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

FCC 95M-25
50744

In Matter of	)	WT DOCKET NO. 94-147
	)	
JAMES A. KAY, JR.	)	
	)	
Licensee of one hundred sixty four Part 90 licenses in the Los Angeles, California area.	)	

MEMORANDUM OPINION AND ORDER

Issued: January 27, 1995 ; Released: January 31, 1995

1. This is a ruling on Request For Permission To File Appeal that is addressed to the Presiding Judge and that was filed on January 23, 1995, by James A. Kay, Jr. ("Kay").[1] This ruling also will dispose of a related Motion For Set Aside And Other Relief that was filed by Kay on January 23, 1995.[2]

2. Kay contends that the Presiding Judge's ruling[3] wherein he denied a request by Kay, that was submitted in the form of a letter, asking to suspend the Prehearing Conference set for January 27, 1995, because the Wireless Telecommunications Bureau had not filed a notice of appearance.

3. This proceeding was initiated by the Commission's Order To Show Cause, Hearing Designation Order And Notice Of Opportunity For Hearing For Forfeiture, FCC 94-315, released December 13, 1994 (the "HDO").[4] The Wireless Telecommunications Bureau had been established by the Commission before the issuance of the HDO. See News Release 50909, published December 1, 1994 (FCC Establishes Wireless Telecommunications Bureau). The former Private Radio Bureau became a Division of the new Bureau.

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[1] The Presiding Judge did not request any responsive pleading to be filed by the Bureau. 47 C.F.R. §1.301(b) (pleadings responsive to interlocutory appeal requests shall be filed only if requested by presiding officer).

[2] On January 26, 1995, the Bureau filed an Opposition wherein it notes correctly that the Motion is an unauthorized request for reconsideration.

[3] Order FCC 95M-16, released January 23, 1995.

[4] There was an Erratum released on December 23, 1994, by the Bureau's Deputy Chief to reflect that the Chief, Wireless Telecommunications Bureau shall be a party to the proceeding.

4. Kay asserts that the Presiding Judge erred by refusing to grant a request for a deferral of the Prehearing Conference because the request was submitted in letter form, i.e., without the Commission heading and without the case caption which attorneys know well are used in pleadings. Kay does not even address the clear meaning of the language of the rule cited by the Presiding Judge:

> Any request to stay the effectiveness of any decision or order of the Commission shall be filed as a separate pleading.

47 C.F.R. §1.44(e). The rule clearly means pleading and not letter form correspondence. Kay also asserts that he complied with §1.49 of the Commission's rules regarding "specifications as to pleadings and documents." But he does not make mention of the letter format that he utilized and he does not acknowledge that a "pleading" is generically different from a "document". In short, it appears that Kay is simply arguing against the obvious.

5. Kay's second point for appeal is the ruling of the Presiding Judge that the Bureau is not required to file a notice of appearance. This proceeding was initiated under the HDO which specifically required that Kay must file a written appearance under §1.91(c) of the Commission's rules in order to be heard. That rule provides:

> [T]he respondent, personally or by his attorney, shall file with the Commission, within thirty days of the service of the order or such shorter period as may be specified therein, a written appearance stating that he will appear at the hearing and present evidence on the matters specified in the order.

47 C.F.R. §1.91(c). It is evident from the HDO, which names the Bureau as a party with a burden of proof, and from the language of §1.91(c) that applies only to "respondents," that there is no requirement for the Bureau to file a notice of appearance in order to participate as a party in this case.

6. Kay relies on §1.221(e) of the Commission's rules that is applicable in Part B proceedings. It applies to "any person" to whom is mailed a notice of a designation as a party. That provision does not apply where the Bureau, which is not a "person," is made a party to the proceeding by the Commission in the designation order and where there is a specific provision for a notice of appearance as in §1.91(c). Also, under §1.221(e), Kay would have defaulted by failing to file his notice of appearance within twenty days of the mailing of the HDO.

7. The Commission's rules provide that interlocutory rulings of administrative law judges are appealable to the Commission's Review Board only if the appeal is allowed by the administrative law judge. 47 C.F.R. §1.301(b). The request for such an appeal must be filed within five (5) days of the release of the ruling and the request must contain:

> a showing that the appeal presents a new or novel question of law or policy and that the ruling is such that error would be likely to require remand should the appeal be deferred and raised as an exception.

Id. There is no new or novel question of law or policy in the contested ruling.

8. The Presiding Judge denied a motion to postpone a Prehearing Conference. Kay has failed to show any new or novel question or that there would be a remand as a result of the rulings. Thus, the Presiding Judge properly exercised discretion in denying the motion. See 47 C.F.R. 1.243(f) (presiding judges have authority to regulate the course of hearings). See also Pan American Broadcasting Co., Inc., 89 F.C.C. 167, 170-71 (Review Bd. 1982).

Order

Accordingly, IT IS ORDERED that the Request For Permission To File Appeal that was filed by James A. Kay, Jr. on January 23, 1995, IS DENIED.

IT IS FURTHER ORDERED that the Motion For Set Aside And Other Relief that was filed by James A. Kay, Jr. on January 23, 1995, also IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge