

1 MS. POWER: That's what I was getting at.

2 THE COURT: And she'd be examined by the Bureau  
3 and then -- maybe on direct, and maybe then by Clear Comm on  
4 direct. I don't know how you want to work it because I know  
5 you both kind of have --

6 MS. LANCASTER: Your Honor, I have one question  
7 about this. Ms. Milstein has currently -- has plans to be  
8 out of the country during that week. And we might need some  
9 leeway as to when exactly we're going to offer her. You  
10 know, if she becomes available during the first week, we  
11 would like to use her when she's available. And at this  
12 point, I'm not sure we know exactly when --

13 THE COURT: Well, that might be an exception. But  
14 as long as opposing counsel has sufficient notice to be able  
15 to prepare, that's what I'm concerned with.

16 MS. LANCASTER: Okay.

17 THE COURT: Yes?

18 MR. GORDIN: Your Honor, just to clarify, because,  
19 Your Honor, originally I was going to ask you, as long as  
20 opposing counsel agree, obviously, it goes without saying  
21 that the attorney should make good faith effort to present  
22 the list --

23 THE COURT: Right.

24 MR. GORDIN: -- as you indicated, because  
25 sometimes you can't pin down a witness, someone is going to

1 take three days, and that throws another witness's schedule  
2 off. Your Honor's concern is that as soon as we know that  
3 there may be a change for cause, that we let opposing  
4 counsel know in sufficient time so that they're are not  
5 taken by surprise in the hearing.

6 THE COURT: Basically, yes. And when we hit the  
7 rebuttal phase, the same obligation is going to be put on  
8 the Westel parties and Mr. Easton in terms of -- let me just  
9 ask. The Westel parties and Mr. Easton -- are you going to  
10 prepare a direct case for exchange on August 11, or are you  
11 going to wait and just --

12 MR. LYON: Mr. Lukas and I were discussing that  
13 very subject today, and we had not made a decision, Your  
14 Honor.

15 THE COURT: Okay, because I think in a case such  
16 as this, this is akin to an old Broadcast revocation case  
17 under -- I forget whether it's 311 or 312 of the Act where  
18 the burdens are on the Bureau. And the licensee, the  
19 parties who -- the licensee, the person that the Commission  
20 is trying to get the license away from, my position's always  
21 been they can wait to see what the case is against them and  
22 then fashion their own case, and I think that would -- their  
23 own rebuttal case.

24 And so -- but if you want to exchange exhibits --  
25 if you want to exchange a direct case on August 11, I'm not

1 saying that you can, like I think Mr. Breen exchanged his  
2 direct case on the previous exhibit exchange.

3 MR. CARROCCIO: Your Honor --

4 THE COURT: But I think things were a little more  
5 frozen then.

6 MR. CARROCCIO: Your Honor, I would also suggest  
7 that we have a different question as to order of proceeding.  
8 In the -- previously, we only had what is now issue two.  
9 And issue two, the burden is on the applicant. And Mr.  
10 Breen, therefore, had the necessity of proceeding.

11 THE COURT: Okay.

12 MR. CARROCCIO: In this -- as it stands now, there  
13 is no issue two if issue one is resolved in a manner that  
14 obviates issue two. So, I do believe that the order of  
15 proceeding has shifted rather substantially in that the  
16 Bureau has the burden of proceeding and the burden of proof  
17 on issue one. And that that issue must precede issue two.

18 THE COURT: Well, they can mix.

19 MR. CARROCCIO: They will inevitably mix, Your  
20 Honor, but Mr. Breen and the two Westel parties may elect to  
21 have a different initial presentation is what I'm getting  
22 at, because I do believe we are entitled to see how issue  
23 one proceeds prior to us having to make a case on issue two.

24 THE COURT: Okay. Does anybody want to comment on  
25 that? I see your point now. Forgive me, but I forget about

1 issues two and three, frankly, because there's been so much  
2 dispute on issue one that issue two just escapes my mind,  
3 and it did, and I apologize for that. I may as well be  
4 candid about it.

5 MR. GORDIN: Maybe if Mr. Carroccio remained  
6 silent, he would have ended up walking away without having  
7 to do anything.

8 THE COURT: Oh, he --

9 MR. CARROCCIO: I may be able to do that yet, Your  
10 Honor.

11 THE COURT: Okay. Ms. Power, you look like you  
12 were going to say something.

13 MS. POWER: Well, my train of thought was going  
14 there. It would seem to me that -- well, I guess I want  
15 more to ask a question as if to say, does our direct case  
16 against -- the prior direct case is now subject to change,  
17 and you want us to redo those or --

18 THE COURT: If you want your prior direct case to  
19 be your current direct case, just write me a letter and say,  
20 "You already have our exhibits" and exchange them with Mr.  
21 Easton and with Clear Comm because Mr. Carroccio already has  
22 them.

23 MS. POWER: But they've already been -- I mean, we  
24 have already given those documents earlier. We gave the  
25 direct case to Mr. Easton -- Mr. Breen.

1 MR. CARROCCIO: But that was an issue two direct  
2 case, Your Honor.

3 MS. POWER: I'm sorry. Are we not talking about  
4 the same thing?

5 THE COURT: If you want to go with what you've  
6 already exchanged on both issues --

7 MS. POWER: Right --

8 THE COURT: -- then just tell everybody.

9 MS. POWER: Okay.

10 THE COURT: But make sure -- Mr. Easton wasn't a  
11 party. Clear Comm wasn't a party at that time.

12 MS. POWER: Right, right.

13 THE COURT: The last time you exchanged.

14 MS. POWER: Right.

15 THE COURT: So, you have to exchange with them.

16 MS. POWER: Right.

17 THE COURT: And I don't remember if there was a  
18 list of witnesses outlining --

19 MS. POWER: No, I don't think we'd gotten to that  
20 point.

21 THE COURT: Okay. So, you have to do that. And  
22 also, was there a list of which witness was sponsoring which  
23 exhibit?

24 MS. LANCASTER: No, I don't believe there was, and  
25 I have a question about that.

1 THE COURT: Okay.

2 MS. LANCASTER: I've never done this before.  
3 Obviously, I'm new to the Bureau. And I have a question  
4 about your footnote. We're kind of skipping around, but  
5 since you brought that up, let me ask you if you don't mind.

6 THE COURT: Sure.

7 MS. LANCASTER: In your order that was released on  
8 March 26, which previously had set the dates for the  
9 exchange of the direct --

10 THE COURT: I just happen to have a paper clip on  
11 it.

12 MS. LANCASTER: In this footnote it says -- let me  
13 find it. "Each exhibit must be accompanied by the affidavit  
14 or declaration under penalty of perjury of a sponsoring  
15 witness." And I have a question about that in that many of  
16 the exhibits and perhaps all -- I haven't -- we haven't  
17 prepared our direct case, so I don't know exactly -- I have  
18 to pull them out. Most, anyway, of the exhibits will have  
19 been identified during one or more depositions.

20 And can I assume that we can reference those  
21 depositions to satisfy this requirement of a sponsoring  
22 witness?

23 THE COURT: Okay. If -- we're in a little funny  
24 position. But take the independent counsel's report, which  
25 was, I think, your Exhibit 1.

1 MS. LANCASTER: Right.

2 THE COURT: My question was, who's going to  
3 sponsor that? Who's going to sit up there in the witness  
4 chair and say, "I prepared it, et cetera, et cetera?" Who's  
5 going to say, "The facts contained therein are true and  
6 correct to the best of my knowledge and belief"? And I  
7 don't know that anybody can do that because it's all  
8 hearsay.

9 But if you want to introduce it for official  
10 notice purposes, I don't think there'd be anybody here that  
11 would object to -- you might object on relevance, but in  
12 terms of putting weight to the words on the paper. Me  
13 putting weight. But certainly, I could take official notice  
14 of the fact that something called whatever -- you know, the  
15 big long name of it was filed with the Commission on  
16 February 20, 1996, and this is what it was called, and this  
17 is what it says. And I don't think you'd have any  
18 objections.

19 Same thing with the letters. If you have a letter  
20 from Michael DouL Sullivan, and you want me to take official  
21 notice of it, I'll take official notice that a letter from  
22 Michael DouL Sullivan -- the letter was dated this date.  
23 It's so many pages long. It concerns this subject. I'll  
24 take official notice of that.

25 If you want me to consider the letter for the

1 truth of the matters asserted therein, Michael Doul Sullivan  
2 sits down in the witness chair and swears to those facts.

3 MS. LANCASTER: That -- all right. I understand  
4 that, Your Honor, but I guess my question --

5 THE COURT: So, if you've exchanged a letter from  
6 Michael Doul Sullivan, which I think you have -- you've  
7 several of them because -- I mean, that's where I pulled the  
8 reference in one of my orders. I mean, it's not like I have  
9 this immense knowledge of this case in my head. But I mean,  
10 that's like your Exhibit 13 or 14 or something like that.

11 You have to put the man on the stand, and he would  
12 have to be -- is this a true and correct copy of the letter?  
13 Are the facts stated therein true and correct to the best of  
14 your knowledge, information and belief? Yes. Ask him more  
15 questions. He's available for cross-examination.

16 MS. LANCASTER: I understand that, Your Honor. My  
17 question goes to -- as I read this order, we have to have an  
18 affidavit in the direct case.

19 THE COURT: Forget that. This is -- this footnote  
20 was -- we had a little different case then, I think. I  
21 think what -- in the typical Broadcast Bureau -- typical  
22 Mass Media case and in other cases I've had here, the direct  
23 case has virtually all been in writing. So, you've had an  
24 affidavit or declaration of so and so, and at the end of  
25 that, you had an affidavit or declaration. And that's what

1 I meant by that.

2 I can see where that's confusing. I think maybe  
3 I'll eliminate that sentence.

4 MS. LANCASTER: Okay.

5 THE COURT: But basically, what I wanted --  
6 Exhibit 1 -- this is going to be the sponsor. Exhibit 2 --  
7 this is going to be the sponsor. If you're going to have  
8 several witnesses sponsor portions of an exhibit, specify  
9 that, too.

10 MR. GORDIN: By sponsor, Your Honor, obviously, is  
11 not eliminating -- can be sponsoring through affidavit or  
12 through prior depositions. If it's prior deposition, then  
13 everyone's already had a shot at the affidavit --

14 THE COURT: No --

15 MR. CARROCCIO: Not through -- excuse me.

16 THE COURT: No, because --

17 MR. GORDIN: For the document.

18 THE COURT: No. I'm making an assumption that  
19 everyone that sponsors an exhibit is going to be cross-  
20 examined. And I didn't want to set up a witness  
21 notification date. I thought that would be a waste of time,  
22 and then there'd be an objection to witness notification.  
23 That would be a waste of time. And we save two weeks, and  
24 we've saved a lot of paper.

25 And I'm just trying to fashion a procedure. We

1 would just get the witnesses on the stand, have them  
2 testify, have them sponsor the exhibits, and have them  
3 cross-examined, and get them out of here.

4 MR. GORDIN: Your Honor --

5 THE COURT: Yes.

6 MR. GORDIN: The depositions are used both for  
7 discovery and for evidence purposes.

8 THE COURT: No, they're not used for evidence  
9 purposes unless a witness is unavailable.

10 MR. GORDIN: Okay. Well, what I would ask is when  
11 you say -- we're in a case where a lot of the documents were  
12 identified by witnesses who, I think, for purposes of the  
13 Federal Rules would be deemed either under the control of  
14 Mr. Easton, for example. Obviously, these are witnesses  
15 including Mr. Easton himself, that we would not -- who we  
16 would, once they were on the stand, may want to be cross-  
17 examining. We may have asked them questions during their  
18 deposition testimony that's useful to us or that establishes  
19 the authenticity of certain documents.

20 But nonetheless, we may want to -- we will not be  
21 sponsoring -- we will -- they will not be our witnesses as  
22 such. They will be under the control of a party or one of  
23 the other parties. And when Your Honor spoke about cross-  
24 examination, I just wanted to be clear that merely by  
25 calling the witness in order to have a piece of evidence

1 admitted or a certain statement made, we weren't, therefore,  
2 limited in terms of that we were sponsoring the witness in  
3 terms of whether we were on cross or direct. That would be  
4 under the Federal Rules.

5 THE COURT: No, no, no. I can't imagine that you  
6 would be calling Mr. Easton as anything but a hostile  
7 witness. And with respect -- I mean, if an individual has  
8 authenticated a document during his deposition, maybe you  
9 can get a stipulation that we don't need to call the witness  
10 to authenticate this document because it's been  
11 authenticated, and cite the pages of the deposition. But if  
12 you can't get an agreement, you're going to have to produce  
13 the witness.

14 And if you --

15 MR. CARROCCIO: Excuse me.

16 THE COURT: If you want to -- did I hear excuse  
17 me?

18 MR. CARROCCIO: You did from me, Your Honor.

19 THE COURT: Okay.

20 MR. CARROCCIO: Please -- I'm sorry for  
21 interrupting.

22 THE COURT: Oh, no. I didn't know if it was you  
23 or the reporter, because I heard the tape flipping at the  
24 same time.

25 But -- like for instance, documents you want to

1 get into with Mr. Easton, I can't imagine Mr. Easton  
2 wouldn't be testifying. And if you want to, rather than  
3 having him -- he'd probably be here for the hearing. Is  
4 that correct?

5 MR. LYON: I suspect that's the case, Your Honor.

6 THE COURT: Okay. You can introduce those  
7 documents when it's your turn to cross-examine Mr. Easton,  
8 and we can play -- okay. So, this cross-examination is  
9 really direct examination of a hostile witness. I mean, I  
10 don't -- I'm not into those formalities. I'm more into, put  
11 the guy up and get the story out. And I don't care who --  
12 how it's done.

13 MR. CARROCCIO: Your Honor --

14 MS. LANCASTER: That goes exactly to my original  
15 question, Your Honor. As far as the direct case is  
16 concerned, we may have documents that we expect to actually  
17 introduce through Mr. Easton in the sense that he has  
18 previously identified these documents during his deposition,  
19 and we were going -- plan to use him again to identify the  
20 documents. And I'm not quite sure what -- if I put that  
21 document in the direct case binder, what kind of  
22 identification or sponsoring information I am required to  
23 put.

24 THE COURT: Put down Mr. Easton.

25 MR. CARROCCIO: Your Honor, if I might be heard

1 for a second here. I'm a little bit concerned that there --  
2 that we make sure everybody understands that the depositions  
3 taken in this case were discovery depositions, and there was  
4 no indication that they were for the preservation of  
5 evidence. There's a very different purpose behind such  
6 depositions. And cross-examination is different as a  
7 result.

8 I do not believe that deposition testimony can be  
9 used to support the introduction of such documents.

10 THE COURT: No, I agree.

11 MR. CARROCCIO: Okay. Second, Your Honor, I think  
12 there's a distinction, I believe Your Honor was making  
13 between documents that were filed with the Commission and  
14 therefore, official notice may be taken of those documents.  
15 To the extent that the documents are correspondence between  
16 private parties and did not reach the Commission, there is  
17 no official notice that can be taken of those documents --

18 THE COURT: That's right --

19 MR. CARROCCIO: -- is my understanding.

20 THE COURT: If the document appears and it was  
21 filed with the Commission, and it appears in the  
22 Commission -- the official Commission record or file, it's  
23 got the Secretary's stamp on them, and I can take official  
24 notice of it. But -- and what I can say about that document  
25 is, "On such and such a date, a document of this many pages

1 was filed. And it appears to be signed by this individual,  
2 and it appears to say this."

3 But any -- I cannot use that document -- that  
4 document can't be used to establish the truth of the matters  
5 asserted therein unless you put a witness up that's got  
6 personal knowledge of those facts. And that's the problem  
7 with the independent counsel's report. The people that  
8 drafted that document and put it together -- I don't -- I  
9 think they may say it themselves. They don't have personal  
10 knowledge of the facts. Every fact contained in that -- and  
11 every fact that concerns me as contained in that document,  
12 is -- the authors of that report had no personal knowledge  
13 of it.

14 MR. GORDIN: Your Honor?

15 THE COURT: Yes?

16 MR. GORDIN: If I may, regarding your orders  
17 regarding listing the witnesses and an outline of detail of  
18 what they expect to testify to, it is possible, and  
19 certainly I haven't -- I don't know what the Bureau's going  
20 to do, and certainly I haven't reached any conclusions.  
21 Since the issue in this case as to issue one, is whether Mr.  
22 Easton lacked candor and Mr. Easton has made many statements  
23 besides what he -- on this issue to others and in other  
24 proceedings and in depositions here, that we may, in order  
25 to establish our case, want to call Mr. Easton to examine

1 him to establish that he's been lying.

2 I would assume that I don't have to outline on my  
3 cross-examination of Mr. Easton under those circumstances,  
4 as a hostile witness.

5 THE COURT: Well --

6 MR. LYON: Your Honor, one of the frustrations  
7 I've had in this case, and part of it is because of the  
8 Commission's discovery rules with respect to the Bureau is,  
9 I would like to know what it is that it's alleged that Mr.  
10 Easton lacked candor of or lied about or did what. And I'm  
11 now hearing that I may not know that until the allegations  
12 are made during cross-examination. I don't know how I can  
13 prepare for such an examination.

14 THE COURT: No, I don't agree with that, and I  
15 think the HDO in this case and when you combine it with the  
16 notice of power and liability for forfeiture which contains  
17 the same facts and maybe a couple more facts, put you on  
18 adequate notice as to what the charges are. And if you put  
19 Mr. Easton on the stand, and Mr. Gordin cross-examined him,  
20 he certainly wouldn't have to tell you in advance the nature  
21 of all of his cross-examination. He doesn't have to tell  
22 you, and you don't have to tell him what impeachment  
23 evidence you have. And you don't have to exchange  
24 impeachment evidence. And you know that.

25 MR. CARROCCIO: Or rebuttal evidence, I would

1 suggest, Your Honor.

2 THE COURT: Well, rebuttal evidence --

3 MR. LYON: Your Honor --

4 THE COURT: Time out. When we finish the direct  
5 cases, then I'm going to give you an opportunity -- I may  
6 have another exhibit exchange for rebuttal evidence. We may  
7 have to continue the thing. I know you don't want to. But  
8 the only fair way to do it -- the only fair way would be to  
9 let you absorb the direct cases, and then prepare a rebuttal  
10 case. And we may have a different -- we may have a new  
11 exchange date for rebuttal and a rebuttal hearing date.  
12 It's not going to be any extensive period of time, you know,  
13 like months and months and months.

14 But I know originally I said that the rebuttal  
15 cases will start immediately after the conclusion of the  
16 direct cases, but I don't think that would be fair to you,  
17 given the nature of what I'm seeing in discovery.

18 MR. LYON: Your Honor, if I could address the  
19 point. I agree with you that Mr. Gordin shouldn't have to  
20 tell me every point he wants to make in cross-examination.  
21 If that was the implication of my words, then I withdraw  
22 them and modify what I was trying to communicate. And you  
23 may have remedied my concern.

24 The concern I have is to what are the allegations  
25 of misrepresentation or lack of candor. And if they are, in

1 fact, limited to what's stated in either the NAL or the  
2 hearing designation order, then I understand. I have notice  
3 of that.

4 If there are going to be allegations coming from  
5 left field that are nowhere mentioned in the HTO or the NAL,  
6 then I think I have a right, at that point, to object to  
7 those as beyond the scope of the issues.

8 THE COURT: Well, let's --

9 MR. LYON: I'm just concerned about -- to  
10 insure --

11 THE COURT: Well, let's worry about specific  
12 objections later. I understand Mr. Gordin's point, and if  
13 he wants to, as part of his direct case, have Mr. Easton  
14 testify as a direct case witness, as a hostile witness, I  
15 think it's fair to do that. The same thing with Mr. Breen.

16 MR. LYON: And then at that -- at the point of my  
17 rebuttal case, I can recall Mr. Easton?

18 THE COURT: Absolutely, absolutely.

19 MS. LANCASTER: And Your Honor, in what great  
20 detail do we have to outline what we expect the testimony of  
21 Mr. Easton and Mr. Breen to be if we call them as a hostile  
22 witness?

23 THE COURT: Well, I'll leave that up to your  
24 judgment. I'm not going to rule in the abstract. But Mr.  
25 Breen's been crossed -- been deposed. Mr. Easton's been

1 deposed. And I think you can look at the depositions and --

2 MR. CARROCCIO: Your Honor --

3 MR. LYON: Your Honor -- I'm sorry. Go ahead.

4 MR. CARROCCIO: As far as rebuttal is concerned,  
5 are we going to see rebuttal on issue one before we have to  
6 make a direct case on issue two?

7 THE COURT: We're going to do it all at once, I  
8 think. I don't want to drag it out any longer than I have  
9 to. No, I understand your dilemma, but let's get it over  
10 with. I don't want to have rebuttal issue one, rebuttal  
11 issues two and three.

12 MR. CARROCCIO: Okay.

13 THE COURT: We'll do it all at once.

14 MR. LYON: Your Honor, do you have a time frame in  
15 mind for the rebuttal?

16 THE COURT: No. I haven't even thought about it.

17 MR. LYON: It would not come directly after the  
18 direct?

19 THE COURT: I don't --

20 MR. LYON: And the reason is purely personal. I  
21 have a vacation set for two weeks after this hearing is  
22 scheduled to begin and I need to know --

23 THE COURT: Well, how long do you think this  
24 hearing is going to go? I mean, that's --

25 MR. CARROCCIO: Your Honor, the direct cases, if

1 I'm hearing the rules you're putting down correctly, I don't  
2 believe should last more than three to four days.

3 MR. GORDIN: I think that is very optimistic. And  
4 I don't like to tell judges things are going to take a long  
5 time, because I know they don't like to --

6 THE COURT: We don't like things to take a long  
7 time.

8 MR. GORDIN: I understand that. But you also  
9 don't like when lawyers tell you things are going to be  
10 short, and they never turn out to be. So, I think to be  
11 candid, I think having seen the way these depositions have  
12 been conducted, seeing the amount of information and the  
13 number of statements that have been made on this subject, I  
14 think -- I can't imagine how it would be done in that short  
15 a time.

16 And I think when I examine, you will not see a  
17 waste of words in my examination of any witnesses. I'm not  
18 going to drag this out. But I think, quite candidly, that  
19 given all of the statements that have been made, the -- some  
20 of the technical material, the number of different  
21 statements that have been made by some of the witnesses on  
22 the same subject, I think examination will take quite some  
23 time.

24 MS. POWER: I agree.

25 THE COURT: Okay. I try to accommodate Ms. Power,

1 I'll try to accommodate you.

2 MR. GORDIN: Thank you, Your Honor.

3 MS. LANCASTER: Your Honor, I think you  
4 answered -- I had one other question, and I think you kind  
5 of answered it.

6 THE COURT: Okay. I'm sure I didn't mean to.

7 MS. LANCASTER: Well, inadvertently, but let me  
8 clarify. Again, because I'm new to this procedure, I'm  
9 confused, and I want to make sure I have an understanding of  
10 it.

11 It's my understanding, according to what Mr.  
12 Carroccio has previously said, that he -- that the issue  
13 number two -- his claim -- he has the burden of going  
14 forward with issue number two assuming that he -- I don't  
15 know how you assume -- how you get to the fact that whether  
16 you've won or lost on issue number one, but that becomes  
17 another question.

18 That being the case, if he has the burden on issue  
19 number two, then it seems to me that what we have -- the  
20 Bureau has previously submitted as its direct case for issue  
21 number two, is, in fact, its rebuttal to issue number two.  
22 Is that a correct statement?

23 THE COURT: Run that by me again.

24 MS. LANCASTER: As you know, the Bureau has  
25 already prepared -- had prepared and exchanged direct case

1 for issue number two prior to Mr. Easton getting into this  
2 procedure. But if, in fact, Mr. Carroccio and Mr. Breen had  
3 the burden in going forward with issue number two, then what  
4 we are calling our direct case for issue number two is, in  
5 fact, our rebuttal for issue number two.

6 THE COURT: Is your rebuttal?

7 MS. LANCASTER: Is that a correct -- I'm asking  
8 you. That's what I've gotten from this conversation, and I  
9 want to know if I've misunderstood something here, because  
10 you're talking about exchanging rebuttal cases versus direct  
11 cases. I've now gotten confused.

12 THE COURT: Isn't basically, your case, with  
13 respect to both issues, the same, though? You have Cynthia  
14 Hamilton saying what she said.

15 MS. LANCASTER: There will be definitely some  
16 overlap in the exhibits that we had for Mr. Breen or  
17 definitely exhibits that we'll have for Mr. Easton, but  
18 there will be more.

19 MS. POWER: There will be additional.

20 THE COURT: Okay. Mr. Carroccio, do you want  
21 to --

22 MR. CARROCCIO: Your Honor, I don't see that the  
23 direct case -- that anybody's direct case is their rebuttal  
24 case. I would certainly not expect that Mr. Breen, simply  
25 by submitting a case that would possibly -- that his direct

1 case would in any way be construed as an abdication or  
2 concession on his right to present rebuttal testimony.

3 THE COURT: I have to think about that. I just  
4 don't know. I mean, I told you I keep forgetting about  
5 issue two and I --

6 MS. LANCASTER: My concern, of course, is that if  
7 you're supposed to then exchange rebuttal testimony -- your  
8 rebuttal case in addition to your direct case, that whether  
9 or not we're going to have an additional binder that we're  
10 supposed to exchange --

11 THE COURT: If you want to do it all at once and  
12 just rest on the exhibits that you previously submitted,  
13 that's fine. And then you can introduce them into evidence  
14 at the appropriate time with the appropriate witnesses.

15 But I do see the point because, again, I keep  
16 forgetting about issue two. And issue two, basically --  
17 yes, the burden -- I just looked it up. And the burden of  
18 the proceeding and the burden of proof is on the Westel  
19 parties. And Mr. Breen is attempting to satisfy his burden  
20 by introducing that affidavit. "This is my version of what  
21 went on during that Cynthia Hamilton meeting, and this was  
22 my state of mind at that particular time." And at that  
23 point, it would be up to the Bureau to rebut that.

24 MS. LANCASTER: To rebut it and --

25 THE COURT: So, I guess, technically, you're

1 right, but that's not really the purpose for which I saw --  
2 I mean, I really didn't think of that.

3 MS. LANCASTER: Okay. Well, I'm just trying to  
4 understand what we're supposed to do.

5 THE COURT: Yes. But I mean if -- I'm not  
6 precluding anybody from exchanging whatever they want on  
7 August 11. And if there is a rebuttal exchange, --

8 MS. POWER: We'll have a different date for that.

9 THE COURT: Probably. You guys want one, right?

10 MR. CARROCCIO: Your Honor --

11 THE COURT: You would want a rebuttal exchange? I  
12 mean, you wouldn't just want to roll into rebuttal and just  
13 say, "Okay. Do the exhibits like they do in real court." I  
14 mean, what you have to do is you have to, basically -- to  
15 handle things in an FCC hearing, you have to have a  
16 different perspective.

17 Now, I know your clients don't have this  
18 perspective. But if you look at this as being not real  
19 court but pretend court, and we're not bound by the Federal  
20 Rules of Civil Procedure. I'm not really bound by the  
21 Federal Rules of Evidence. I'm bound by the Commission's  
22 rules, but I can stretch them any which way I want to. If I  
23 hear something interesting, I can say, "Keep talking."

24 And if you look at this as not being real court,  
25 and that we don't have the stringent rules that the regular

1 courts have, and that we can basically tailor our  
2 proceedings -- what my job is is to get as full a complete  
3 record as I can under the parameters of the issue. And if I  
4 have to stretch a little bit to do that, I'll do that.

5 Of course, what I don't want to happen is three  
6 years from now for somebody to say, "Gee, you should have  
7 gotten more on this or more on that." And that's why I'm  
8 trying to fashion a procedure that's fair to everybody and  
9 that makes sense.

10 MR. CARROCCIO: Your Honor, that is somewhat what  
11 I was trying to get at with my question about the order of  
12 proceeding, whether or not we would fully dispose of both  
13 direct and rebuttal case on issue one before proceeding with  
14 issue two. I think the -- I might suggest that the solution  
15 to the Bureau's question or the answer to the Bureau's  
16 question is that the Bureau may feel free to submit whatever  
17 case it wants as part of its direct case, and does not have  
18 to worry that some of that could not be used in rebuttal --  
19 later on in rebuttal, a witness recalled for rebuttal  
20 purposes.

21 Simply because a witness is noted as part of a  
22 direct case, that witness could be called as a rebuttal  
23 witness, as well, I believe, Your Honor.

24 THE COURT: Oh, I agree with that.

25 MR. CARROCCIO: Okay.

1           THE COURT: But what I want to do is do as much of  
2 the case as we can before we break. I really see the  
3 problem as concerning mostly Mr. Easton, because I think he  
4 should be given an adequate opportunity to evaluate what's  
5 been presented against him and fashion a defense. And he  
6 won't really know that for sure until after all the direct  
7 cases are finished.

8           I don't see that Mr. Breen has that problem. Of  
9 course, the facts and circumstances concerning him on the  
10 23rd was he wasn't even there. He was in his car in a  
11 snowstorm talking on the cell phone a couple times, and we  
12 really don't get into him until after stuff happened.

13           So, I don't see that you've got the problem as  
14 much as they do. And I don't want to make Mr. Easton commit  
15 to his rebuttal case before he's seen the evidence against  
16 him.

17           Okay. I think we've spent enough time on this.

18           MR. GORDIN: Your Honor, if I may just preview for  
19 the Court. There is one aspect of Mr. Easton's deposition  
20 testimony that we're currently looking at and evaluating  
21 that may lead us to file shortly, a motion to enlarge the  
22 issues in this case. We don't believe that will affect --  
23 because of the nature of it, we don't believe that will  
24 affect the timing of this at all. But just to make clear  
25 that one thing is in it.