

FCC MAIL SECTION

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

FCC 95M-49

50841

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: February 13, 1995 ; Released: February 15, 1995

1. This is a ruling on a second Request For Permission To File Appeal that was filed by James a. Kay, Jr. ("Kay") on February 6, 1995. Kay seeks permission to appeal to the Review Board certain rulings of the Presiding Judge in his Memorandum Opinion And Order FCC 95M-24, released January 30, 1995.¹ 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

2. 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 23, 1994 ("HDO"). The HDO was adopted by the Commission on December 9, 1994. The Chief of the Private Radio Bureau was designated a party and the Commission was assigned the burden of proceeding and the burden of proof. See HDO at Paras. 13, 14. The case was docketed as PR Docket No. 94-147. The undersigned was appointed Presiding Judge on December 21, 1994 (FCC 94M-652). An Order was issued by the Presiding Judge on December 22, 1994, which noted that the burdens of proof and proceeding were assigned to the Wireless Telecommunications Bureau. See Order FCC 94M-653, released December 22, 1994. On December 23, 1994, the Deputy Chief of the Bureau released Erratum 51344, wherein the docket designa-

¹ Kay did not refer to the ruling's citation FCC 95M-24. Kay only cites the date of an Order of the Presiding Judge that was released on January 30, 1995. At times there may be multiple rulings on the same day. Therefore, it provides a more readily focused consideration of counsels' arguments when the Presiding Judge is given the full citation. Also, the rulings to which Kay takes exception were made in a Memorandum Opinion And Order.

² The legal and policy positions of the Bureau with respect to the issues were formerly presented in its Opposition To Application For Review that was filed on February 6, 1995. The Bureau's arguments and analyses in that pleading are considered by the Presiding Judge in connection with this ruling.

tion was changed from PR to WT and the Chief, Wireless Telecommunications Bureau was named a party. Kay filed a Notice of Appearance on January 12, 1995, in accordance with Section 1.91(c) of the Commission's rules. The Bureau was not required to file a Notice of Appearance. On that same date, Kay filed four motions in which he sought alternate relief for dismissal, deferral of proceeding, enlargement, change or deletion of issues, and for reconsideration by the Presiding Judge of his acknowledgement in Order FCC 94M-653, supra, that the Bureau is a party.³ Thereafter, on January 27, 1995, Kay appeared and participated in the Prehearing Conference that had been set in the Chief Judge's assignment Order that was released on December 21, 1994. At that Conference, Kay requested and received authorization to conduct discovery of the Wireless Telecommunications Bureau by interrogatories. Thus, this case is well underway with Kay and the Chief of the Wireless Telecommunications Bureau participating as parties.

3. The Wireless Telecommunications Bureau ("the Bureau") was created by the Commission in a reorganization that was announced to the public on December 1, 1994. See FCC NEWS (50909) dated December 1, 1994. The functions of the Private Radio Bureau were assumed by the new Bureau when the former Bureau was made a Division of the Wireless Telecommunications Bureau. Id. Kay argues that there was no delegation of authority by the Commission to the new Bureau that authorizes any change to the HDO or to add the Bureau as a party. However, as the Bureau notes, Kay does not contest the delegated authority of the former Private Radio Bureau which was incorporated into the new Bureau as a Division. The Bureau acknowledges that such delegated authority was subsumed by the new Bureau Chief in the reorganization and the Presiding Judge concurs with the Bureau's position. Therefore, it is not necessary for the Bureau to produce a specific order which shows a new delegation of the authority of the former Private Radio Bureau to the new Wireless Telecommunications Bureau.

4. Kay now requests permission to appeal to the Review Board on two issues: (1) whether the Chief, Wireless telecommunications Bureau ("Bureau Chief") was lawfully named a party to the proceeding; and (2) whether the Bureau Chief was required to file a Notice of Appearance. The request for permission to appeal was filed timely. The Commission's standards for interlocutory appeal to the Review Board require:

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.

47 C.F.R. §1.301(b).

³ All four motions were denied by the Presiding Judge in his omnibus ruling which is the subject of Kay's request for an interlocutory appeal.

5. Kay contends that the Chief, Wireless Telecommunications Bureau was not lawfully named a party in this proceeding. The Presiding Judge takes official notice⁴ that on December 1, 1994, the Commission announced to the public and to the communications community that on or before that date the Commission had established a Wireless Telecommunications Bureau which subsumed the functions and the authority of the former Private Radio Bureau which was made a Division of the new Bureau. See FCC News Release 50909, published December 1, 1994. With respect to Commission Bureaus being named parties to administrative proceedings, the Commission's rules provide:

The appropriate Bureau Chief(s) of the Commission shall be deemed to be a party to every adjudicatory proceeding (as defined in the Administrative Procedure Act) without the necessity of being named in the order designating the proceeding for hearing.

47 C.F.R. §1.21. Clearly, the rule covers this situation where there is a reorganization incorporating a former Bureau into a new Bureau while an administrative proceeding is underway. There is no confusion here. The appropriate Bureau Chief, and any successor, will at all times be a party to represent the Commission's interests.

5. The facts disclose that there has been a continuity of parties because there has always been a Bureau as a named party. There is no need for the Bureau to offer proof on its bona fides. Furthermore, there is no prejudice to Kay that arises from the reorganization. The substantive charges under the HDO remain the same after issuance of the Erratum. Therefore, the relevant Commission evidence to which Kay will need to respond will be the same regardless of the name of the Bureau involved. Since there is no prejudice shown to Kay in the litigation of the case there is no need for any concern of a remand to hear additional evidence.

6. The second issue on which Kay seeks an appeal is the non-filing of a Notice of Appearance by the Bureau. Kay asserts that the Commission's rules require that the Bureau Chief file a Notice of Appearance. In advancing that argument, Kay relies on Section 1.221(4)(e) of the Rules of Practice [47 C.F.R. §1.221(4)(e)] (any person named as a party must file a Notice of Appearance within 20 days of the mailing of the designation order in order to be heard at the hearing). Kay fails to address the fact that Section 1.221 applies only to applications for broadcast licenses wherein the applicant parties have their qualifications compared. This case is a show cause proceeding for possible revocation that was designated under Section 1.91(c)

⁴ See 47 C.F.R. §1.351 (federal rules of evidence apply) and FRE 201(b) (generally known fact may be judicially noticed).

[47 C.F.R. §1.91(c)]. That rule requires only the respondent to file a Notice of Appearance. Therefore, Section 1.221 applies only to Kay and not to the Bureau.⁵

7. It is concluded by the Presiding Judge that the issues sought to be appealed to the Review Board by Kay do not present novel questions of law and that any error would not require a remand should the appeal be deferred and raised as an exception. 47 C.F.R. §1.301(b).

Accordingly, IT IS ORDERED that the Request For Permission To File Appeal that was filed by James A. Kay, Jr. on February 6, 1995, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel
Administrative Law Judge

⁵ Kay also fails to recognize that his own Notice of Appearance was filed on January 12, 1995, a date which is beyond 20 days of the mailing of the HDO. Therefore, the erroneous application here of Section 1.221(4)(e) could have the unintended result of precluding Kay from offering a defense against the charges.