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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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 fifty-two Part 90 licenses in the Los Angeles, California area.	)	

To: The Honorable Richard L. Sippel

OPPOSITION TO WIRELESS TELECOMMUNICATIONS
BUREAU'S MOTION TO ENLARGE ISSUES

James A. Kay, Jr. ("Kay"), by his attorneys, pursuant to Sections 1.229 and 1.294(c) of the Commission's Rules, hereby files this Opposition to the Wireless Telecommunications Bureau's Motion to Enlarge Issues (the "Motion"). In support thereof, Kay states as follows:

1. On December 13, 1994, the Commission released its Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, FCC 94-147, released December 13, 1994 (the "HDO") in the above-captioned matter.

2. The Bureau filed the Motion on March 19, 1997. The Motion seeks to expand on the issues contained in the HDO to include whether (i) Kay misrepresented material facts during the discovery phase of the hearing proceeding; (ii) Kay abused the Commission's discovery processes during the hearing proceeding; and, (iii) based on the foregoing, whether Kay is basically qualified to be and remain a Commission licensee.

3. For the reasons set forth herein, the Motion is both procedurally defective and legally insufficient to support the relief requested by the Bureau. It must be dismissed or, in the alternative, denied.

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ARGUMENT

A. THE MOTION IS PROCEDURALLY DEFECTIVE AND MUST BE SUMMARILY DISMISSED

4. Section 1.229(a) of the Commission's Rules provides that, except for motions to modify in comparative broadcast proceedings, a motion to enlarge, change or delete issues must be filed "within 15 days after the full text or a summary of the order designating the case for hearing has been published in the Federal Register." (emphasis added). The HDO in the above-captioned matter was released on December 13, 1994 and was published in the Federal Register on January 18, 1995. Consequently, pursuant to Section 1.229(a) of the Commission's Rules, the deadline for the filing of the Motion was February 2, 1995. The Bureau missed that deadline by a wide margin.

5. Section 1.229(b)(3) of the Commission's Rules further provides that any person desiring to modify hearing issues after the appropriate expiration date "shall set forth the reason why it was not possible to file the motion within the prescribed period." The Bureau has failed to meet its Section 1.229(b)(3) burden. The Bureau's argument, presented without legal authority, is that the Motion was timely filed in light of the recently issued Memorandum Opinion and Order, FCC 97I-06, released February 20, 1997 ("MO&O"), which remanded the case to the Presiding Officer for a full evidentiary hearing. This claim is wide of the mark.

6. The Bureau's argument that the Motion was timely filed is wrong on two grounds. First, the Bureau suggests that the Motion was timely filed because it was filed within 30 days of the release of the MO&O. Section 1.229 of the Commission's Rules addresses a 30 day period to file motions to modify only in the context of comparative broadcast proceedings. See Section

1.229(b) of the Commission's Rules. This proceeding is not a comparative broadcast proceeding.

7. In addition, the Bureau cites no authority for the proposition that the MO&O restarted the period within which to file motions to modify. Section 1.229(a) of the Commission's Rules only addresses the filing of a motion to modify "within 15 days after the full text or a summary of the order designating the case for hearing has been published in the Federal Register." Consequently, even assuming, arguendo, that the MO&O restarted the submission for the filing of motions to modify, the Motion was untimely since it was not filed within 15 days after the MO&O was released (March 7, 1997).

8. Since the Bureau failed to timely file the Motion or seek to explain why good cause existed for the Motion to be accepted out of time, under provisions of Section 1.229(b)(3), the Motion must be denied.

9. The Motion is also procedurally defective because Section 1.229(d) of the Rules has not been complied with. Section 1.229(d) provides that motions to modify must contain specific allegations of fact and be supported by affidavits of a person or persons having personal knowledge thereof. The Bureau attached the Affidavit of Gary P. Schonman, Esquire, to its Motion. Mr. Schonman, counsel for the Bureau, lacks specific knowledge of the facts contained in the Motion. For example, in the Motion, the Bureau states that "Kay deliberately misdirected the Bureau in his answer to Interrogatory No. 4 to documents that Kay *knew* did not contain the information which the Bureau was seeking." (Pgs. 4-5 - emphasis in original). The Bureau also states that "Kay's actions were intended to impede and frustrate the Bureau's ability to obtain relevant evidence, meet its burdens, and prosecute its case." (Pg. 5). Not only are these

allegations false, Mr. Schonman also does not have personal knowledge of any facts upon which to make these statements and has not established in his Declaration how he has received such personal knowledge. As such, the Motion is procedurally defective and must be dismissed.

B. KAY HAS PRODUCED ALL OF THE RECORDS THAT HE WAS REQUIRED TO MAINTAIN UNDER THE COMMISSION'S RULES

10. Assuming, arguendo, that the Presiding Officer accepts the Bureau's untimely and improper Motion, the Motion must be denied because Kay has produced all of the records that he was required to maintain under Commission's Rules. To properly understand the Motion and Kay's opposition thereto, a summary of the procedural history is necessary.

11. On or about February 17, 1995, the Bureau served its First Set of Interrogatories on Kay. Interrogatory No. 4 states as follows:

> 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.

12. On or about March 10, 1995, Kay responded to the Bureau's First Set of Interrogatories.

13. On or about May 30, 1995, the Bureau filed a Motion to Compel Answers to Interrogatories claiming that Kay's response to Interrogatory No. 4 was inadequate.

14. On June 12, 1995, Kay filed an opposition to the Bureau's Motion to Compel.

15. Pursuant to an Order, FCC 95M-203, released October 31, 1995, the Presiding Judge ordered Kay to respond to Interrogatory No. 4.

16. On or about November 13, 1995, Kay filed his Supplemental Answers to Interrogatory No. 4.

17. On December 4, 1995, the Bureau filed a Motion for Summary Decision (the "Motion") based on Kay's alleged continued failure to provide the information requested by the Bureau in Interrogatory No. 4. The Bureau's Motion for Summary Decision was granted (Summary Decision, FCC 96D-02, released May 31, 1996) and subsequently remanded pursuant to the MO&O.

18. As stated in numerous prior pleadings, Kay has fully responded to Interrogatory No. 4 since he has identified the matters requested of him: each and every "end-user" and the number of mobile units of each such end-user. In Interrogatory No. 4, the Bureau requested no more of him. The Bureau's argument that Kay failed to allocate the mobiles to a particular station for a particular customer misrepresents what the Bureau asked of Kay in its own Interrogatory.

19. The documents previously provided to the Bureau were directly responsive to Interrogatory No. 4. Kay's customer records are limited to a record of the systems or frequency(ies) and location(s) used by a customer; they do not identify customers with respect to any certain call sign. Kay has not maintained, nor is he required to maintain, information concerning the call sign with which an end user of a specific mobile unit is associated.

20. Moreover, as discussed below, Kay produced the "end-user" information despite the fact that the Commission's Rules no longer require Kay to maintain this information.[1]

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[1] In the MO&O, the General Counsel, recognizing various Commission rule-makings, found that "there is an open question as to whether the documents that Kay has submitted provide the

21. Pursuant to the Report and Order in Amendment of Part 90 of the Commission's Rules To Eliminate Separate Licensing of End Users of Specialized Mobile Radio Systems (PR Docket No. 92-79), 7 FCC Rcd. 5558 (1992), the Commission deleted the requirement that Part 90 licensees provide loading reports at regular intervals and to require submission of such information by Part 90 licensees only when they were applying for authorizations where loading was a prerequisite.[2] In fact, prior to the effective date of the rule changes in PR Docket No. 92-79, the licensee was not entitled to use its business records for determining loading, but had to rely on official Commission records. Id. at n. 31. Effective October, 1992, Part 90 licensees were required to only maintain ordinary business records in order to establish their loading and, in doing so, they were given "substantial latitude" in determining the business records to maintain. Id.

22. The Bureau's request in Interrogatory No. 4 and the Presiding Judge's Order directing Kay to respond to Interrogatory No. 4 are inconsistent with the Commission's Rules. On the one hand, the Commission no longer requires Part 90 licensees to maintain "end-user" information. On the other hand, the Bureau has requested this "end-user" information from Kay. Kay submits that Commission policy overrides any Bureau decision.

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information that the Bureau is seeking or whether, after a hearing, they would support a finding that Kay has provided adequate loading information for his licensed facilities . . ." (Pg. 8).

[2] The requirement that Part 90 licensees provide reports at regular intervals only applied to licenses for trunked SMR systems that were granted by the Commission as such. The licenses held by Kay were never originally granted as trunked SMRs. All of Kay's trunked stations were converted from other stations. Therefore, the rules regarding the reporting of loading at regular intervals that were effective prior to October 1992 did not apply to Kay's stations.

23. The Bureau's request for records from Kay since 1991 also fails to recognize that there is no time requirement for maintenance of relevant business records. The only time provided in Part 90, Section 90.447, does not apply to end user record maintenance. Thus, in the absence of a requirement for record maintenance, Kay cannot be faulted for the fact that he has not maintained up to six years of records that he felt were not commercially prudent to maintain. No more is required of him nor can be expected of him.

24. Subsequent to the Presiding Judge's October 31, 1995 Order, Kay has produced all information and records available to him. Kay must only produce documents in his possession, control or custody; Kay is under no obligation to research and/or create information for another party.

25. The Bureau has cited no Commission Rule or other authority indicating that Kay or any other licensee must keep loading records in some form unspecified by the Bureau in Interrogatory No. 4. In the absence of such authority, the Bureau does not and cannot point to a specific violation of the Commission's Rules. Therefore, the Bureau cannot allege, much less prove, that Kay misrepresented material facts or abused Commission processes based on his alleged failure to produce the loading records in some unspecified form desired by the Bureau. In the absence of a legal basis to fault Kay's actions, a hearing issue cannot be added.

WHEREFORE, for the reasons set forth herein, Kay requests that the Presiding Officer deny the Motion.[3]

Respectfully submitted,

JAMES A. KAY, JR.

By: Scott A. Fenske

Barry A. Friedman
Scott A. Fenske

Thompson Hine & Flory LLP
1920 N Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 331-8800

Dated: March 31, 1997

[3] The Declaration of James A. Kay, Jr. is attached hereto as Exhibit "A".

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Licensee of one hundred fifty-	)	
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DECLARATION OF JAMES A. KAY, JR.

I, James A. Kay, Jr., certify that I have read the foregoing Opposition to Wireless Telecommunications Bureau's Motion to Enlarge Issues and the facts stated therein are true and correct to the best of my knowledge and belief.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 28, 1997.

James A. Kay, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Opposition to Wireless Telecommunications Bureau's Motion to Enlarge Issues was hand-delivered on this 31st day of March, 1997 to the following:

Gary P. Schonman, Esquire
Federal Communications Commission
Wireless Telecommunications Bureau
Enforcement Division
Suite 8308
2025 M Street, N.W.
Washington, D.C. 20554

and sent via first-class mail, postage prepaid on this 31st day of March, 1997 to:

W. Riley Hollingsworth
Deputy Associate Bureau Chief
Wireless Telecommunications Bureau
1270 Fairfield Road
Gettysburg, Pennsylvania 17325-7245.

Scott A. Fenske

Scott A. Fenske

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