

1 would make a lot of senses to me, but, you know, the  
2 Bureau's kind of between a rock and a hard place in a sense  
3 because they have got these witnesses under subpoena now,  
4 and nonce you start tinkering with scheduling, unless the  
5 witnesses are perfectly cooperative.

6 MR. FRIEDMAN: I believe the Tuesday witnesses ar  
7 Sobel and --

8 MR. SCHAUBLE: Ashauer.

9 MR. FRIEDMAN: -- Ashauer, both of whom  
10 voluntarily are appearing in advance of receiving subpoenas,  
11 so they will voluntarily come in place of when Kay was  
12 scheduled to avoid any problem.

13 JUDGE SIPPEL: Well, let me just said that I think  
14 I can deal with this very quickly, is I'm not going to rule  
15 on that. I'm not going to rule on that. I know that you  
16 will cooperate, to the extent that you can, Mr. Schauble.  
17 But the bottom line is, is these depositions, the schedule  
18 is set and I don't want anything done to upset the schedule  
19 now that could lead to the possibility of a deposition being  
20 missed because of some confusion or some -- I mean, Mr.  
21 Sobel and this other gentlemen, I'm sure, maybe have planned  
22 their business day for Wednesday now. They may be all set  
23 to do something and they may not want to change their  
24 schedule. We have to accommodate the witnesses.

25 MR. FRIEDMAN: We believe we can accommodate the

1 witnesses and get Mr. Kay up front now to avoid anybody  
2 falling afoul of the sequestration order, which is the last  
3 thing we would like happen.

4 JUDGE SIPPEL: Makes perfectly good sense to me.  
5 There is other things in that sequestration order, and I  
6 certainly am concerned about sequestration with respect to  
7 Mr. Sobel and Mr. Kay in light of what, you know, I have  
8 read from Judge Freisiak's decision. You know, I want to be  
9 getting clean testimony from every single witness, and you  
10 know what I mean by that. I want to -- not that I'm  
11 suggesting that somebody is going to set up a witness. I  
12 just mean to say that I want -- I don't want them distracted  
13 or in any way confused or anything. Come in and tell the  
14 story as they know the facts, and get off the stand, and  
15 let's get on with it.

16 MR. FRIEDMAN: Your Honor, I hope Judge Freisiak's  
17 decision does not impact on this case.

18 JUDGE SIPPEL: Why should it?

19 MR. FRIEDMAN: Just wanted to be sure.

20 JUDGE SIPPEL: That's a very pointed question. I  
21 mean, there is a decision out that's been -- you know,  
22 that's been published. It's an initial decision, and it  
23 certainly talks in terms of Mr. Sobel's conduct and certain  
24 of Mr. Sobel's conduct with respect to Mr. Kay

25 MR. FRIEDMAN: But nothing relating to discovery

1 or any hearing issue.

2 JUDGE SIPPEL: Not yet.

3 MR. FRIEDMAN: Okay.

4 JUDGE SIPPEL: Not at this point.

5 MR. FRIEDMAN: Um-hmm.

6 JUDGE SIPPEL: But it certainly puts me on notice  
7 and it gives me additional cause and concern to issue what I  
8 consider to be a pretty tight sequestration order, and I am  
9 particularly -- as I say, focused between those two  
10 gentlemen because they both have a lot of information, and  
11 their interests might not be the same.

12 Now, which leads me to another interesting  
13 question. I saw in the ID, the initial decision,  
14 appearances that Mr. Fenske is representing Mr. Sobel.

15 MR. FRIEDMAN: He didn't, Your Honor.

16 MR. SCHAUBLE: That is an error, Your Honor.

17 MR. FRIEDMAN: Even the Bureau agrees for once.

18 JUDGE SIPPEL: You see, I do read these things.

19 MR. SCHAUBLE: Mr. Friedman and Mr. Fenske were  
20 presenting Mr. Kay --

21 MR. FRIEDMAN: Yes.

22 MR. SCHAUBLE: -- who intervened as a party in  
23 that, and Mr. Keller is Mr. Sobel's counsel in the -- all  
24 right.

25 MR. FRIEDMAN: Even Judge Freisiak makes a

1 mistake. How do you like that?

2 JUDGE SIPPEL: Well, I'm not going to comment on  
3 that, but I was just going to say I do read things.

4 Now, well, I have a checklist. I want to go back  
5 over my checklist which we covered on the phone. You don't  
6 have to -- if you are satisfied that you've got what you're  
7 going to get out of this, Mr. Gehman, you can leave.

8 MR. GEHMAN: Okay.

9 JUDGE SIPPEL: And thank you very much, and tell  
10 your client that I have done everything I possibly can to  
11 make his experience out there a meaningful one for purposes  
12 of this case and, you know, the least concern to himself,  
13 although a deposition witness, like any other kind of  
14 witness, is kind of like going to the dentist. It is not a  
15 nice thing as a general proposition.

16 MR. GEHMAN: We understand.

17 JUDGE SIPPEL: All right, you are excused then,  
18 sir. Thank you.

19 Okay, so we covered -- my topics -- we've covered  
20 sequestration. We've covered the scope of the Killian  
21 cross. The deposition transcripts of David Pfeifer and  
22 Deborah Killian, that subject is covered.

23 What about Roy Jensen, the Roy Jensen address?

24 MR. SCHAUBLE: Your Honor, we hope to have -- we  
25 have been having people investigate that. We hoped to have

1 something -- we hope to have something on that either today  
2 or tomorrow. And as soon as we have any information on that  
3 we will immediately communicate that to Mr. Friedman or Mr.  
4 Fenske.

5 JUDGE SIPPET: Okay. All right. Well, do you  
6 have any idea when that's -- you know, I am looking for a  
7 time or a date. Do you think you will have it in a day or  
8 two or is this going to go on?

9 MR. SCHAUBLE: The understanding we have is --

10 MR. KNOWLES-KELLETT: We are waiting on the  
11 Postmaster, Your Honor.

12 MR. SCHAUBLE: We are waiting on the Postmaster,  
13 and from what we're told we are expecting information either  
14 today or tomorrow.

15 MR. KNOWLES-KELLETT: But it's not --

16 MR. SCHAUBLE: It's not something that's certainly  
17 within our control.

18 JUDGE SIPPET: I understand. Now, if you had that  
19 information and you were able to give it to Mr. Friedman,  
20 would that make Jensen a possible witness out there, as a  
21 deposition witness? I mean, I'm asking that of either side  
22 or both.

23 MR. SCHAUBLE: I believe -- we he has been -- Mr.  
24 Jensen has been noticed and my understanding is Your Honor  
25 signed a subpoena for Mr. Jensen. The difficulty is in

1 terms that Mr. Kay has been unable to serve Mr. Jensen with  
2 the subpoena

3 MR. KNOWLES-KELLETT: There has been absolutely no  
4 communication with him, telephone or anything like that?

5 MR. FRIEDMAN: We can find him.

6 MR. KNOWLES-KELLETT: Okay.

7 MR. FRIEDMAN: Can't find him, can't serve him.

8 JUDGE SIPPEL: You're absolutely right. Can't call  
9 him either. All right. Did anybody look for his telephone  
10 number in the phone book?

11 MR. SCHAUBLE: We've looked, Your Honor.

12 JUDGE SIPPEL: Okay, that's it for Mr. Jensen. Do  
13 the best you can.

14 We went through this -- I'm not going to go  
15 through this, I just want to -- the experts, there is going  
16 to be further information provided on the next status report  
17 which will be the 6th of January, right? We've already gone  
18 over that.

19 The payment for Mr. LaFontaine, that's going to be  
20 the Bureau's responsibility, for his ticket, his airline  
21 ticket to come down for whenever that deposition is set.

22 Inspection reports?

23 MR. SCHAUBLE: Your Honor, I have the inspection  
24 report now, and we anticipate that that will be produced to  
25 Mr. Kay either today or tomorrow; hopefully, today.

1 JUDGE SIPPEL: Okay. I don't think that I should  
2 see it yet.

3 MR. FRIEDMAN: I don't believe so. It's not  
4 evidence yet.

5 JUDGE SIPPEL: That's what I am saying.

6 All right.

7 MR. SCHAUBLE: Your Honor, I believe, to confirm  
8 one thing we agreed on in the conference the other day is  
9 that because the Commission has not yet acted on Mr. Kay's  
10 motion requesting the deposition of the Commission employees  
11 be taken, we have an understanding that their depositions  
12 will not be taking place on December 17th as noticed. But  
13 as soon as an order comes out from the Commission, the  
14 Bureau will cooperate with Mr. Kay in terms of scheduling  
15 those depositions.

16 JUDGE SIPPEL: All right. I'm assuming that.

17 MR. SCHAUBLE: Yes.

18 JUDGE SIPPEL: There is nothing you can do without  
19 the Commission order, but I do want to be -- I want to say  
20 at least this much concern with that inspection report, and  
21 if you need some relief from me on this, or I'm hoping there  
22 will be a letter agreement between counsel, but that report  
23 is to be solely for purposes of this case, and would not be  
24 publicly disclosed until there is an appropriate time for  
25 that.

1           In other words, that doesn't become a public  
2 record unless it's received into evidence in this case.  
3 You're nodding, Mr. Friedman.

4           MR. FRIEDMAN: I agree, yes.

5           JUDGE SIPPTEL: Listen, that's what I'm here for.  
6 Okay, be sure that you pin that down, Mr. Schauble.

7           Let me think now. Oh, that's it. Okay, January  
8 6th is going to be the status report as you request. Makes  
9 sense to me in light of the holiday season.

10           I was just going to ask Mr. Friedman if you  
11 wouldn't mind -- I want to be sure that the record in this  
12 case remains consistent even on things like status reports.  
13 If you would at some time that's convenient to you file the  
14 one, or a copy, file it with the secretary with, you know,  
15 some kind of a pleading caption on it, Precipe, or whatever  
16 you determine to use, and from here on out if you would put  
17 it in pleading form and go through the formal filing system.

18           MR. FRIEDMAN: Okay.

19           JUDGE SIPPTEL: Let's see, I think that's it.

20           Yes, that covers my -- that is my shopping list,  
21 and I will have kind of like an omnibus order out that will  
22 cover those things, a separate order with respect to the  
23 modification on Killian, but there will be kind of an  
24 omnibus order out to just highlight these things so that  
25 it's clear that we got them covered, everybody has got a

1 checklist.

2 Is there anything else? Anything else you need?

3 MR. SCHAUBLE: Your Honor, just one inquiry. I  
4 mean, hopefully, to the extent any questions or objections  
5 come out of the deposition if counsel can work them out  
6 among themselves. The question I have is during this period  
7 when we are going to be out taking depositions, is there  
8 going to be any period when Your Honor will be unavailable?

9 JUDGE SIPPEL: That's a good question. At  
10 different times throughout next week I will be unavailable  
11 for prior commitments. I mean, everything from getting my  
12 third session with the dentist, which shouldn't take too  
13 long on Tuesday, or maybe that's Monday. Anyway, I've got a  
14 few things like that to do. I've got a class in ethics that  
15 I have to attend before the end of the year because, believe  
16 it or not, because of my status with the FCC. And I have  
17 another class commitment here at the FCC on Wednesday and  
18 Thursday which is pretty substantial.

19 What I would suggest you do is let's agree on a  
20 time. Between 12 and 1 my time I will be at my desk with a  
21 sandwich. I'm talking now about Wednesday and Thursday of  
22 next week. And I will also come back by 4:00 our time, and  
23 I will stay in the office until 5:30.

24 Now, the rule, I did look at the rule before  
25 coming in here and it talks in terms of -- it shows how

1 recent the rule. You folks got telegraphing, telegraphing  
2 written requests, or teletyping or something like that.  
3 That would be a big help. In other words, if you have a  
4 problem coming up, if you could outline it and fax it into  
5 my office, then when I come back I could take a look at it,  
6 and if you leave a number, I could have my secretary call  
7 you, and then you could patch me in.

8 But, obviously, whatever you have available to  
9 you, use it. I mean, if I'm there in the office and the  
10 phone call comes in, I'll pick up the phone and you patch me  
11 in and I'll do what I have to do. If it's not, if it's a  
12 message when I come back, I'll do the best I can to get in  
13 touch with you before the deposition is completed.

14 Unfortunately, we have this three-hour difference,  
15 and that's why I was thinking, that if something comes up,  
16 you know, at 7 - 8 o'clock our time, you can write it up and  
17 fax it in. I could look at it the first thing the following  
18 morning. That wouldn't do any good either, would it,  
19 because then you wouldn't be around.

20 Well, anyway, you could get it noontime the  
21 following day. I'll do what I can. I'll do as much as I --  
22 I'll do what I can. On Thursday, normally if you don't get  
23 me by 4:00 on a normal day you're going to have difficulty  
24 finding me. I will stay around until 4:30. On Wednesday  
25 and Thursday, I will stay around until 5:30. And anything

1 else that I can do to accommodate, I will.

2 I'm hoping what you say is true, you know.

3 Normally, in these cases I don't get bothered. I mean, I  
4 have -- I don't mean to say that in the negative sense. I  
5 mean, I don't get -- I am not asked to get involved in  
6 depositions as a general proposition. Certainly it has  
7 happened and I'm prepared to do it and I know how to, you  
8 know, that's the answer.

9 MR. SCHAUBLE: We're hoping also, Your Honor, that  
10 it's not necessary.

11 JUDGE SIPPEL: You don't want to talk to me.  
12 That's okay. I'm just kidding.

13 Is there anything else?

14 MR. FRIEDMAN: No, Your Honor.

15 JUDGE SIPPEL: All right, you all have a lot of  
16 work to do. It's a quarter after 10. Thank you very much.

17 We're in recess.

18 MR. SCHAUBLE: Thank you, Your Honor.

19 (Whereupon, at 10:15 a.m., the prehearing  
20 conference was concluded.)

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**REPORTER'S CERTIFICATE**

FCC DOCKET NO.: 94-147

CASE TITLE: JAMES A. KAY, JR.

HEARING DATE: December 4, 1997

LOCATION: Washington, D.C.

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