

1 back, and we would put on witnesses, obviously in addition  
2 to Mr. Kay, that would respond to what their case in chief  
3 looks like.

4 JUDGE SIPPEL: So, these would be responsive?

5 MR. FRIEDMAN: It would be responsive witnesses to  
6 the testimony and --

7 JUDGE SIPPEL: Do you have any idea now as to who  
8 those witnesses are going to be?

9 MR. FRIEDMAN: No, we don't, Your Honor, until we  
10 get to see which of -- until we see the 12 and then the six  
11 and what they have to say, we're not totally certain. We  
12 originally were looking at a universe of maybe up to 30  
13 potential witnesses, because that's what they told us  
14 originally. But, as we narrow it down, once it's narrowed  
15 and we see, once they put their cards on the table, we can  
16 put our cards on. But, we haven't seen their cards yet.

17 JUDGE SIPPEL: Well, they've done something. They  
18 have given you, in terms of numbers, the 18 to 20 first cut  
19 names and these are people who, I'm assuming Mr. Kay knows  
20 and knows pretty well. The allegations or the hearing  
21 designation order certainly tells the story. There would be  
22 a lot of things that you and Mr. Kay would be in a position  
23 to put together at this point, in terms of relevant  
24 information.

25 You wouldn't have it down item by item, but you

1 have a pretty good idea.

2 MR. FRIEDMAN: Your Honor, I feel like I have a  
3 puzzle here. We have all these pieces. I know what these  
4 pieces look like, but somehow fitting them together until I  
5 know that X is going to be testifying and about what, I  
6 can't really put them together and take a look at it, to see  
7 if I can do my preparation for response.

8 JUDGE SIPPEL: Well, I suspect, from what I've  
9 been seeing was the amount of efforts that have been going  
10 on with these FOIA requests for information, I suspect that  
11 whatever that you have established quite a gathering of  
12 information. I'm not saying -- I'm just making an objective  
13 observation from somebody who's trying to manage a case to  
14 come to hearing.

15 There's going to have to be some point in time  
16 when you have to cut. I've got the Bureau, now, I think, at  
17 least in the best position that I've had them so far. I've  
18 got to look to you at some point for the same thing. You're  
19 go to see an awful lot of their case on the 24th. Now, as  
20 far as their testimony, obviously you're not going to see  
21 that on the 24th and you're going to be preparing for those  
22 depositions. I would think that you would be in a position  
23 to make your cut from your witnesses not too much longer  
24 after you see their witnesses.

25 MR. FENSKE: After the depositions, I could do a

1 revision potentially and undoubtedly, we're going to get  
2 into that. But, if we take depositions in early December,  
3 yes, at some reasonable point after that, we would have a  
4 better feel for it, consistent with what Mr. Friedman said,  
5 until we know exactly who, what, where, when and how and  
6 what persons are going to testify to certain alleged  
7 misconduct, we can't tell you who we're going to produce to  
8 rebut. That's assuming --

9 MR. SCHAUBLE: Your Honor, may I respond?

10 JUDGE SIPPEL: That assumes also, they don't know  
11 exactly how these witnesses are going to turn out.

12 MR. FENSKE: That's exactly right. Just briefly,  
13 I liken this to a criminal complaint. If we had on the  
14 table that Mr. Smith robbed First National Bank of Maryland  
15 on June 15 at 2:30, we could respond to that with any of our  
16 witnesses, etc. But, since we don't have that, you know, we  
17 are not in a position to properly our defense, because we  
18 don't know specifics yet.

19 I would agree with you that I'm finally getting  
20 toward that point that we are knowing --

21 JUDGE SIPPEL: I hear you, and following that  
22 analogy, if facts were good enough, we might be able to talk  
23 about plea bargaining, you never know.

24 MR. FENSKE: That's correct.

25 JUDGE SIPPEL: Mr. Schauble?

1           MR. SCHAUBLE: Your Honor, it seems to me that  
2 once we provide them with our information on the 24th,  
3 pursuant to Your Honor, it seems to me that they would be in  
4 a position shortly afterwards to provide similar information  
5 at some point after that, realizing that in no case are you  
6 going to be able to provide the sort of information with  
7 exact precision. We'd be asking for at least some sort of  
8 idea of the universe of who their witnesses might be.

9           Your Honor mentioned a goal which I think is a  
10 very desirable goal of having depositions take place in one  
11 session, as opposed to having multiple, as opposed to first  
12 having Kay having discovery on our witnesses and then going  
13 through the process again with Kay's witnesses and going  
14 through another. It seems to me that that would not be the  
15 most desirable method of getting this case moving along or  
16 of trial preparation.

17           JUDGE SIPPEL: Well, I tell you, I'm dealing with  
18 what the Bureau is giving me, and this case has been around  
19 for what, almost two years now? This is the first time,  
20 this is the first time that the Bureau has gotten the  
21 position that they're actually telling me what they're going  
22 to do, what they're going to go to trial with.

23           I'm not saying that the Bureau doesn't have good  
24 reason as to why this is taking this long. But, I can't  
25 turn to the other side of the table and say, okay, now you

1 know, now give me the same information at essentially the  
2 same time. They can put on their defense any way they see  
3 fit within the confines of the Rules of Evidence and  
4 relevance. They've got to see what you're going to put on.  
5 They want to see what your witnesses have to say, they want  
6 to see what their testimony is going to be, and then they're  
7 going to respond to it.

8 Now, it's not going to be too much longer after  
9 those depositions that we're going to require them to do the  
10 same thing I require you all to do. You may not want to --  
11 they may say, okay, we've got ten witnesses. You may not  
12 want to -- you may want to talk on the telephone, you may  
13 want to go out and talk to them in person. You may already  
14 know who these people are, already talked to them. There  
15 are a number of ways in which you can handle this, rebuttal  
16 type witnesses, from the standpoint of the Government.

17 The name of this game in this session today is  
18 getting specific things to do within specific time frames.  
19 Right now, I don't think that I can really turn to this side  
20 of the table and say they've got to do what you've got to  
21 do. But, if it is going to be too much longer -- those  
22 things should not take long. They should not take long.

23 MR. SCHAUBLE: Your Honor, our current estimate is  
24 that the Bureau's depositions would be about a week's worth  
25 of depositions.

1 JUDGE SIPPPEL: In the scheme of things, that  
2 shouldn't be too bad. I understand, you know, you're saying  
3 the most efficient way would be for both sides to go out and  
4 take this line of depositions at the same time. I don't  
5 think I can require Mr. Friedman to do that. I just don't  
6 think he has seen enough of your case for them to bear that  
7 kind of -- he may very well have a good idea, but good ideas  
8 are not -- I don't feel I'm in a position to pin him down,  
9 but it's going to be soon after those transcripts come in,  
10 Mr. Friedman.

11 MR. FRIEDMAN: Once we have it, Your Honor, we  
12 will get back to you and tell you who our deposition list  
13 and our witness list, just as they do.

14 JUDGE SIPPPEL: And that witness list -- that list,  
15 I am going to look at it very closely, if it looks like it's  
16 too excessive. I'm not going to get into a debate with you  
17 on that, but I am looking for every way that I can to keep  
18 this case pared down. IF we can eliminate, I think you've  
19 gotten a lot out of here, but if we can stipulate out a lot  
20 of things that are the wheat from the chafe kind of things  
21 straightened out before we go into hearing, it will  
22 considerably shorten the process, I'm hoping.

23 MR. FRIEDMAN: We would love it to be that way.  
24 I'm sure you would, too. I'm sure Mr. Kay would.

25 JUDGE SIPPPEL: I've got what I feel is a schedule

1 that I think you've met and I'm going to set that schedule.  
2 I will certainly send an order out on this, but here's what  
3 I have.

4 I want discovery, I want a complete discovery by  
5 on or about the 6th of March. In other words, I want to  
6 shut this case down. That would give the Bureau until April  
7 3 to come in with their exhibits and with their testimony.  
8 Since we're not using a prepared written testimony, we'll  
9 get a summary of what the witnesses intend to testify to,  
10 this would be the issues. There shouldn't be much more than  
11 that required. By that time, we're going to have certainly  
12 a significant number of depositions, if not 100 percent.  
13 That's April 3. Same thing for Mr. Kay on the 17th.

14 MR. SCHAUBLE: Your Honor, just a quick, would  
15 that also be a date for submission of trial briefs?

16 JUDGE SIPPEL: No, hold on.

17 MR. SCHAUBLE: Okay.

18 JUDGE SIPPEL: The 21st would be subpoenas, trial  
19 subpoenas. Then, on the first of May would be the trial  
20 date. Admission session on the 8th of May. We'll reserve a  
21 courtroom in D.C., here in D.C. for the 12th, three days,  
22 the 12th until the 14th of May and continue to receive that  
23 day would be some testimony related to the stipulations, to  
24 whatever rebuttal.

25 The L.A. session will go from the 2nd of June till

1 the 12th of June and then back here to Washington. That  
2 L.A. session will be for the L.A. witnesses. Then, the  
3 session back here in Washington will be to finish it up will  
4 be the experts and Mr. Kay.

5 Now, that to me, I've worked this several  
6 different ways and to me, this is the most efficient,  
7 expeditious way of getting a very complicated matter  
8 completed. I am very encouraged by what I've seen here  
9 today, the willingness to try to move this case, and I don't  
10 see any reason why those dates can't be met.

11 So, I'm going to set those down, those dates. The  
12 only thing that's iffy at this point is going to be the  
13 construction of Mr. Kay's defense and how that is going to  
14 be presented, in terms of trial preparation. I'm not going  
15 to set anything down specifically at this time. I'm going  
16 to wait until those depositions are completed and I'm going  
17 to then set another prehearing conference. So, I want to be  
18 told the last business day of every month just how things  
19 are going. That can be an informal status report.

20 Now, you can alternate in terms of giving me a  
21 letter, just to insure the other side has seen the report.  
22 You all work it out how you want to, but I want to know how  
23 things are going.

24 Today we'll set up another conference and we'll go  
25 through a similar process with Mr. Friedman with respect to

1 his witnesses. In the meantime, I would encourage you, in  
2 the meantime, if either side thinks about something and you  
3 figure out, you know, Mr. Friedman, you say, oh, well, since  
4 we're going to be out there, by the way, these are two guys  
5 that I really don't want to talk to. They'll probably be  
6 using or certainly consider seriously for using, maybe you  
7 can pick up a couple more witnesses out there for those  
8 purposes.

9 I'm saying that out of a bit of caution, because I  
10 don't want that used as an opportunity to just go out there  
11 and beat the bushes. If you're going to take those kinds of  
12 depositions, I'm going to have to be somehow notified with a  
13 request to take their depositions and exactly why. I'm not  
14 looking for using this as a target of opportunity to get as  
15 much of this serious prehearing discovery concluded. This  
16 is not the type of evidence that we could see whether or not  
17 there's a problem here. This is the approach when you're  
18 getting ready for trial. That puts a different element to  
19 it than just that broad, you know, that broad discovery  
20 relevance. So, that's where I come out. That's it.

21 I am very encouraged by what I heard and the  
22 reaction of both the counsel. I think there's no reason why  
23 we can't get this case tried.

24 MR. SCHAUBLE: Your Honor, one question about the  
25 schedule?

1 JUDGE SIPPEL: Go ahead.

2 MR. SCHAUBLE: The testimony of the experts and  
3 Mr. Kay in D.C., that would be immediately after the L.A.  
4 session.

5 JUDGE SIPPEL: Well, I've got the dates in L.A. on  
6 the 2nd of June to the 12th. Now, I don't mean to say that  
7 it has to be consecutive. I'm going to reserve space out  
8 there to get it done by the 12th, all right.

9 MR. SCHAUBLE: Okay.

10 JUDGE SIPPEL: If we get it done by the 8th,  
11 great, and then come back here and finish it up in D.C. on  
12 the 17th, starting on the 17th. So, there's five days  
13 between there. We can start with the experts and bring Mr.  
14 Kay in last, or bring Mr. Kay on first.

15 MR. SCHAUBLE: My apologies. I didn't hear the  
16 17th date. That was the problem.

17 JUDGE SIPPEL: Now, we can, give or take a couple  
18 of days, those dates can be adjusted as we go down through  
19 this process. There's no reason for it, just no reason for  
20 it.

21 MR. SCHAUBLE: I agree, Your Honor.

22 JUDGE SIPPEL: Do you see any problems with that  
23 schedule?

24 MR. FRIEDMAN: Not at the moment, Your Honor.

25 JUDGE SIPPEL: Well, I don't like that not at the

1 moment.

2 (Laughter.)

3 MR. FRIEDMAN: Unless we have an earthquake in  
4 California.

5 JUDGE SIPPEL: Well, earthquakes, acts of God,  
6 what can you do?

7 MR. FRIEDMAN: Right.

8 JUDGE SIPPEL: But, everybody, at least, is on  
9 target. As I say, I'm going to be very firm with this and  
10 there's going to have to be an awful lot shown to change  
11 this. We're going to be finished with your case, Mr.  
12 Schauble and full time attention should be nice.

13 Okay, thank you very much. We're in recess until  
14 further call.

15 (Whereupon, at 10:59 a.m., the hearing was  
16 concluded.)

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**REPORTER'S CERTIFICATE**

FCC DOCKET NO.: 94-147  
CASE TITLE: JAMES A. KAY, JR.  
HEARING DATE: October 9, 1997  
LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Federal Communications Commission.

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