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

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

PREHEARING CONFERENCE ORDER

Issued: February 27, 1997 ; Released: March 3, 1997

Background

In furtherance of the General Counsel's Memorandum Opinion And Order FCC 97I-06, released February 20, 1997, denying summary disposition of this case and remanding all issues for hearing, a Prehearing Conference SHALL BE HELD on **March 19, 1997 at 10:00 a.m.** in a Commission courtroom.[1]

Status Report

Counsel who will be trying this case shall meet in advance of the Conference to discuss the subjects set forth below.[2]

Each party thereafter SHALL FILE AND SUBMIT to the Presiding Judge by **12 noon on March 18, 1997**, a Status Report ("Report") which shall state with particularity any further discovery that is desired, dates when it is expected that such discovery will be commenced and completed, the estimated number of witnesses who will be called to testify in Washington, D.C. and in

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[1] In preparing this Order the Presiding Judge has considered the respective Statements Of Readiness For Hearing that were filed on October 23, 1995; Discovery Status Reports submitted by James A. Kay, Jr. on November 30, 1995, and December 29, 1995; and the Bureau's Status Report submitted on November 30, 1995. Additional and more current information is needed in order to determine when this case is ready to be tried on all issues.

[2] Additional hearing preparation instructions and procedures are set forth in Order FCC 95M-28, released February 1, 1995; Order 95M-106, released April 17, 1995; and Order FCC 95M-201, released October 26, 1995.

Los Angeles, CA., suggested dates for the exchange of Trial Briefs and hearing evidence, and suggested dates for evidentiary admissions session(s) and hearing.[3]

Prehearing Motions

The parties shall identify in their Reports the procedural and evidentiary issues which are expected to be the subject of prehearing motions and indicate the anticipated dates that the motions are to be filed.[4]

Depositions

Deposition scheduling of James A. Kay, Jr. and fact witnesses must be agreed to in advance of serving Notices of Depositions and before requesting subpoenas. An agreed Joint Deposition Schedule shall be submitted in writing by **April 2, 1997**. Witnesses who may require a subpoena for deposition should be identified in the Joint Deposition Schedule as ("Subp. W").

By April 9, 1997, the parties shall exchange the names and addresses of proposed expert and/or industry witnesses on practices for SMR record-keeping. The parties also shall exchange curricula vitae or other summary of qualification, and a statement that sets forth the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. Cf. F.R.C.P. 26(b)(4). Places and dates for deposing experts shall also be reported in the Joint Deposition Schedule.

Stipulations

The parties shall specify evidence or categories of evidence which might be introduced by stipulations if agreements to stipulate can be reached.

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[3] The Reports must provide the information about witnesses. It is not sufficient to merely refer to prior discovery documents such as answers to interrogatories for the identity of witnesses. Nor is it sufficient to make reference to a "large number of witnesses" without describing the precise categories of subjects that will be the subject of testimony and how may witnesses are expected to testify to each subject.

[4] For example, in a Statement Of Readiness submitted for James A. Kay, Jr., counsel identified Commission staff members for depositions. The Commission staff may not be deposed without Commission authorization. 47 C.F.R. §1.311(b)(2).

Document Discovery

Counsel shall be prepared at the Prehearing Conference to report and discuss procedures whereby any further document discovery can be limited and expedited.[5]

The Reports also shall include the current status of document discovery,[6] including a date for James A. Kay, Jr. to furnish a log to Bureau counsel that identifies relevant documents that the licensee claims to be privileged and for which in camera inspection may be required. See Tri-State Community Development and Communications Corp., 4 F.C.C. Rcd 2402 (Review Bd. 1989) and cases cited therein.

End-User Information

On November 30, 1996, Kay furnished supplemental information to the Bureau on end-users. Even with that information there appears to be an absence of business records that identify customers by call sign. The Bureau contends that such information is necessary to determine compliance (non-compliance) with the Commission's loading provisions. Cf. Order FCC 95M-203. Counsel shall consult in advance on means to obtain that information and/or the availability of any proxy for the data that would be a sufficient equivalent.

Charts And Summaries

To narrow the record and facilitate the hearing, the parties may present aggregate data and repetitive facts or data in chart or other summary form, with supporting documents being available for comparison but not introduced as exhibits.

Frozen Sworn Testimony

The use of sworn written testimony that is subject to cross-examination would be in the best interests of the testimonial presentations. The parties shall confer and report at the Conference on the utilization of that procedure. 47 C.F.R. §1.248(d)(3).

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[5] It may be efficient under the circumstances that the Bureau depose Mr. Kay shortly after the Conference on record-keeping and compliance with prior discovery requests.

[6] There already has been a considerable amount of document discovery concluded. The narrowing of factual issues would narrow the need for further documents. Counsel for both parties should seek to narrow factual issues throughout discovery.

Witnesses

The parties are to avoid using witnesses (particularly non-party witnesses) whose testimony will be repetitive.

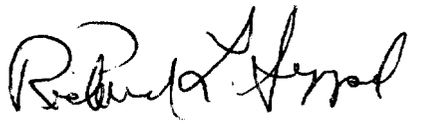
Depositions of non-party fact witnesses whose credibility is not challenged or whose testimony is not dispositive or who will testify to non-controversial or neutral facts may be used in lieu of their live testimony. Of course, James A. Kay, Jr. and any experts will be required to testify in open court. But, other witnesses who are considered candidates for testifying through depositions should be identified in the Joint Deposition Schedule as ("Depo. W").

Forfeiture

The Bureau will represent whether or not it intends to seek a forfeiture in this case and, if so, Bureau counsel shall recommend evidentiary proof and procedures that should be utilized in determining an appropriate forfeiture.

SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION[7]



Richard L. Sippel
Administrative Law Judge

[7] Copies of this Order were e-mailed/faxed to counsel of record on date of issuance.