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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the matter of)
)
JAMES A. KAY, JR.)
)
Licensee of one hundred sixty-)
four Part 90 licenses in the)
Los Angeles, California area.)

WT Docket No. 94-147

DOCKET FILE COPY ORIGINAL

To: Administrative Law Judge
Richard L. Sippel

**MOTION TO STRIKE WIRELESS TELECOMMUNICATIONS BUREAU'S
REPLY TO OPPOSITION TO MOTION FOR
SUMMARY DECISION AND ORDER REVOKING LICENSES**

James A. Kay, Jr. ("Kay"), by his attorneys, hereby moves to strike the Wireless Telecommunication Bureau's ("Bureau") Reply to Opposition to Motion for Summary Decision and Order Revoking Licenses (the "Reply") filed on January 22, 1996. In support thereof, Kay states as follows.

INTRODUCTION

1. On December 4, 1995, the Bureau filed a Motion for Summary Decision (the "Motion"). Kay filed a timely opposition to the Motion on January 11, 1996 (the "Opposition").

2. During a January 11, 1996 conference call involving all the parties to this proceeding, the Presiding Judge, sua sponte, authorized, inter alia, the Bureau to file a reply to Kay's Opposition (the "Conference Call").¹ The Presiding Judge's

¹ Pursuant to Section 1.294 of the Commission's Rules, replies are not normally permitted to an opposition to a motion for summary decision.

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rulings during the Conference Call were memorialized in an Order, FCC 96M-1, released January 18, 1996.²

3. During the Conference Call, the Presiding Judge specifically stated that the Bureau's Reply was to be limited to correcting any alleged factual errors made by Kay in his Opposition. Consistent with the Presiding Judge's ruling, Section 1.45(b) of the Commission's Rules provides that a "reply shall be limited to matters raised in the oppositions . . ." The Presiding Judge's stated intent in providing the Reply opportunity was to allow the Bureau to correct factual "misrepresentations," not to get the last word in this matter.

ARGUMENTS

4. The Reply represents a clear abuse by the Bureau of the privilege, given to the Bureau by the Presiding Judge, to file a reply to the Opposition. The Reply contains no allegations that Kay misrepresented or otherwise altered any facts in this matter.

5. The Reply contains the Bureau's attempt to modify the basis for its Motion from one premised on Kay's alleged failure to produce the loading information requested in Interrogatory No.

² Kay maintains his objection to the Presiding Judge's Order, FCC 96M-1, released January 18, 1996, to the extent that the Presiding Judge authorized the Bureau to file a reply pleading in an active matter--Bureau's Motion for Summary Decision--and authorized Kay to file a reply to a matter that was previously decided--Kay's Motion for Partial Summary Decision. See Memorandum Opinion and Order FCC 95M-141, released June 14, 1995 (denying Kay's Motion for Partial Summary Decision).

4³ to a Motion based entirely on Section 308(b) of the Communications Act of 1934, as amended (the "Act"), "[e]ven if Kay, at this late date, were to suddenly produce the requested loading data." (See Page 3 of the Reply).⁴ The heart of the Kay's Opposition was that he has fully complied with the Presiding Judge's Order, FCC 95M-203, released October 31, 1995, regarding Interrogatory No. 4. In support of this contention, the Opposition contains Kay's detailed description, given by Kay under penalty of perjury, of his record-keeping system. In the Reply, the Bureau fails to produce any evidence, either physical evidence or by a sworn statement, that Kay has not complied with the Presiding Judge's Order concerning Interrogatory No. 4. Likewise, the Reply is not limited to matters raised in Kay's Opposition and, therefore, must be stricken under Section 1.45(b) of the Commission's Rules. Industrial Business Corp., 26 RR 2d 1447 (Rev. Bd. 1973). Either by virtue of the Bureau's violation

³ See Page i of the Bureau's Motion ("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 license.")

⁴ See also Page 4 of the Reply ("The Bureau's motion is predicated on the fact -- supported by reliable evidence -- that Kay willfully and/or repeatedly violated § 308(b) of the Act before this case was designated for hearing and again by his post-designation failure to comply fully and completely with the Presiding Judge's Order, FCC 95M-203 (released October 31, 1995) compelling Kay to produce information requested in Interrogatory No. 4.")

of the Presiding Judge's directions or Section 1.45(b) of the Commission's Rules, the Reply must be stricken in its entirety.

6. Another example of the Bureau's unilateral expansion of the issues addressed in the Opposition is its allegation that "Kay was required to report the number of mobile units operating on each of his stations and to attribute each mobile unit to a specific station." (See Page 5 of the Reply, emphasis added) This statement completely mischaracterizes the Bureau's request in Interrogatory No. 4, which simply states:

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 submits that he did just that. Prior to the Reply, the Bureau never requested that Kay allocate the mobiles to a particular station for a particular customer. The Bureau cannot do so now through the motions process.

7. Instead of focusing on Kay's alleged failure to properly respond to Interrogatory No. 4--the sole issue addressed in the Opposition⁵--the thrust of the Reply is on Kay's predesignation conduct. Kay's predesignation conduct was not the basis for the Motion. Kay's legal position, both before and after the Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, FCC 94-147,

⁵ See Opposition at pages 2 and 3 ("In this Opposition, Kay responds only to the Bureau's central allegation; namely, that Kay has failed to properly answer Interrogatory No. 4.")

released December 13, 1994 (the "HDO") was issued, has been that the information requested by the Bureau pursuant to Section 308(b) of the Act was overbroad since it required Kay to produce confidential business information which, if placed in a public file, would destroy his business. As a result, Kay, upon the advice of legal counsel, challenged the Bureau's request. Kay expected that the Commission would rule on whether he should have to provide confidential business information or, at a minimum, offer Kay protection against the release of such documents from the Commission's files or by a Freedom of Information Act request.

8. After the Bureau issued the HDO and considering that the Presiding Judge's Order overruled Kay's arguments on this point (Order, FCC 95M-203, released October 31, 1995), Kay unequivocally answered Interrogatory No. 4 to the best of his ability. The Bureau has been unable to demonstrate, as a matter of law, that the assertion of a legal challenge to the Bureau's request violates Commission Rules or otherwise supports the Bureau's allegation that Kay is unfit to be a Commission licensee.

9. In fact, subsequent to the Presiding Judge's October 31, 1995 Order, Kay has produced all information and records available to him. According to the Federal Rules of Civil Procedure⁶, Kay must only produce documents in his possession,

⁶ Pursuant to Section 1.351 of the Commission's Rules, the Federal Rules are applicable to this proceeding.

control or custody; Kay is under no obligation to create information for another party. See, e.g., Hicks v. Arthur, 159 F.R.D. 468 (E.D. Pa. 1995).⁷ Kay has clearly satisfied this obligation.

10. Despite the numerous pleadings filed and arguments advanced by the Bureau, the Bureau's extremely high burden of proof required to succeed on a motion for summary decision cannot be forgotten. The Bureau has not produced sufficient evidence to support its Motion⁸. In fact, the Bureau has not produced any evidence (either physical or by sworn affidavit) that Kay has not produced all information in his possession in response to Interrogatory No. 4. In order to secure a grant of summary decision, the Bureau must meet the stringent standards that serve to "insure due process." Midwest St. Louis, Inc., 48 RR 2d 95, 104 (1980). This requires a showing that no genuine issue of material fact exists for determination at hearing. Summary Decision Procedure, 24 RR 2d 1715 (1972). The burden is on the Bureau to establish that there is no doubt as to facts and

⁷ As a practical matter, Kay cannot create documents based on information from other parties in responding to an interrogatory. Under Section 1.323(b) of the Commission's Rules, a respondent to an interrogatory must aver to his answers. Kay would be in no posture to affirm the accuracy of any information other than that which he had in his own possession, or knew from a review of his records.

⁸ The Bureau only alleges that it has presented sufficient evidence to support its Motion. See Page 3 of the Reply ("Given the compelling evidence presented by the Bureau, . . .") and Page 4 of the Reply ("The Bureau's motion is predicated on the fact -- supported by reliable evidence -- . . .") (emphasis added). Such evidence is notably absent from the Bureau's pleadings.

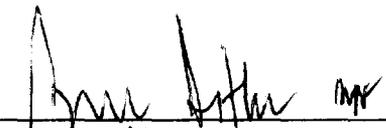
only that legal conclusions remain. The Presiding Judge is to proceed with a hearing even if evidentiary standards are met, when it is otherwise appropriate "in view of the nature of the proceeding or the surrounding circumstances." Midwest St. Louis, Inc., supra. Clearly, the only course of action in this proceeding is to continue with the hearing.

CONCLUSION

WHEREFORE, for the reasons set forth above, Kay respectfully requests that the Reply be stricken from the record.

Respectfully submitted,

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Dated: January 26, 1996

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing James A. Kay Jr.'s Motion to Strike Wireless Telecommunications Bureau's Reply to Opposition to Motion for Summary Decision and Order Revoking Licenses was hand-delivered on this 26th day of January, 1996 to the following:

The Honorable Richard L. Sippel
Administrative Law Judge
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and sent via first-class mail, postage prepaid on this 26th day of January, 1996 to:

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