

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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re

Amendment of the Commission's Rules
to Establish a Single AM Radio
Stereophonic Transmitting
Equipment Standard

ET Docket
No. 92-298

APPLICATION FOR REVIEW
OF FREEDOM OF INFORMATION ACTION

Leonard R. Kahn, a party in the above-captioned proceeding, hereby applies, pursuant to Subpart 0(C) of the Commission's Rules, for review of the staff letter dated August 10, 1993,¹ denying his request for an advance ruling that the Commission would withhold from public inspection the documents containing information subject to confidentiality orders of United States District Courts.²

The staff letter misconceives the issue presented by Mr. Kahn's request. The issue here is not as it was in GTE

1/ Letter to Mr. Kahn from Bruce A. Franca, Acting Chief Engineer, in Docket No. 92-298, dated August 10, 1993, a copy of which is appended hereto.

2/ Letter to Ms. Donna R. Searcy from Mr. Kahn dated May 3d, 1993, responding to Ms. Searcy's letter, dated April 22, 1993, returning the confidential appendices to Mr. Kahn's comments and reply comments filed in Docket No. 92-298.

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Sylvania,³ cited in the staff letter, whether a District Court injunction against the agency disclosure excused agency non-compliance with FOIA's disclosure requirement. Rather the issue here is whether the Commission may lawfully adopt its proposed rule without informing itself of the relevant content of the confidential documents. The District Court orders effectively establish the confidential nature of the documents, i.e., documents under judicial non-disclosure orders are not customarily released to the public by the party submitting them to the agency, under Exception 4, 5 U.S.C. § 552(b)(4)⁴ and 47 C.F.R. § 0.457(d).

3/ GTE Sylvania v. Consumers Union, 445 U.S. 375 (1980). The "sole" question decided in GTE Sylvania was whether the agency's withholding the documents pursuant to an injunction of one U.S. District Court was an improper withholding under the FOIA. 445 U.S. at 384.

4/ See S. Rpt. No. 813, 89th Cong., 2d Sess. 9 (1964), quoted in Critical Mass Energy Project v. NRC, --- U.S.App.D.C. ---, 975 F.2d 871, 877 (1992) ("Critical Mass III"). In Critical Mass III the Court by a vote of 7-4 reaffirmed the test in National Parks v. Morton, Secretary, 162 U.S.App.D.C. 223, 498 F.2d 765 (1974), that

financial or commercial information provided to the Government on a voluntary basis is "confidential" for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained.

* * *

So long as that information is provided voluntarily and so long as it is of a kind that [submitter] customarily withholds from the public, it must be treated as confidential.

975 F.2d at 879-80. Here the Commission should presume that the parties to the District Court litigation would "customarily" obey the judicial non-disclosure orders. This satisfies the objective criterion of National Parks. See Critical Mass III, supra, at 879.

The Commission is legally disabled from adopting the Motorola system as its AM stereo standard without considering the documents supporting Mr. Kahn's allegations of violations of the antitrust laws by the proponent of the Motorola system. The antitrust allegations are relevant because:

(1) The NPRM, 8 F.C.C. Rcd 688 (1992), proposes to adopt the Motorola system because "broadcasters, manufacturers and radio purchasers have, directly or indirectly, demonstrated a strong preference for the Motorola system." *Id.* at ¶ 5. If, in fact, Motorola's claim to such "strong preference" reflects only the suppression of competition in violation of the antitrust laws, that putative preference does not support the Commission's conclusion either as an evidentiary fact or as a matter of law.

(2) The Commission cannot make the required public interest determination based on a violation of the public policy of the United States embodied in the antitrust law.

(3) The Commission should not, by adopting the Motorola system, aid and abet the principals or advance the conspiracy to violate the antitrust laws alleged in Mr. Kahn's complaints in the courts.

In determining the public interest the Commission may not ignore Congressional policies embodied in the antitrust laws. See McLean Trucking Co. v. U.S., 321 U.S. 67, 80 (1944). The antitrust laws are not foreign to the manufacture, sale, and use of AM stereo generators and receivers, for Section 313(a) of the Act explicitly declares all the Federal antitrust laws "to be applicable to ... radio apparatus and devices".

The Supreme Court repeated the teaching of McLean Trucking in Denver & R.G.W.R. Co. v. U.S., 387 U.S. 485, 492 (1967) (ICC may not "close its eyes" to anticompetitive effects under Clayton

Act § 7 and "is required to weigh" them under public interest standard), citing FCC v. RCA Communications, 346 U.S. 86, 94 (1953) ("There can be no doubt that competition is a relevant factor in weighing the public interest"), and California v. FPC, 369 U.S. 482, 484-85 (1962) ("Evidence of antitrust violations is plainly relevant..., for part of the content of 'public convenience and necessity' ... is found in the laws of the United States").⁵ Here, the statutory public interest standard precludes the Commission from rewarding violations of the antitrust laws, and P.L. 102-538 neither excuses past violations of the antitrust laws nor authorizes the Commission to act in furtherance of any on-going violation of the antitrust laws.

The D.C. Circuit made it clear that the intent of the Freedom of Information Act was to enhance, not impair, "the ability of the Government to make intelligent, well-informed decisions...." Critical Mass III, *supra*, at 877, quoting National Parks, *supra*, at 767. The staff letter of August 10th works a perversion of that purpose.

Properly analyzed, then, the text of the FOIA requires a result other than that reached in the staff letter of August 10th. Mr. Kahn has voluntarily offered the confidential material under a condition consonant with the judicial orders.

5/ See also Southern S.S. Co. v. NLRB, 316 U.S. 31, 47 (1942) ("the Board has not been commissioned to effectuate the policies of the National Labor Relations Act so singlemindedly that it may wholly ignore other and equally important Congressional objectives").

The Commission is obliged to consider the material under the Communications Act. It follows literally from Critical Mass III, quoted in note 4 ante, that the material must be treated as confidential.⁶

In any event, the judicial orders in the Southern and Eastern Districts of New York do not stand in the way of the Commission's discharging its statutory duties. The Commission could, if necessary, simply require Motorola to produce its documents and Mr. Kahn to produce his documents, subject to any claim to confidentiality either might make under Section 0.457(d) of the Rules. See Sections 403 and 4(1) of the Act. The judicial orders do not prohibit the parties to the litigation from producing their own respective documents or disclosing them to each other;⁷ the orders only prohibit each party from publicly disclosing the other's documents. The availability of a coercive alternative, however, does not vitiate Exemption 4 for voluntary submissions. See Critical Mass III, supra, at 880.

Conclusion

The staff action, because it is based on an incomplete analysis of the situation and ignores the Commission's

6/ FOIA strikes the balance between the government's need to know and the private sector's legitimate right to maintain the confidentiality of its private commercial and financial information. See Critical Mass III, supra, at 877-79.

7/ In this rulemaking proceeding, Mr. Kahn served copies of both confidential appendices on counsel for Motorola at the time they were originally filed with the Commission.

affirmative duty to inquire into and to weigh the antitrust implications of its actions in this proceeding, should be vacated. The Commission should either declare that the confidential documents are subject to protection under Section 0.457 or affirmatively seek their production under Sections 4(i) and 403 of the Act. In no event can the Commission properly adopt the Motorola system as standard without having considered the alleged violations of the antitrust laws.

Respectfully submitted,


William Malone

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Attorney for
Leonard R. Kahn

August 17, 1993

Attachment

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

10 AUG 1993

IN REPLY REFER TO:

Mr. Leonard J. Kahn
Kahn Communications, Inc.
222 Westbury Avenue
Carle Place, New York 11514

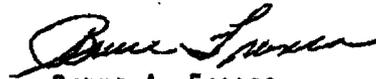
Re: ET Docket No. 92-298

Dear Mr. Kahn:

This responds to your May 8, 1993 letter, in which you request an "advanced ruling" that if you file with the Commission certain materials described in that letter they would be withheld from public inspection pursuant to section 0.459 of the Commission's Rules. In particular, you request that the Commission indicate that it would withhold from public inspection a "Reply Appendix" that contains information subject to a confidentiality order of a Federal District Court. For the reasons set forth below, your request is denied.

Section 0.459 of the Commission's Rules provides that a request that materials be withheld from public inspection will be acted on by the appropriate Bureau or Office Chief and will be granted if "it presents by a preponderance of the evidence a case for non-disclosure consistent with the provisions of the Freedom of Information Act." 47 C.F.R. Section 0.459(d). The Freedom of Information Act, however, does not authorize an agency to withhold documents from public inspection simply because they are the subject of a confidentiality order to which the agency is not a party. See 5 U.S.C. Section 552(b); 47 C.F.R. Section 0.457. Cf. STE Sylvania v. Consumers Union, 445 U.S. 376 (1980) (agency properly withheld records subject to court nondisclosure order to which agency was a party). Accordingly, your request is denied.

Sincerely,



Bruce A. France
Acting Chief Engineer

RECEIVED AUG 13 1993

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be mailed this day a copy of the foregoing application for review to the following persons:

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WILLIAM MALONE

Washington, D.C.
August 17, 1993