.W., Washington,  
20 D.C., 20554, in Courtroom No. 1, on Thursday, September 8,  
21 1994, at 9:00 a.m.

22 APPEARANCES:

23 On behalf of Scripps Howard Broadcasting Company:  
24 RONALD L. WICK, ESQUIRE  
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On behalf of Four Jacks Broadcasting, Inc.:  
GREGORY L. MASTERS, ESQUIRE  
KATHRYN G. SCHMELTZER, ESQUIRE  
Fisher Wayland Cooper Leader & Zaragoza, L.L.P.  
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On behalf of FCC Mass Media Bureau:  
ROBERT A. ZAUNER, ESQUIRE  
Mass Media Bureau  
Federal Communications Commission  
Washington, D.C. 20554

## I N D E X

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
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Ms. Emily Barr

By Mr. Howard	1579			
By Ms. Schmeltzer		1580		

## E X H I B I T S

	<u>Identified</u>	<u>Received</u>	<u>Rejected</u>	<u>Withdrawn</u>
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Scripps Howard:

Exhibit No. 36	1559	1568		
Exhibit No. 37	1569	1570		
Exhibit No. 38	1572	1578		

Four Jacks:

Exhibit No. 30	1582	1729		
Exhibit No. 31	1605	1614		
Exhibit No. 32	1654	1670		
Exhibit No. 33	1698		1706	
Exhibit No. 34	1712		1718	

Page

Excerpts		1732, 1736, 1737, 1741
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Hearing Began: 10:02 a.m.	Hearing Ended: 3:35 p.m.
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Lunch Break Began: 12:25	Lunch Break Ended: 1:45 p.m.
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## P R O C E E D I N G S

1  
2 JUDGE SIPPEL: Again, as yesterday, I'm assuming  
3 that everybody has given their -- that all counsel have iden-  
4 tified themselves to the reporter. We have some preliminary  
5 matters that we want to cover first, as we discussed yester-  
6 day. Let me ask, Mr. Howard, how do you want to proceed with  
7 these -- with your documents?

8 MR. HOWARD: We've got the, the three documents that  
9 we're -- that you asked us to introduce into evidence this  
10 morning ready for introduction into evidence, Your Honor. I  
11 would ask -- I, I believe that our -- we had an Exhibit No. 35  
12 that you said bring to the hearing but that has not yet been  
13 received into, into evidence, and that was the additional FCC  
14 document.

15 JUDGE SIPPEL: All right. Well, that was proposed  
16 as --

17 MR. HOWARD: Right.

18 JUDGE SIPPEL: -- No. 35. You can --

19 MR. HOWARD: Right.

20 JUDGE SIPPEL: -- change that number if you'd like.

21 MR. HOWARD: The only thing I need to make sure is  
22 that we stick -- that that since we exchanged the -- Ms.  
23 Barr's testimony as Exhibit 36, that's already so identified,  
24 I'd like to keep that as 36.

25 JUDGE SIPPEL: I, I noticed that. Yeah, your, your

1 pagination is SH36-1. No problem with that.

2 MR. HOWARD: With respect to Ms. Covington's origi-  
3 nal notes, which Four Jacks has asked be introduced into the  
4 record, we, we could just stipulate that these are the notes  
5 and, and put them into the record, but that -- if that's  
6 without objection we'll close down this. Since we haven't got  
7 Exhibit 35 in, let's make them Exhibit 35, Ms. Barr's testimo-  
8 ny Exhibit 36.

9 MS. ABRUTYN: That's going to get confusing --

10 MR. HOWARD: Well, if we could -- can we -- since  
11 you have directed that that other exhibit will be accepted  
12 when it's offered, shall we just leave -- skip 35 and make  
13 this 36?

14 JUDGE SIPPEL: That would be find. I think that,  
15 that makes sense. So, this you're making 36 is --

16 MR. HOWARD: Ms. Barr's testimony.

17 JUDGE SIPPEL: -- Ms. Barr's testimony?

18 MR. HOWARD: Covington Barr's notes will be 37.

19 JUDGE SIPPEL: Covington notes in the original, 37.

20 MR. HOWARD: And the Covington deposition will be  
21 38.

22 JUDGE SIPPEL: 38, the deposition. All right.  
23 That's fine. The only question I have is with the Covington  
24 notes in the original, obviously there's only going to be one  
25 original, and then there's a duplicate copy of the exhibits at

1 | the Commission. There probably should be a copy made for the  
2 | reporter identified as, you know, as being -- well, a copy of  
3 | the original that's submitted as -- in other words, the re-  
4 | porter is supposed to receive this as an original and, and  
5 | one. It's just a mechanical thing. I'm not going to worry  
6 | about it right now. Proceed in the manner in which you've  
7 | outlined and I, I'll -- we'll take care of this with the  
8 | reporter, with "this" being that she's only going to have one  
9 | original. There won't be two, there won't be two documents  
10 | the same.

11 |           MR. HOWARD: Understood, Your Honor. At some -- it  
12 | might be noted for the record that with the original some of  
13 | those documents are front and back, written front and back.

14 |           JUDGE SIPPEL: We understand why. We understand  
15 | that this has been asked to be submitted in that form by Four  
16 | Jacks because the writing will be clearer on the original than  
17 | on any of the copies we have, so that the original will go  
18 | with the record all the way up.

19 |           MR. HOWARD: And to make the copies exactly like the  
20 | original, we, we -- the originals that will be submitted to  
21 | the court reporter will also be front and back, just like the,  
22 | the original.

23 |           JUDGE SIPPEL: Exactly. Exactly. All right, then.  
24 | Why don't we proceed with your first number, which will be  
25 | number 36, and we can have it marked and received. It will be

1 subject, of course, to voir dire, cross-examination, motions  
2 to strike when the witness takes the stand, but we can have it  
3 marked and put in right now.

4 MS. ABRUTYN: That's the original.

5 JUDGE SIPPEL: The reporter is now receiving --  
6 let's see, Ms. Abrutyn, what is -- what are you giving to the  
7 reporter now?

8 MS. ABRUTYN: That's the original of Scripps Howard  
9 Exhibit 36.

10 JUDGE SIPPEL: The reporter will mark that as Exhib-  
11 it 36. This is the written statement of Emily Barr and it's  
12 got four tabs, A, B, C, and D, attached. That will be marked  
13 as No. 36 for identification.

14 (Whereupon, the document referred to  
15 as Scripps Howard Exhibit No. 36 was  
16 marked for identification.)

17 JUDGE SIPPEL: Subject to the objections -- any  
18 objections which would be on the basis of motions to strike,  
19 is there any objection to receiving this into evidence at this  
20 time?

21 MS. SCHMELTZER: I'll be happy to give my objections  
22 now, if you want.

23 JUDGE SIPPEL: Maybe it would be better if Ms. Barr  
24 were on the stand.

25 MS. SCHMELTZER: I don't think it matters.

1 JUDGE SIPPEL: Well, we can do that. Because you,  
2 you're going to go down and you're going to have defined  
3 objections to certain matters in the document, correct?

4 MS. SCHMELTZER: Right.

5 JUDGE SIPPEL: I'd sooner do that on the -- with the  
6 motions to strike, and we'll, we'll put her on the stand and  
7 at that time she'll be able to respond to questions, if there  
8 are any.

9 MS. SCHMELTZER: Well, I don't really have questions  
10 in the nature of voir dire. I, I -- I mean, these matters  
11 really could be handled now.

12 JUDGE SIPPEL: All right. Go ahead.

13 MS. SCHMELTZER: On page 1 I would move to strike  
14 all of paragraph 2 as duplicative of material that's already  
15 in the case in earlier exhibits of Ms. Barr that were tendered  
16 in November of '93 and also as irrelevant to the issues that  
17 are now before us.

18 JUDGE SIPPEL: Okay. Anybody else? Mr. Zauner?

19 MR. ZAUNER: I have no objection. I think it's  
20 harmless. And it's background.

21 MR. HOWARD: It's identified as background, Your  
22 Honor.

23 JUDGE SIPPEL: Yeah. I'll overrule the objection.  
24 Receive it as background information.

25 MS. SCHMELTZER: In paragraph 4 I would move to --

1 in the third sentence I would move to strike the words "vast  
2 amount of" as qualitative, self-serving, and irrelevant.

3 JUDGE SIPPEL: Anybody else? Mr. Zauner?

4 MR. ZAUNER: I'm sorry. I'm having trouble finding  
5 that. It's in paragraph 4?

6 JUDGE SIPPEL: Paragraph 4.

7 MS. SCHMELTZER: Paragraph 4, the third sentence,  
8 the words "vast amount of."

9 MR. ZAUNER: I'm still having trouble --

10 MR. GREENEBAUM: It's the third, it's the third line  
11 of the first sentence.

12 MR. ZAUNER: Oh. I was looking for the third sen-  
13 tence.

14 MS. SCHMELTZER: It's the third line.

15 MR. ZAUNER: Third line. I was looking for the  
16 third sentence. I'm sorry. I -- it's still early in the  
17 morning. I wouldn't have any objection to striking that.

18 JUDGE SIPPEL: Mr. Howard, Howard, why is it --

19 MR. HOWARD: Yes, Your Honor. I think it's highly  
20 relevant. One of the issues here is the, the amount of the  
21 materials that Ms. Barr had to go through. It's -- so, it is  
22 relevant. It's amply supported by the attachments to Ms.  
23 Barr's testimony that were offered in the, in the hearing,  
24 including the, the network programming that was issue-  
25 responsive, the fact that 35 percent -- as, as I recall, it

1 was over 30 percent of the station's programming was devoted  
2 to news and public affairs. The Contact 2 programming, the  
3 PSA exhibit, the regularly scheduled public affairs program-  
4 ming. It's, it's amply documented in the -- in, in the rec-  
5 ord, because there was a vast amount of issues-responsive  
6 programming offered over the station during this period of  
7 time. And, finally, if, if Ms. Schmeltzer is troubled by the  
8 accuracy of it, Ms. Barr will be available for cross-  
9 examination.

10 MS. SCHMELTZER: Your, Your Honor, I think Mr.  
11 Howard may be operating under some kind of a mischaracteriza-  
12 tion here. The, the qualifying language modifies the word  
13 "programming," not the number of documents that she reviewed.  
14 And the amount of programming that was produced is not at all  
15 relevant to these issues.

16 MR. HOWARD: Well, it, it's relevant because it took  
17 a lot of documents to identify the programming, Your Honor.

18 JUDGE SIPPEL: Well, she, she does -- later on in  
19 her testimony she does recite the fact that there is a sub-  
20 stantial number of documents involved. I think she comes up  
21 with the number 10,000 at one point. So, you can make argu-  
22 ment on that, but I, I do agree with Ms. Schmeltzer's analysis  
23 of it in, in the context in which it's presented here. And I  
24 don't think that it -- well, I'm going to grant the motion --  
25 or the -- sustain the objection and the word "vast" will be

1 stricken so that it will just say "demonstrating the amount of  
2 issue..." -- well, the "vast" is stricken. Next objection?

3 MS. SCHMELTZER: On page 3 -- this is not an objec-  
4 tion, but I would like to arrive at a stipulation with Mr.  
5 Howard. At the -- the last sentence in paragraph 9 says, and  
6 it's referring to the NBC programming, it says, "These docu-  
7 ments, totalling nearly two thousand pages, were produced to  
8 Four Jacks." And the stipulation I would like to arrive at is  
9 that a number of these documents, they were produced but  
10 Scripps Howard later claimed that they were produced inadver-  
11 tently, that they were really work product and that they  
12 should not have been produced. Now, Scripps Howard never  
13 pressed that through a motion, but this came up at Ms. Barr's  
14 deposition on July 16th and it also came up on a phone call I  
15 had with Mr. Howard.

16 JUDGE SIPPEL: Well, why, why do we need that infor-  
17 mation in --

18 MS. SCHMELTZER: My, my only point is that all of  
19 these documents were not produced voluntarily. They were  
20 produced -- some of them -- many of them were produced  
21 inadvertently.

22 MR. HOWARD: But that's still voluntarily.

23 MR. GREENEBAUM: It just says they were produced.  
24 We don't characterize them one way or the other.

25 JUDGE SIPPEL: I, I --

1 MR. GREENEBAUM: That's a meaningless point.

2 JUDGE SIPPEL: Well, I'm -- yeah, I'm not going to  
3 pursue that at all. I'm -- no. If that's, if that's an  
4 objection, it's, it's overruled -- or request is denied.  
5 What's your next objection?

6 MS. SCHMELTZER: All right. My next objection is on  
7 page 14. And this is in paragraph 41; it's the fourth line  
8 from the bottom -- fourth and -- I'm sorry, the third and  
9 fourth line from the bottom of the paragraph. I would move to  
10 strike the words that modify Four Jacks. The words are "sud-  
11 den and previously unexpressed." This is a characterization  
12 of what Four Jacks wanted, and Ms. Barr is not competent to  
13 characterize what Four Jacks' interest in the documents might  
14 be.

15 JUDGE SIPPEL: Are you, are you saying that she's  
16 not competent to testify to that --

17 MS. SCHMELTZER: I'm saying she is not competent to  
18 say that our interest was sudden -- "sudden and previously  
19 unexpressed."

20 JUDGE SIPPEL: You would be able to ask her  
21 questions in terms of how she formulated those --

22 MS. SCHMELTZER: Well, I have no objection in saying  
23 "in light of Four Jacks' interest," but I, I -- she is cer-  
24 tainly not -- she can't say whether our interest was sudden or  
25 previously unexpressed.

1 MR. ZAUNER: What I don't --

2 MR. GREENEBAUM: What she's saying is that her --

3 MR. ZAUNER: -- saying that --

4 JUDGE SIPPEL: Wait. Let me hear from Mr.  
5 Greenebaum.

6 MR. GREENEBAUM: I think what she's saying is what  
7 her state of mind is, what her perception -- and I think  
8 that's relevant to understand what she's saying as to why she  
9 didn't misspeak or intend to mislead this Court or Four Jacks.

10 JUDGE SIPPEL: I'm sorry. Mr. Zauner?

11 MR. ZAUNER: Yeah. Yeah. I agree with that state-  
12 ment. I, I, I read this as, as the sudden and previously  
13 unexpressed to her, well, the interest in obtaining the  
14 documents --

15 JUDGE SIPPEL: Yes.

16 MR. ZAUNER: -- not that it's the previously unex-  
17 pressed interest of Four Jacks. So, I, I agree with Mr. --

18 JUDGE SIPPEL: If we just receive it as the state of  
19 mind, the state of mind evidence, in other words, it wouldn't  
20 go beyond this witness in terms of drawing any conclusions,  
21 would, would that satisfy your concern?

22 MS. SCHMELTZER: Well, not entirely.

23 JUDGE SIPPEL: Well, no. I mean -- well, okay.  
24 That's, that's, that's not a fair question on my part. I'm  
25 going to -- I, I'm going to limit that evidence as it's been

1 represented by Mr. Greenebaum in terms of considering it and I  
2 will overrule the objection. So, it's being received for a  
3 limited purpose. All right. Next objection?

4 MS. SCHMELTZER: That's, that's all I have, Your  
5 Honor.

6 JUDGE SIPPEL: That's it?

7 MS. SCHMELTZER: Yes.

8 MR. ZAUNER: Your Honor, the Bureau --

9 JUDGE SIPPEL: Does the Bureau --

10 MR. ZAUNER: -- has one on page 3. And in talking  
11 about her deposition, Ms. Barr states "At the same time, I was  
12 asked to describe the facsimile, and I gave a complete and  
13 accurate description of the contents of the facsimile." What  
14 she is doing there is stating what -- or restating what her  
15 impression of what she said at the deposition. I believe the  
16 best evidence of what she said at the deposition and whether  
17 it's a complete and accurate description of the contents of  
18 the facsimile would be the transcript of the deposition it-  
19 self. Here we have a characterization by Ms. Barr of what  
20 occurred at the, at the deposition rather than the actual  
21 deposition, which would give us the best evidence of, of what  
22 it was she said.

23 MS. SCHMELTZER: Well, I'd like to cross-examine her  
24 on this, Your Honor.

25 JUDGE SIPPEL: Well, you will be entitled to.

1 MS. SCHMELTZER: That's right.

2 JUDGE SIPPEL: Mr. Howard?

3 MR. HOWARD: Perhaps Mr. Zauner would be satisfied  
4 if we -- if Scripps Howard offered to supplement the testimony  
5 with copies of the -- with the, with the relevant pages of the  
6 deposition, and then the testimony can stand and the deposi-  
7 tion would be available?

8 MS. SCHMELTZER: I don't have any trouble with --

9 JUDGE SIPPEL: That, that would be --

10 MS. SCHMELTZER: -- putting in relevant pages of the  
11 deposition.

12 MR. ZAUNER: That would be absolutely fine.

13 JUDGE SIPPEL: All right. Well, I, I take it you  
14 were going to cross-examine her on this anyway. You indicated  
15 that.

16 MS. SCHMELTZER: Yeah, I, I -- what I would suggest  
17 as relevant pages of the deposition would be the pages that  
18 were attached to her July 29th deposition of this year.

19 MR. HOWARD: I'll -- we'll -- I, I'd like to look at  
20 that and then we'll, we'll reach an agreement on what the  
21 relevant pages are and --

22 JUDGE SIPPEL: All right. Well, once -- you know,  
23 but -- yes, but once, once Ms. Barr takes the stand, she's  
24 open for cross-examination on anything that's in here. So,  
25 whether that's in the record -- well, in other words, did the

1 -- the cross-examination via the deposition may be in place  
2 before you have an opportunity to get those pages into the  
3 record. I'm just saying that as a point of how this is going  
4 to play out. It -- I don't have any objection to what you're  
5 suggesting to do. You may want to do it in terms of -- you  
6 know -- the cross-examination perhaps will not cover every-  
7 thing in the deposition that you would find to be responsive  
8 to the point, so you would want to introduce more of addition-  
9 al portions of the deposition, and that can be done after  
10 she's off the stand.

11 MR. GREENEBAUM: I would suggest we wait and do it  
12 then.

13 JUDGE SIPPEL: Very good.

14 MR. ZAUNER: I withdraw my objection on that.

15 JUDGE SIPPEL: Fine. Thank you, Mr. Zauner. Any-  
16 thing else? There being nothing further, then Exhibit 36 for  
17 identification is now in evidence as Exhibit 36.

18 (Whereupon, the document marked for  
19 identification as Scripps Howard  
20 Exhibit No. 36 was received into evi-  
21 dence subject to the Judge's  
22 rulings.)

23 JUDGE SIPPEL: All right. And 37?

24 MR. HOWARD: Scripps Howard now offers the marking  
25 and admission into evidence as Exhibit 37 Janet Covington's

1 original notes and one copy.

2 MS. ABRUTYN: Does anybody need copies or did every-  
3 body bring theirs?

4 MR. HOWARD: We have an extra copy.

5 JUDGE SIPPEL: We have copies in tab -- one of the  
6 tabs to Ms. Barr's testimony, Tab C. I'd like to take a look  
7 at the original briefly and -- thank you. Go off the record  
8 for a minute.

9 (Off the record. On the record.)

10 JUDGE SIPPEL: I've just compared the copy in Ms.  
11 Barr's testimony of the Covington notes -- and I certainly  
12 have other sets of copies of these notes, but focusing on the  
13 ones that Ms. Barr is going to be testifying to -- and I find  
14 the original, with the exception of the very bottom line of  
15 the last -- the next to the last page, is sufficiently clear  
16 to read. I just want to make that note for the record. There  
17 is no need for me to consider further these original notes.  
18 They're going to go into the file as the, the -- the  
19 evidentiary file of this case as Exhibit 37, if the reporter  
20 will mark that, please?

21 (Whereupon, the document referred to  
22 as Scripps Howard Exhibit No. 37 was  
23 marked for identification.)

24 JUDGE SIPPEL: And they'll be received in evidence  
25 at this time as Scripps Howard Exhibit No. 37.

1 (Whereupon, the document marked for  
2 identification as Scripps Howard  
3 Exhibit No. 37 was received into evi-  
4 dence.)

5 JUDGE SIPPEL: All right. And after they are marked  
6 and identified that -- identified and marked by the reporter,  
7 during the break today I'm going to authorize the reporter to,  
8 to release the original to you, Mr. Howard, to, to your team,  
9 and have a photocopy made so that there is an original and one  
10 that are going into the file, and it will be -- the photocopy  
11 will be of that which was marked by the reporter. You  
12 understand my instructions?

13 MR. HOWARD: She's got a copy she could mark. Do  
14 you want -- would you rather --

15 JUDGE SIPPEL: You -- do you have -- did they give  
16 you an extra copy?

17 COURT REPORTER: (No audible response.)

18 JUDGE SIPPEL: Fine. I take that back. Do it that  
19 way. Mark -- in other words, mark the original and the copy  
20 just as you would in the normal course of events.

21 MS. SCHMELTZER: Your Honor, I'd just like you to  
22 take note of one item on the original, if the court reporter  
23 could hand it back to you.

24 JUDGE SIPPEL: Certainly. Please?

25 MS. SCHMELTZER: If, if you would compare --

1 JUDGE SIPPEL: Thank you.

2 MS. SCHMELTZER: -- that to -- if you would compare  
3 that to Attachment C to Ms. Barr's testimony, and it's at  
4 SH36-27? Now, if you look at the very top of that page,  
5 SH36-27, you'll, you'll notice in Ms. Barr's -- in the copy  
6 that's attached to Ms. Barr's testimony it looks like there  
7 had been some writing at the top, but you can't read it.

8 JUDGE SIPPEL: I see. I see what you're referring  
9 to, yes.

10 MS. SCHMELTZER: Right. And if you look at the top  
11 page of the original, this is the page that begins, "June  
12 3rd." It's a little more -- it's a little clearer and it, it  
13 seems to say, "Emily, well, it's not here, but I might..." and  
14 then I can't read the word, and then, "...to include..." and  
15 then I can't read the word after that. But I just wanted you  
16 to take notice of that, that something was erased.

17 JUDGE SIPPEL: All right. That was -- I, I, I  
18 acknowledge that, you pointed it out to me, and my recollec-  
19 tion is that that was covered in Ms. Covington's deposition.

20 MS. SCHMELTZER: Right.

21 JUDGE SIPPEL: And you certainly will have the  
22 original here today if you want to pursue that with, with Ms.  
23 Barr. I'm handing the original back to the reporter. And  
24 last, we should have the Covington deposition.

25 MR. HOWARD: Yes, Your Honor.

1 MS. SCHMELTZER: Okay. I'm sorry. That's all on  
2 that item.

3 MR. HOWARD: Scripps Howard would offer and move for  
4 admission into evidence as Exhibit 38 the deposition of Janet  
5 Covington, signed, and with an errata sheet.

6 JUDGE SIPPEL: And that would be --

7 MS. SCHMELTZER: Your Honor, I have never seen an  
8 errata sheet.

9 JUDGE SIPPEL: Well, let's have it marked as an  
10 exhibit, as Exhibit 38.

11 (Whereupon, the document referred to  
12 as Scripps Howard Exhibit No. 38 was  
13 marked for identification.)

14 JUDGE SIPPEL: Thank you, sir. Let's go off the  
15 record for just a minute.

16 (Off the record. On the record.)

17 MS. SCHMELTZER: Can I just clarify, Your Honor?  
18 Have you received the Covington notes? I didn't hear you say  
19 you received them.

20 JUDGE SIPPEL: If I, if I haven't -- if I didn't say  
21 it, I, I meant to say it. Yes, the Covington notes are re-  
22 ceived in evidence as Scripps Howard Exhibit No. 37.

23 Now we have Scripps Howard -- the deposition, rath-  
24 er, of Covington, Janet Covington, dated August 17, 1994,  
25 which includes her acknowledgement and an errata sheet

1 consisting of two pages, marked for identification as Scripps  
2 Howard Exhibit No. 38.

3 I had noted off the record, and the reporter will  
4 make these corrections, that on the errata sheet on the first  
5 page where it says page 17, line 26, that should be changed to  
6 -- remain page 17 but strike 26 and insert 2. And just below  
7 that where it references page 17, strike line 27 and insert 3.

8 All right. Now, having made that correction for the  
9 record, are there any objections to the receipt of the Coving-  
10 ton deposition?

11 MS. SCHMELTZER: Yes, there are, Your Honor. As you  
12 know, we have previously argued that this is part of Scripps  
13 Howard's direct case, that if, if they're going to sponsor  
14 testimony of Ms. Covington that she should be here so she can  
15 be cross-examined. I think the fact that at this late date  
16 they are making changes to the deposition, and there are at  
17 least three or four substantive changes among those changes, I  
18 think that requires her to be here for cross-examination. As  
19 you've previously noted, she does not fall under any provision  
20 of the rule that would excuse her appearance at this hearing.  
21 And while they submitted a letter from a doctor about her  
22 husband's health, that letter in no way says that Ms.  
23 Covington is not physically able to come here for a hearing.

24 JUDGE SIPPEL: All right.

25 MS. SCHMELTZER: So, for all those reasons we do

1 object.

2           JUDGE SIPPEL: All right. And I'm, I'm not going to  
3 -- we've already heard all the arguments with respect to the  
4 -- on the availability issue and, and the exercise of my  
5 discretion. I just want to stay now with the substance of the  
6 deposition. I understand. It's, it's -- if it comes in, it's  
7 going to come in over your objection. I recognize that. And,  
8 and I will say that, of course, the fact that she's not here  
9 to testify to be subject to cross-examination can -- arguably  
10 will affect the weight of the evidence. But my ruling is my  
11 ruling.

12           Now, with respect to the -- what are the substantive  
13 problems that you have with the errata sheet?

14           MS. SCHMELTZER: The sentences that you mentioned on  
15 page 17 change the substance of the testimony. That's lines 2  
16 and line 3 on 17.

17           JUDGE SIPPEL: Let me hear from -- how does the  
18 Bureau feel about those changes?

19           MR. ZAUNER: Just one second, Your Honor. Let me  
20 refresh my recollection. I don't believe it changes the  
21 substance. And even if it did, Janet Covington has a right  
22 to, to make a correction in her testimony if she believes that  
23 it more accurately reflects what happened. That's part of the  
24 reason that witnesses get copies of transcripts of depositions  
25 to review. But in any case, I don't think there's any real

1 change in the substance here, and I don't --

2 JUDGE SIPPEL: Well --

3 MR. ZAUNER: The matter isn't material anyway.

4 JUDGE SIPPEL: Well, materiality -- the relevance  
5 and materiality is something else again, but certainly there,  
6 there is a distinction recognized between substantive changes  
7 and just grammatical changes or, or changes to reflect things  
8 that would clearly be misleading. Let me just hear briefly  
9 from Mr. Howard's side of the table and --

10 MS. ABRUTYN: Well --

11 MR. HOWARD: We agree totally with the Bureau, and  
12 Ms. Abrutyn talked to Ms. Covington.

13 MS. ABRUTYN: Ms. Covington had not heard anybody  
14 else's testimony or anything prior to making these correc-  
15 tions, and these are the corrections that she felt were neces-  
16 sary for, for her to testimony to be true and accurate, and we  
17 certainly would dispute that it's substantive. If you read  
18 the entire paragraph in context, it's clear that's what she  
19 said or meant to say.

20 MR. GREENEBAUM: Maybe I don't understand the word  
21 substantive, but it seemed to be grammatical and mechanical.  
22 And there's nothing -- the thrust of that paragraph starts on  
23 page 16. It doesn't change because -- "This is something that  
24 I really must..." and it goes to -- "really must have been."  
25 I mean, I -- if that's substantive, I, I'm not familiar with

1 what's going on.

2 MS. SCHMELTZER: Your Honor, if I may explain how I  
3 think it affects the substance, Ms. Covington was the Director  
4 of Public Affairs. She was talking at this juncture about the  
5 Second Quarter Issues Programs List. She admitted at the  
6 deposition that she had never seen that list previously. This  
7 is the Second Quarter 1991 Issues and Programs List. And then  
8 she said, well, I really must have done it with Tony Wright.  
9 Now, for her to suddenly change that and say, it must have  
10 been done by Tony Wright -- it's a totally different  
11 interpretation.

12 MR. ZAUNER: No. The way you said it the first time  
13 is the way she's saying it now.

14 MR. GREENEBAUM: Now. That's what's she's --

15 MR. ZAUNER: Read it.

16 MR. GREENEBAUM: -- saying now.

17 MS. SCHMELTZER: No, but she inferred that she had  
18 had some participation in it. I asked her, Did you have any  
19 participation in physically putting together this material?

20 MR. ZAUNER: Is there something more substantive we  
21 can get on to?

22 JUDGE SIPPEL: Well --

23 MS. SCHMELTZER: I'm saying it's a substantive  
24 change. We can argue about materiality of it, but it's a  
25 substantive --