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MAR 29 1996

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

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

RESPONSE TO WIRELESS TELECOMMUNICATIONS BUREAU'S REPLY

James A. Kay, Jr. ("Kay"), by his attorneys and pursuant to Section 1.294(d) of the Commission's Rules, files this Response to Wireless Telecommunication Bureau's (the "Bureau") Reply. In support thereof, Kay states as follows:

INTRODUCTION

1. On February 23, 1996, the Bureau filed a Motion for Leave to File Supplement and Supplement to Motion For Summary Decision and Order Revoking Licenses (the "Motion for Leave").

2. On March 5, 1996, Kay filed a Supplemental Opposition to the Bureau's Motion for Summary Decision as Supplemented by Motion for Leave to File Supplement and Supplement to Motion for Summary Decision and Order Revoking Licenses (the "Opposition").

3. On March 20, 1996, the Bureau filed a Reply to Kay's Opposition (the "Reply"). Recognizing that the Reply is not authorized by the Commission's Rules, the Bureau also sought leave to file the Reply.[1]

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[1] Kay did not oppose the filing of the Reply.

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ARGUMENT

I. THE BUREAU HAS NOT DISPUTED THE FACTS ASSERTED IN THE OPPOSITION

4. The Reply contains an insightful glimpse at this case--not for what the Reply contains, but for what it does not contain. Kay's Opposition contained deposition transcripts, sworn statements and declarations which exposed several fundamental flaws in the Bureau's case against Kay. Kay has mounted this challenge against the Bureau's case in the best way possible without the benefit of meaningful discovery from the Bureau. In its Reply, the Bureau did not challenge any of the facts set for in Kay's Opposition, despite the fact that the Bureau has obtained meaningful discovery from Kay and had an opportunity to investigate the allegations made against Kay before filing the Order to Show Cause, Hearing Designation Order, and Notice of Opportunity For Hearing for Forfeiture, FCC 94-315 (released December 13, 1994) (the "HDO").

5. The primary value of the Reply is that the Bureau neither challenged Kay's Declaration, attached as Exhibit "C" to the Opposition, nor any other factual statement made in the Opposition. The most that the Bureau has said is that Kay's Declaration was "unjustified, unnecessary and insulting". An allegation that the Opposition contained false statements is conspicuous by its absence.

II. ANY DELAY IN THESE PROCEEDINGS HAS EITHER BEEN CAUSED BY THE BUREAU'S ACTIONS OR EVENTS OUTSIDE OF KAY'S CONTROL

6. On page two (2) of the Reply, the Bureau alleges that "[t]he record clearly reveals that the Bureau tried repeatedly to obtain critical loading information from Kay during discovery in order to properly prepare for, and meet its burdens at, the hearing on the HDO. But for Kay's recalcitrant behavior, this case would have gone forward on schedule." This allegation is flawed in two respects.

7. First, as has been argued in numerous pleadings previously submitted to the Presiding Judge, Kay has provided the Bureau with every relevant business record in his possession. The Bureau has neither objected to any of Kay's other discovery responses (other than Interrogatory No. 4) nor demonstrated that Kay has withheld certain information from the Commission. The Bureau's only argument on this point is the unsubstantiated position that Kay could not run his business without maintaining the records in some undefined manner that the Bureau prefers.

8. Second, the delays in this case have been caused solely by the two (2) federal government shutdowns and, more recently, by the Bureau's discovery that twelve (12) licenses were designated for revocation, despite the fact that Kay did not own these twelve (12) licenses. The Bureau's statement that the delays have been caused by "Kay's recalcitrant behavior" is conclusory and unsubstantiated.

III. THE BUREAU HAS AGAIN ATTEMPTED TO EXPAND THE GROUNDS FOR SUMMARY DECISION

9. Likewise, Kay strenuously objects to the Bureau's unsubstantiated assertion that Kay "knowingly deceived the Bureau and Presiding Judge during discovery." See Reply, page 2. Prior to the Reply, the Bureau has never alleged that Kay deceived the Bureau and the Presiding Judge during discovery. This allegation is another attempt by the Bureau to expand the grounds upon which it seeks summary judgment. Moreover, consistent with several of the pleadings that the Bureau has filed to date, the Bureau has alleged no facts, through declaration, affidavit or otherwise, to support this allegation. Under these circumstances, the Bureau's statement concerning Kay's alleged deception should be stricken as inappropriate and improper argument.

CONCLUSION

WHEREFORE, for the reasons set forth both herein and in numerous other pleadings before the Presiding Judge, James A. Kay, Jr., requests that the Presiding Judge deny the Bureau's Motion for Summary Decision, schedule a full hearing in this proceeding, and grant such other and further relief as is just and proper.

Respectfully submitted,

JAMES A. KAY, JR.

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Dated: March 29, 1996

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing James A. Kay Jr.'s Response to Wireless Telecommunications Bureau's Reply was hand-delivered on this 29th day of March, 1996 to the following:

The Honorable Richard L. Sippel
Administrative Law Judge
Federal Communications Commission
2000 L Street, N.W., Suite 220
Washington, D.C. 20554

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and sent via first-class mail, postage prepaid on this 29th day of March, 1996 to:

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Scott A. Fenske

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