RECEIVED
DEC 4 1995
FEDERAL COMMUNICATIONS COMMISSIO
OFFICE OF SECRETARY

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

In the 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	)	

DOCKET FILE COPY ORIGINAL

To: Administrative Law Judge
Richard L. Sippel

WIRELESS TELECOMMUNICATIONS BUREAU'S MOTION FOR SUMMARY DECISION AND ORDER REVOKING LICENSES

Michele C. Farquhar
Chief, Wireless Telecommunications Bureau

W. Riley Hollingsworth
Deputy Associate Bureau Chief

William H. Kellett
Gary P. Schonman
Anne Marie Wypijewski
Attorneys

Federal Communications Commission
2025 M Street, N.W., Suite 7212
Washington, D.C. 20554
(202) 418-1430

December 4, 1995

No. of Copies rec'd 0+4
List ABCDE

Summary

The Show Cause Order in this proceeding specified an issue to determine whether Kay violated § 308(b) of the Communications Act of 1934, as amended. The issue was specified, in part, because Kay repeatedly refused to provide his loading information in response to multiple Commission inquiry letters. By Order, FCC 95M-203 (released October 31, 1995), the Presiding Judge directed Kay to answer completely a Bureau interrogatory requesting the same loading information. Kay failed to comply with the Order.

Kay's continued refusal to provide his loading information -- this time, in flagrant defiance of the Presiding Judge's Order -- constitutes irrefutable evidence establishing a pattern of abusive conduct insofar as Kay's obligations under § 308(b) of the Act are concerned. As a consequence of Kay's continued recalcitrance and based on Commission precedent, there is ample justification for the Presiding Judge to now find, as a matter of law, that Kay is basically unqualified to remain a Commission licensee.

Accordingly, the Presiding Judge should resolve the § 308(b) issue against Kay, conclude that Kay is basically unfit, revoke his authorizations, and terminate this proceeding.

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

In the 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	)	

To: Administrative Law Judge
Richard L. Sippel

WIRELESS TELECOMMUNICATIONS BUREAU'S MOTION FOR SUMMARY DECISION AND ORDER REVOKING LICENSES

1. The Wireless Telecommunications Bureau, pursuant to § 1.251 of the Commission's Rules, hereby requests the Presiding Judge to issue a summary decision adverse to James A. Kay, Jr. ("Kay") on the issue of whether he willfully and/or repeatedly violated § 308(b) of the Communications Act of 1934, as amended. The Bureau also requests the Presiding Judge to issue a further order revoking Kay's licenses because he is unqualified to remain a Commission licensee. In support whereof, the following is shown.

2. The Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing for Forfeiture, FCC 94-315 (released December 13, 1994) ("Show Cause Order"), at ¶ 10, specified, inter alia, the following issue:

(a) To determine whether James A. Kay, Jr. has violated Section 308(b) of the Act and/or Section 1.17 of the Commission's Rules, by failing to provide information requested in his responses to Commission inquiries.

The § 308(b) issue was predicated, in part, on Kay's repeated failure to provide critical loading information in response to multiple Commission inquiry letters directed to Kay pursuant to § 308(b) of the Act[1] and § 1.17 of the Commission's Rules.[2] More recently, in direct contravention of the Presiding Judge's Order, FCC 95M-203 (released October 31, 1995), Kay *again* failed to provide the same loading information. Kay's continued refusal to provide his loading information, in flagrant defiance of the Presiding Judge's Order, constitutes irrefutable evidence establishing a pattern of noncompliance with § 308(b) of the Act and § 1.17 of the Commission's Rules. As discussed more fully below, given Kay's

---

[1] Section 308(b) of the Act states in pertinent part:

> The Commission, at any time after the filing of such original application and during the term of any such licenses, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee in any manner or form, including by electronic means, as the Commission may prescribe by regulation.

[2] Section 1.17 of the Commission's Rules states:

> The Commission or its representatives may, in writing, require from any applicant, permittee or licensee written statements of fact relevant to a determination whether an application should be granted or denied, or to a determination whether a license should be revoked, or to some other matter within the jurisdiction of the Commission. No applicant, permittee or licensee shall in any response to Commission correspondence or inquiry or in any application, pleading, report or any other written statement submitted to the Commission, make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission.

contemptuous behavior, the § 308(b) issue designated against Kay can now be resolved against him. Moreover, based on Kay's demonstrated pattern of violating § 308(b) of the Act and § 1.17 of the Commission's Rules and failure to comply with a valid discovery Order, the Presiding Judge should enter an order finding Kay to be basically unfit to remain a Commission licensee, revoking his licenses, and terminating this proceeding.

3. The Bureau first asked Kay to produce his loading information on January 31, 1994, nearly two years ago. See Attachment No. 1. The Bureau's request for this information constituted a valid exercise of its authority.[3] By letter dated April 7, 1994, Kay

---

[3] The Commission has stressed that obtaining loading information in enforcement proceedings from land mobile licensees is vital to the Commission's statutory spectrum management responsibilities. Amendment of Part 90 of the Commission's Rules Pertaining to End User and Mobile Licensing Information, 7 FCC Rcd 6344, 6345 (1992)(¶ 8 and accompanying footnotes). Kay is the licensee of Specialized Mobile Radio ("SMR") stations operating in the conventional mode and 470-512 MHz private land mobile stations. As such, Kay provides communications services, for a fee, to commercial customers ("end users") who need to communicate with their mobile fleets. When a licensee's loading -- that is, the number of end user mobile units attributable to a particular channel -- reaches a specified critical number, the licensee is entitled, under the Commission's Rules, to obtain exclusive use of the channel, rather than being required to share the channel with other licensees. See §§ 90.313 and 90.633 of the Commission's Rules. Loading criteria is also important with respect to assessing a licensee's eligibility for additional channels in a particular area. Thus, a complete and accurate accounting of a licensee's loading is critical to the Commission's task of determining whether exclusive use is warranted and whether additional channels are justified. See §§ 90.135(a)(5), 90.313 and 90.633 of the Commission's Rules; Report and Order, 7 FCC Rcd 5558, 5562 (1992) (¶ 24). Kay is also the licensee of SMR stations operating in the trunked mode. Trunked operation uses groups of channels and employs computers to select an available channel for use by each user. The Commission uses loading criteria in determining, among other things, whether to authorize the addition of channels to existing trunked systems and whether to authorize the conversion of conventional SMR channels to trunked use. See § 90.615 of the Commission's Rules. Thus, a complete and accurate accounting of a licensee's loading is critical to an assessment of the licensee's compliance with the Commission's Rules applicable to trunked SMR systems. See § 90.631 of the Commission's Rules.

declined to produce his loading information, asserting that the requested information was "unnecessary" and the Commission had "no authority" to request loading information from him. See Attachment 2. Kay was subsequently warned, by letter dated May 20, 1994, from the Bureau, that his response was inadequate, evasive, and contrived to avoid full and candid disclosure to the Commission. See Attachment 3. After receiving yet a further inadequate response, the Bureau, by letter dated June 10, 1994, admonished Kay for his dilatory tactics and warned that Kay's continued refusal to produce his loading information could place his authorizations in jeopardy. Nevertheless, the Bureau afforded Kay an additional opportunity to comply, on terms designed to accommodate Kay:

> We repeat our request for a list of users as of January 1, 1994, but will accept a list, as detailed in our January 31, 1994 letter, as of any date subsequent to January 1, 1994 convenient to Mr. Kay. (emphasis in original).

See Attachment 4. On June 30, 1994, in advance of the Bureau's stated deadline, Kay flatly rejected the Bureau's revised request for loading information. Kay stated:

> However, Mr. Kay respectfully reports that there is no date subsequent to January 1, 1994 for which the submission of the requested information would be convenient. Therefore, we trust that that report terminates the Commission's request . . . .

See Attachment 5.[4] The Commission subsequently designated Kay's licenses for revocation. It specifically did so, in part, because of Kay's repeated failures to produce critical loading

---

[4] On March 1, 1995, Kay responded to the Bureau's February 17, 1995, First Request for Admissions of Fact and Genuineness of Documents. Kay admitted receiving the Commission inquiry letters discussed above, and he admitted to the genuineness of his forementioned written responses. These documents comprise a portion of the correspondence that ensued between the Bureau and Kay prior to designation relating to the solicitation of loading information. See the Bureau's February 17, 1995, First Request for Admissions of Fact and Genuineness of Documents, Attachments 6-18.

information. Order to Show Cause, ¶¶ 6-9.

4. On February 17, 1995, during the discovery phase of this proceeding, the Bureau properly served on Kay its First Set of Interrogatories. Interrogatory No. 4 requested Kay to provide certain specific information to the Bureau concerning his attributable loading. The language of the interrogatory was unambiguous:

> With respect to each of the call signs listed in Appendix A of the Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing for Forfeiture, FCC 94-315 (released December 13, 1994), identify each and every "end-user" (i.e., customer) and the number of mobile units of each such "end-user" (i.e., customer) since January 1, 1991.

Kay failed to provide the requested call sign loading information. On May 30, 1995, pursuant to § 1.323 of the Commission's Rules, the Bureau timely filed[5] a Further Motion to Compel Answers to Interrogatories seeking a complete and candid response to Interrogatory No. 4. By Order, FCC 95M-203 (released October 31, 1995),[6] the Presiding Judge determined that the loading information sought by the Bureau was relevant to the designated issues, and he ordered Kay to provide a "complete answer" to Interrogatory No. 4 by November 13, 1995. Significantly, in discussing Kay's obligation to turn over his loading information, the Presiding Judge stated:

---

[5] By Order, FCC 95M-88 (released March 28, 1995), the Presiding Judge afforded the Bureau until May 30, 1995, to file a motion to compel answers to its interrogatories because Kay had relied in answering certain interrogatories on documents which he had not yet produced.

[6] By Order, FCC 95M-144 (released June 21, 1995), the Presiding Judge stayed all procedural dates in this proceeding for four months to allow Kay to effectuate a settlement. Kay failed to do so during this period, and by Order, FCC 95M-201 (released October 26, 1995), the Presiding Judge returned the case to active status.

> There is an additional more general statutory ground for requiring Kay to answer Interrogatory No. 4. Under the Communications Act, a licensee can be required to submit statements of fact to determine whether or not a license should be revoked. See Communications Act of 1934, as amended, Section 308(b). *The answer to an interrogatory that is signed by the applicant or an attorney is tantamount to a statement under § 308(b).* (emphasis added).

Order, at n.1.

5. Kay submitted a response on November 13, 1995.[7] However, Kay's answer was woefully incomplete. Interrogatory No. 4 clearly requested, and the Presiding Judge's Order required, Kay to produce all loading information *dating back to January 1, 1991.* Kay did not provide *any* loading information whatsoever prior to *November 9, 1995.*[8] Interrogatory No. 4 further requested, and the Presiding Judge's Order also required, Kay to produce customer lists and the number of mobile transmitters for *each specific call sign* listed in Appendix A of the Show Cause Order. Kay failed to comply in large part. Instead of listing end users by call sign, Kay reported end users and grouped call signs in many instances according to *repeater stations* that he employs. By intentionally grouping call signs according to repeater stations rather than in the manner requested, Kay frustrated the Bureau's ability to assess his compliance with the Commission's loading requirements. Interrogatory No. 4 requested, and the Presiding Judge's Order required, Kay to identify "each and every" of his end users. Kay's answer, however, excluded certain classes of end

---

[7] The Bureau has been informed that the Presiding Judge is in receipt of a copy of Kay's November, 13, 1995, submission.

[8] By Order, FCC 95M-117 (released May 1, 1995), compelling Kay to produce certain, relevant documents, the Presiding Judge apprised Kay that "unless otherwise specified, the relevant period of time is from January 1, 1991, to the present."

users (e.g., demos, loaners, non-paying customers, etc.) that he was otherwise required to identify. Finally, Interrogatory No. 4 requested, and the Presiding Judge's Order required, Kay to "identify," as that term is used in the Bureau's interrogatory request, all of his end users. However, Kay's answer simply refers to a previously-produced "Customer List" which itself is deficient in providing identifying information for Kay's end users.

6. Kay's continued violation of § 308(b) of the Act cannot be justified or tolerated in the wake of the Presiding Judge's repeated warnings to him. By Memorandum Opinion and Order, FCC 95M-141 (released June 14, 1995), at ¶ 5, the Presiding Judge advised Kay of his obligation to respond to § 308(b) inquiries, citing the Commission's decision in Warren L. Percival, 8 FCC 2d 333, 334 (1967).[9] Moreover, the Presiding Judge, quoting at length from the Commission's decision in Carol Music, Inc., 37 FCC 379, 383-84 (1964), explained that revocation may be warranted where a licensee withholds material information, thereby frustrating the Commission's ability to assess the licensee's qualifications.

---

[9] In Warren L. Percival, the Commission stated quite succinctly:

> Under Section 308(b) of the Act, the Commission is entitled to request and receive from a licensee information relevant and material to a determination whether or not a license should be revoked. "While information which is self incriminatory may be withheld, the licensee in doing so, frustrates the Commission in the performance of its duty. In such event, denial or revocation of a license where information is not furnished may be warranted on this ground alone, since it is the licensee who deprives the Commission of information necessary to determine its compliance with the public interest standard." Carol Music, Inc., 37 FCC 379 (1964); cf. Blumenthal v FCC, 318 F. 2d 276 (1963); Borrow v. FCC, 285 F.2d 666 (1960).

8 FCC Rcd at 333-334 (1967).

Memorandum Opinion and Order, FCC 95M-141 (released June 14, 1995), at ¶ 15. Furthermore, the Presiding Judge explicitly advised Kay that § 308(b) of the Act establishes an additional ground for requiring a complete answer to Interrogatory No. 4. Order, at n. 1.[10] Kay's June 12, 1995, Opposition to the Bureau's Further Motion to Compel Answer to Interrogatories contained language evidencing a clear understanding by Kay of exactly what Interrogatory No. 4 requested. Additionally, Kay is an experienced land mobile licensee who was represented simultaneously by no fewer than three communications law firms when he submitted his latest answer. Given all of the foregoing, Kay's defiance of the Presiding Judge's discovery Order is inexcusable.

7. It is well established that the Commission does not tolerate abuses of its discovery processes. Indeed, the Commission has encouraged presiding judges to "use the tools that are available to assure the continued vitality, integrity and usefulness of the discovery procedures . . . ." Amendment of Part 1, Rules of Practice and Procedure to Provide for Certain Changes in the Commission's Discovery Procedures in Adjudicatory Hearings, 91 FCC 2d 527, 532-33 (1982). In the seminal case dealing with sanctions for serious discovery derelictions, the Commission dismissed the renewal application for a full power commercial television station because of the licensee's failure to respond to § 308(b) inquiry letters and orders compelling answers to interrogatories. Faith Center, Inc., 82 FCC 2d 1

[10] Also, in his Order compelling Kay to produce his loading information, the Presiding Judge, quoting from Amendment of Part 90 of the Commission's Rules Pertaining to End User and Mobile Licensing Information, 7 FCC Rcd 6344, 6345 (1992), exhorted that land mobile licensees are "not off the hook" in their responsibility to provide loading information in enforcement proceedings. Order, at p. 1-2.

(1980), aff'd, Faith Center, Inc. v. FCC, 679 F.2d 261 (D.C. Cir. 1982), cert. denied, 459 U.S. 1203 (1983). The Commission stated in Faith Center:

> Judicial and quasi-judicial forums have the inherent power to protect the integrity of their processes and the public from this type of abuse by dismissing the offender's case. We have made this the policy of the Commission. (footnotes omitted).

82 FCC 2d at 31.

8. The violations by the licensee in Faith Center are remarkably similar to those perpetrated by Kay. In each instance, the licensee withheld material information from the Commission prior to designation. Furthermore, in each instance, the licensee failed to heed a valid discovery order of the presiding officer. In Faith Center, the Commission imposed a sanction which stripped the offending licensee of its most valuable asset -- its authorization. In a multitude of other Commission cases, similar sanctions have followed when a party failed to comply with valid discovery orders in adjudicatory proceedings. For example, in Carroll, Carroll & Rowland, 4 FCC Rcd 7149 (Rev. Bd. 1989), aff'd 5 FCC Rcd 2430 (1990), the Review Board dismissed the offending party's application after its principals failed to appear for their depositions taken on the date ordered. In V.O.B. Incorporated, 4 FCC Rcd 6753 (Rev. Bd. 1989), the Review Board dismissed a party's application for failure to produce documents in response to the presiding judge's order. Similarly, in Mad River Broadcasting Co., 97 FCC 2d 679, 680-81 (1984), the Review Board dismissed a party's application for failure to exchange exhibits on the scheduled exchange date. In Vue-Metrics, Inc., 69 FCC 2d 1049 (1978), the Commission dismissed a party's application for failing to fully comply with the presiding judge's discovery order requiring the production of

certain relevant documents. In Classic Vision, 104 FCC 2d 1271 (Rev. Bd. 1986), the Review Board dismissed a party's application for failure to respond, in part, to a motion for production or documents and motions to compel.

9. The foregoing cases firmly establish that severe sanctions are appropriate when a party frustrates the Commission's hearing processes by failing to comply with discovery orders. Indeed, in each case the Commission expressed its absolute intolerance with such noncompliance by taking the strongest action available -- dismissal. Admittedly, Faith Center and the other decisions discussed above did not involve a revocation proceeding in which the evidentiary burdens rest on the appropriate operating bureau. Although there is, in the instant case, no application pending which the Presiding Judge might dismiss as a consequence of Kay's abusive behavior, the Presiding Judge can and should resolve the § 308(b) issue against Kay. Resolving the § 308(b) issue against Kay as a direct consequence of his demonstrated pattern of abusive conduct[11] is not only an entirely

---

[11] Kay's defiance of the Presiding Judge's Order is not the only action which can fairly be characterized as abusive. Indeed, Kay's conduct throughout this proceeding has evidenced an intent to delay and obfuscate the Commission's resolution of the designated issues. See Order, FCC 95M-16 (released January 23, 1995) (denying Kay's request to suspend a scheduled prehearing conference on the basis that the Bureau failed to file a notice of appearance); Memorandum Opinion and Order, FCC 95M-24 (released January 30, 1995) (rejecting as absurd Kay's request to dismiss Show Cause Order on the basis that the Commission was unauthorized to create the Wireless Telecommunications Bureau); Memorandum Opinion and Order, FCC 95M-25 (released January 31, 1995) (denying Kay's request to appeal ruling refusing to suspend prehearing conference); Order, FCC 95M-34 (released February 3, 1995) (denying Kay's request to disqualify Bureau counsel); Memorandum Opinion and Order, FCC 95M-44 (released February 10, 1995 (denying an Application for Review referred to the Presiding Judge challenging the substitution of the Wireless Telecommunications Bureau for the Private Radio Bureau); Memorandum Opinion and Order, FCC 95M-49 (released February 15, 1995) (denying Kay's request to interpose

appropriate remedy in this instance because the requirements for summary decision have been satisfied, it is perhaps the *only* suitable "sanction" available to the Presiding Judge in this context.[12] As discussed above, this sanction, admittedly serious, is entirely warranted and amply supported by Commission precedent. Clearly, it would render this entire proceeding superfluous and undermine the integrity of the Commission's hearing processes if Kay were unilaterally permitted to withhold material information without appropriate recourse, thereby preventing the Bureau from satisfying its burdens. Such manipulation of the Commission's processes cannot be permitted.

10. Summary decision of the § 308(b) issue against Kay is appropriate at this junction because there is no longer any genuine issue of material fact remaining for

---

an appeal to the Review Board regarding status of the Wireless Telecommunications Bureau as a party in this proceeding); Order, FCC 95M-52 (released February 15, 1995) (sustaining Bureau's objection to Kay's untimely request for admissions regarding issues beyond the scope of the proceeding); Order, FCC 95M-56 (released February 22, 1995) (denying Kay's request to appeal the denial of his request to change and delete issues from the Show Cause Order); Memorandum Opinion and Order, FCC 95 M-72 (released March 15, 1995) (denying Kay's request for interlocutory appeal challenging the Wireless Telecommunications Bureau's authority to issue an erratum to the Show Cause Order); Memorandum Opinion and Order, FCC 95M-141 (released June 14, 1995) (rejecting as unacceptable Kay's proposition that licensees cannot violate § 308(b) of the Act).

[12] The imposition of a forfeiture is *not* an appropriate remedy in this instance because Kay's noncompliance with § 308(b) of the Act and the Presiding Judge's Order deprives the Bureau of material information which is uniquely within Kay's control and is essential to determining whether Kay possesses the basic qualifications to remain a Commission licensee. See n. 9, supra. For this reason, nothing short of resolving the § 308(b) issue against Kay and revoking his licenses would remedy Kay's refusal to produce the requested information.

determination at hearing. See § 1.251 of the Commission's Rules.[13] Indeed, the Bureau has satisfied its burden of establishing that the truth is clear, the basic facts are beyond dispute, and there can be no reasonable disagreement on the inferences to be drawn from the facts. Big Country Radio, Inc., 50 FCC 2d 967 (1975). Section 308(b) of the Act imposed a statutory duty on Kay to provide his call sign loading information to the Commission upon request. See Memorandum Opinion and Order, FCC 95M-141 (released June 14, 1995). ¶ 5. The documentary evidence appended hereto demonstrates that the Commission directed multiple written requests to Kay in 1994 for this information. The documentary evidence further shows that Kay blatantly refused to discharge his statutory obligation and, instead, engaged in obstructive behavior. His answers were either evasive or unresponsive. Any question that Kay willfully violated § 308(b) of the Act prior to designation can be put to rest by his post-designation failure to comply with the Presiding Judge's valid discovery Order requiring him to turn over, inter alia, the *same* critical information. As discussed above, at all relevant times Kay was aware of what information he was required to produce, and he received sufficient and repeated warnings of the severe consequences that would flow from his noncompliance. The only logical conclusion that can be drawn from Kay's actions is that he has willfully violated § 308(b) of the Act. "Intent is a factual question that, like other factual questions, can be found from evidence affording a reasonable inference." Capitol City Broadcasting Company, 8 FCC Rcd 1726, 1734 (Rev. Bd. 1993). Moreover, it is

[13] Pursuant to § 1.251 of the Commission's Rules, the party filing a motion for summary decision is required to support its request by "affidavit *or* by other materials subject to consideration by the presiding officer." In support of the instant motion for summary decision, the Bureau is relying on documentary materials subject to consideration by the Presiding Judge. Consequently, there is no affidavit appended hereto.

unnecessary to find that a violation has been willful when it has been repeated. See § 312 of the Communications Act of 1934, as amended. Thus, even assuming, arguendo, that the evidence does not conclusively demonstrate that Kay has willfully violated § 308(b), his refusal to comply with the Presiding Judge's Order definitively establishes that he has repeatedly violated § 308(b) of the Act.

11. Kay's recalcitrance can no longer be condoned, and neither the Bureau, the Presiding Judge, nor the Commission should be placed in a situation where it must grovel for information to which it is clearly entitled.[14] The Bureau should not have to request another motion to compel, and it is offensive to expect the Presiding Judge to issue yet *another* order requiring Kay to comply with his prior Order. Compliance with valid discovery orders is *required* in the first instance. Kay already has had more than enough opportunities to provide the requested information. If the integrity of the Commission's processes are to be maintained, the Presiding Judge must find, as a matter of law, that Kay has willfully and/or repeatedly violated § 308(b) of the Act and that he is, as a consequence, basically unqualified

---

[14] The Review Board has stated:

> Since the Commission must license thousands of radio and television stations in the public interest, it must therefore rely substantially on the completeness and accuracy of the submissions made to it. WHW Enterprises, Inc. v. FCC, 753 F.2d 1132, 1139 (D.Cir. 1985); RKO General, Inc. v. FCC, 670 F.2d 215, 232 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982). It is manifest that applicants before the Commission "have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandates." Id. at 232.

Mid-Ohio Communications, Inc., 104 FCC 2d 572 (Rev. Bd. 1986).

to remain a licensee. The Bureau has satisfied its burdens under § 1.251 for summary decision of the §308(b) issue, and it has demonstrated that Kay is basically unfit to continue holding his authorizations. Equally compelling, the Bureau has shown, based on analogous Commission precedent, that revocation of Kay's authorizations is the appropriate sanction to be imposed in the context of this revocation proceeding.

12. Accordingly, the Bureau respectfully requests that the Presiding Judge issue an order that (a) finds that Kay has willfully and/or repeatedly violated § 308(b) of the Communications Act of 1934, as amended; (b) concludes that Kay is not qualified to remain a Commission licensee; (c) mandates the revocation of Kay's licenses; and (d) terminates this proceeding.

Respectfully submitted,
Michele C. Farquhar
Chief, Wireless Telecommunications Bureau

W. Riley Hollingsworth
Deputy Associate Bureau Chief

William H. Kellett
Gary P. Schonman
Anne Marie Wypijewski
Attorneys

Federal Communications Commission
2025 M Street, N.W., Suite 7212
Washington, D.C. 20554
(202) 418-1430

December 4, 1995

ATTACHMENT 1

Federal Communications Commission

1270 Fairfield Road
Gettysburg, PA 17325-7245

JAN 31 1994

In Reply Refer To:
Compliance File No. 94G001

VIA REGULAR MAIL & CERTIFIED MAIL -
RETURN RECEIPT REQUESTED

James A. Kay, Jr.
P.O. Box 7890
Van Nuys, CA 91409

Dear Mr. Kay:

The Commission has received complaints questioning the construction and operational status of a number of your licensed facilities. Specifically, the complaints allege that numerous facilities licensed to you are on U.S. Forest Service land, but do not have the requisite permits for such use. The presumption is that those facilities were not constructed and made operational as required by the Commission's rules and therefore, the licenses have canceled. In addition, the Commission has also received complaints questioning the actual loading and use of your facilities. The complaints allege that the licensed loading of the facilities does not realistically represent the actual loading of the facilities, thereby resulting in the warehousing of spectrum.

Based upon these allegations, we need more information to determine whether you are qualified to be a Commission licensee. We are authorized to request this information pursuant to the Communications Act of 1934, as amended, 47 U.S.C. Section 308(b). Failure to respond timely, completely, and truthfully could result in initiation of revocation proceedings against your licenses.

(1) List alphabetically the call signs and licensee names of all facilities owned or operated by you or by any companies under which you do business. Annotate those facilities which are located on U.S. Forest Service land.

(2) Provide for each call sign listed in (1), the original date of grant of the call sign, the date the licensed station was constructed and placed in operation, and the type of facility.

(3) Provide a copy of the U.S. Forest Service permit for those facilities constructed and made operational on U.S. Forest Service lands in order of the list of call signs in (1). The permit should clearly indicate when such use was authorized.

(4) For those facilities which are authorized on U.S. Forest Service lands, but for which you do not hold a permit, please explain the reason why a permit has not been obtained.

(5) For each station shown in (1) include a user list. The list must include the user name, business address and phone number, and a contact person, along with the number of mobile units and for trunked systems, the number of control stations, operated by the user. Users operating on multiple systems under (1) above should be annotated to identify all such systems and should be appropriately cross indexed.

(6) For each station in (1), please list the total number of units operated on each station. Such demonstration of use must be substantiated by business records.

Please send your reply to: Federal Communications Commission, 1270 Fairfield Road, Gettysburg, PA 17325-7245, Attention: Compliance - Room 41.

You are requested to furnish this information within 60 days of the date of this letter. Your attention is directed to Title 18, U.S.C. Section 1001, in which Congress has determined that a wilful false reply to a letter of this type may result in fine or imprisonment.

Sincerely,

W. Riley Hollingsworth

W. Riley Hollingsworth
Deputy Chief, Licensing Division

amw/kay12/rah

ATTACHMENT 2

BROWN AND SCHWANINGER
LAWYERS
1835 K STREET, N.W.
SUITE 650
WASHINGTON, D.C. 20006

DENNIS C. BROWN
ROBERT H. SCHWANINGER, JR.
KATHLEEN A. KAERCHER†
NADJA S. SODOS†
† NOT ADMITTED IN D.C.

(202) 223-8837

GETTYSBURG OFFICE
1275 FAIRFIELD ROAD, SUITE 16
GETTYSBURG, PENNSYLVANIA 17325

April 7, 1994

W. Riley Hollingsworth, Deputy Chief
Licensing Division
Federal Communications Commission
Gettysburg, Pennsylvania 17325

Re: Compliance File No. 94G001

Dear Mr. Hollingsworth:

We represent the radio system interests of James A. Kay, Jr. before the Federal Communications Commission. Accordingly, on behalf of Mr. Kay, we hereby respond to the Commission's recent request for information concerning Mr. Kay's operations in the Los Angeles, California, area.

1) In response to the Commission's request that Mr. Kay "list alphabetically the call signs and licensee names of all facilities owned or operated by you or by any companies under which you do business," we respectfully submit that the requested call sign and licensee name information is already within the Commission's possession. Accordingly, Mr. Kay respectfully declines the Commission's request that he duplicate that information or perform secretarial sorting tasks which the Commission could more expeditiously perform by the application of its computer resources to the call sign and licensee name information which it has in its own records.

In response to the Commission's request that Mr. Kay "annotate those facilities which are located on U.S. Forest Service land," Mr. Kay respectfully declines to supply that information for the reason that whether or not a station is located on U.S. Forest Service land is irrelevant to the stated purpose of the Commission's inquiry. The Commission's jurisdiction does not extend to regulation of the use of U.S. Forest Service land, and neither the Communications Act nor the Commission Rules prohibit the location of a radio facility on U.S. Forest Service land. Therefore, whether a station is or is not located on U.S.

Entire contents copyright, James A. Kay, Jr., 1994. All rights reserved. No portion of this document may be copied or reproduced by any means.

Forest Service land would be immaterial and irrelevant to a determination of whether Mr. Kay is qualified to be a Commission licensee. Consequently, the Commission has no need for and no authority to request information concerning whether a specific station is located on U.S. Forest Service land. Although the Commission has no need for the requested information to exercise its authority to regulate the radio spectrum, if the Commission desires to ascertain that information, we respectfully suggest that it may desire to plot each station on a map which shows the boundaries of the U.S. Forest Service land.

2) With respect to the Commission's request that Mr. Kay supply "the original date of grant of the call sign" for each station, we respectfully call to the Commission's attention that the requested information is already in the Commission's possession and Mr. Kay is not required to keep any record of that information. With respect to the Commission's request that Mr. Kay provide "the date the licensed station was constructed and placed in operation," we respectfully call to the Commission's attention that the Commission's Rules do not require Mr. Kay to keep any record of that information. To the extent that Mr. Kay has previously reported that information to the Commission, the requested information is already in the Commission's possession.

With respect to the Commission's request that Mr. Kay provide "the type of facility" for each call sign, we respectfully submit that the request is not sufficiently specific to allow Mr. Kay to be sure what the Commission requested. However, we respectfully suggest that the requested information is already within the Commission's records and may be found by referring to the Commission license for each station.

3) With respect to the Commission's request that Mr. Kay "provide a copy of the U.S. Forest Service permit for those facilities constructed and made operational on U.S. Forest Service lands," we respectfully call to the Commission's attention that the existence of permits for use of U.S. Forest Service lands is not a subject which is within the Commission's jurisdiction. Neither the Communications Act nor any Commission Rule requires that a Commission licensee obtain a permit from the U.S. Forest Service for a Private Radio Services facility. With respect to lands administered by the Bureau of Land Management, the Commission has determined that it will issue a license for a radio station without regard to whether the BLM has granted consented to the proposed facility, Ft. Collins Telecasters, MM Docket No. 83-777, _____ FCC Rcd. _____ (Review Board) (Released May 9, 1986 RCC 86R-26), and cases cited therein. We suggest that, were the issue to arise with respect to lands administered by the U.S. Forest Service, the Commission would take the same position which it has taken with respect to the BLM, namely, that whether a land management agency of the Federal Government has consented to the operation of a proposed station is irrelevant to the exercise of the Commission's authorized functions.

Because the regulation of the use of U.S. Forest Service lands is not within the Commission's jurisdiction, because the requested information would not be relevant to the

Entire contents copyright, James A. Kay, Jr., 1994. All rights reserved. No portion of this document may be copied or reproduced by any means.

Commission's administration of the Communications Act, and because the requested information would not be relevant to a determination as to whether Mr. Kay is qualified to be a Commission licensee, Mr. Kay respectfully declines to supply the requested information.

In its letter of inquiry, the Commission stated that "the presumption is that those facilities [, if any, for which he does not hold a U.S. Forest Service permit] were not constructed and made operational as required by the Commission's rules and therefore, the licenses have cancelled." It is not clear from the Commission's letter whether the presumption to which the letter refers was the presumption of the complainant(s) or is a presumption of law which the Private Radio Bureau has purported to initiate by its letter of inquiry. It is also not clear from the Commission's letter whether the reported presumption is purported to be rebuttable or irrebuttable. Accordingly, Mr. Kay was not provided with sufficient notice required for him to respond fully to the statement. In an abundance of caution, however, we respectfully submit that any such presumption would be unreasonable and contrary to law.

The Commission is authorized to regulate the use of the electromagnetic spectrum. It is not authorized to regulate the use of U.S. Forest Service lands. A radio system operates equally well, with or without a U.S. Forest Service permit. Just as the Commission's Rules do not require a licensee to comply with local zoning requirements, property tax requirements, the Americans With Disabilities Act, or the Federal Highway Administration Act to effectuate completion of construction of a radio facility and to place it in operation, the existence or non-existence of a U.S. Forest Service permit is immaterial and irrelevant to the completion of construction of a Private Radio Services facility or the placing of such a station in operation. Since the Commission does not require compliance with any law other than that which is within the Commission's jurisdiction for a licensee to be deemed to have completed construction of a station and to have placed it in operation, the presumption referred to by the Commission's letter of inquiry is unreasonable.

The presumption referred to by the Commission's letter is also unreasonable because the incentives which lead a person to complete construction of a Private Radio Services station and to place it in operation are not the same as the incentives which lead a person to add, or not add, a station to his U.S. Forest Service permit. While a licensee is compelled to complete construction of a Private Radio Services station and to place it in operation within a certain period of time at the risk of loss of his Commission license, he is under no similar compulsion to add a station to his U.S. Forest Service permit. Because the U.S. Forest Service demands a percentage of the user's revenues as compensation for use of U.S. Forest Service land, there is a positive disincentive for a user to add a station to his U.S. Forest Service permit within any certain period of time. Since the licensee is subject to competing incentives and disincentives in completion of construction of a station in a timely manner and in adding the station to his U.S. Forest Service permit, the presumption suggested by the Commission's letter is unreasonable.

Entire contents copyright, James A. Kay, Jr., 1994. All rights reserved. No portion of this document may be copied or reproduced by any means.

The presumption referred to by the Commission's letter is also unreasonable because it does not take into account the way in which the Forest Service's permit system operates. The Forest Service issues an initial permit to a radio station licensee. Subsequent to the issuance of the initial permit, the licensee is subject to a "self-certification" requirement, under which he is to submit to the Forest Service a report of the addition of any frequency at the site which he is authorized to use. Subsequent to the licensee's reporting the addition of a frequency, in the fullness of time, the Forest Service routinely issues an amendment to the initial permit. However, just as the Commission is currently backlogged by several quarters in the processing of SMR-Trunked system applications, the Forest Service runs a perpetual backlog in responding to permittee updates. In some current instances, Mr. Kay has been waiting nearly one year for a response from the Forest Service to his reports of frequency additions. Accordingly, a Forest Service permit cannot be relied upon as any evidence of the existence of a radio facility at any certain site.

The suggested presumption is contrary to law because it presumes the existence of certain facts based on an alleged violation of a rule which is not within the Commission's jurisdiction. That the Forest Service did not hear a tree fall in the forest does not reasonably lead to the conclusion that no lumberjack had been at work there. Just as the absence of a record in the Forest Service's tree files does not even tend toward a conclusion that a certain tree must not exist, the absence of a certain radio station from a U.S. Forest Service permit does not tend toward any conclusion, whatsoever, concerning whether the station was actually constructed and placed in operation.

4) The Commission's jurisdiction does not extend to the regulation of U.S. Forest Service lands. The reasons why Mr. Kay may or may not hold a U.S. Forest Service permit for a certain radio facility are immaterial to the Commission's regulation of the radio spectrum. Therefore, Mr. Kay respectfully declines to supply the requested information.

5) With respect to the information requested by Item 5 of the Commission's letter of inquiry, the Commission has sought to engage in an unlawful fishing expedition. We respectfully submit that the extent of information requested is unnecessary to fulfill the stated purpose of the Commission's inquiry. Since the Commission stated that it had received "complaints questioning the actual loading and use of [Mr. Kay's] facilities," the Commission might be able to meet its stated objectives by requesting information which was directly related to the complaints upon which its inquiry was based. However, the breadth of information requested is clearly well beyond the scope of the complaints which the Commission stated that it has received and well beyond the extent of information which the Commission might need to determine the accuracy of the reported complaints.

With respect to the specific information requested, we respectfully note that the stations licensed to Mr. Kay are not shared, *see*, Notice of Proposed Rule Making in PR Docket No. 92-78, 7 FCC Rcd. at 2880 n. 38 (1992), and the case cited therein. Therefore, the Commission does not require Mr. Kay to maintain any record of his users' names,

Entire contents copyright, James A. Kay, Jr., 1994. All rights reserved. No portion of this document may be copied or reproduced by any means.

business address, phone number, contact person, number of mobile units or number of control stations, or to take any action when the loading on his stations changes. Neither does the Commission require a licensee to maintain any record of the various systems with which a given customer operates. Because the Commission's Rules do not require a licensee to maintain the above referenced information, we respectfully submit that the Commission has no authority to request that information from Mr. Kay.

In its letter to Mr. Kay dated March 1, 1994, the Commission declined to provide Mr. Kay with any assurance that it would treat any customer information which he submitted with strict confidence. In the Finder's Preference matter of Joe Hiram Trucking, Inc., in which Mr. Kay is the finder, the Commission recently disclosed to Mr. Kay certain financial information which Joseph Hiram had requested that the Commission keep confidential. As our office had reported to you, during the pendency of your request for information, the existence and contents of your request leaked out of the Commission to Mr. Kay's competitors and the information that he has been asked certain questions has been used against him in their efforts to obtain the trade of his end users. The information which the Commission has requested concerning Mr. Kay's end users constitutes essentially the entire value of the business which he has built up over many years of hard effort, and we trust that the Commission will understand that he is unwilling to share that information with his competitors. Because the Commission has declined to assure Mr. Kay of confidential treatment, and because the Commission's recent actions give Mr. Kay no cause for confidence that any information which he might submit would be kept from the eyes of his competitors in the highly competitive Los Angeles market, we trust that the Commission will understand why Mr. Kay respectfully declines the Commission's request.

The Commission's request at Item 6 essentially requests that Mr. Kay tell the Commission everything about everything. However, the Commission has declined to provide Mr. Kay with an assurance that he will be immune to criminal prosecution based on the information which it has requested. Accordingly, Mr. Kay respectfully declines to supply the Commission with the requested information on the basis of the guarantees of the Fifth Amendment to the United States Constitution.

6. With respect to the information requested by Item 6 of the Commission's letter of inquiry, Mr. Kay respectfully reports that the question is not sufficiently specific for him to supply the requested information. Item 6 did not specify any date or time as the window of time during which the information was requested. The number of units operated on each of Mr. Kay's stations is subject to wide variation with times of day, economic status of the Los Angeles area, season of the year, weather, and external events affecting mobile radio system use. Further, many of Mr. Kay's end users are equipped with radio transceivers which are capable of operating in association with various stations, including stations for which he holds the license, and other stations, as well. Accordingly, at any given instant of time, Mr. Kay may not know the number of mobile units operated on each of his stations.

Entire contents copyright, James A. Kay, Jr., 1994. All rights reserved. No portion of this document may be copied or reproduced by any means.