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FEDERAL MAIL SECTION

FCC 97M-167  
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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

1997 OCT 9 11 27 AM '97

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.	)	

MEMORANDUM OPINION AND ORDER

Issued: October 7, 1997 ; Released: October 9, 1997

Background

1. This is a ruling on the Wireless Telecommunications Bureau's Motion To Enlarge Issues that was filed on March 19, 1997. James A. Kay, Jr. ("Kay") filed an Opposition on March 31, 1997. The Wireless Telecommunications Bureau ("Bureau") filed its Reply on April 7, 1997.<sup>1</sup>

2. The Bureau seeks to have issues added alleging that Kay may have misrepresented or was lacking in candor and abused the Commission's discovery process in a reply to Bureau Interrogatory No. 4. On February 17, 1995, the Bureau asked Kay for the identification of each end-user for each call sign and the number of mobile units of each end-user (loading data) from January 1, 1991. Kay responded by referring the Bureau to Kay's earlier response to Requests 4 and 5 of the Bureau's First Request For Documents.

Facts

3. The Bureau represents that on May 30, 1995, after a review of the documents to which Kay made reference, the Bureau filed a motion to compel a complete answer to Interrogatory No. 4. On June 12, 1995, in response to the motion to compel, Kay advised that he did not have documents that reflected the loading information sought by the Bureau. The Presiding Judge granted the Bureau's motion to compel and ordered Kay to provide a "complete answer" to Interrogatory No. 4. See Order FCC 95M-203, released October 31, 1995. On November 13, 1995, Kay submitted a Supplemental Answer To Interrogatory No. 4 which the Bureau contends was inadequate because Kay failed to furnish information prior to November 9, 1995, and because the information that was furnished was not on a station-by-station basis. The matter was not pursued

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<sup>1</sup> On March 26, 1997, Kay filed a motion to disqualify the Presiding Judge which was denied on April 14, 1997 (FCC 97M-52). That ruling was affirmed by the Commission on October 2, 1997. See Memorandum Opinion And Order FCC 97-349. Since the filing of the disqualification request, all proceedings in this case were suspended. See Order FCC 97M-58, released April 21, 1997.

by the Bureau at that time. On December 4, 1995, the Bureau filed a motion for summary decision which concerned issues of fact that are related to the subject of the present motion.<sup>2</sup> The Bureau now argues that issues should be added charging that Kay's first answer to the interrogatory was false or misleading and that Kay had abused the Commission's discovery process because the documents referenced in the initial response to Interrogatory No. 4 were not responsive to the interrogatory.

4. Kay argues in his Opposition that the Bureau failed to seek the issues in a timely manner under the Commission's rules. Kay further argues that he has produced all of the records that he was required to maintain under the Commission's rules.

#### Discussion

5. A motion to enlarge issues in a case such as this must be filed within fifteen days of publication of the designation order unless it is shown that it was impossible to file the motion within the prescribed period of time. See 60 Fed. Reg. 3642-02 (January 18, 1995). 47 C.F.R. §1.229(a). The Bureau argues that the motion was timely because it was filed within 30 days of the release of the General Counsel's order denying summary decision.

6. The Bureau is correct that it could not have filed the motion to enlarge within fifteen days of publication of the designation order. Discovery did not commence until after the case was set for hearing and the Bureau could not make its own determination on the integrity of Kay's discovery until the Bureau received the responses to its interrogatories. These events occurred more than fifteen days after publication of the designation order. While the Commission's rules are flexible and provide for motions to enlarge based on newly discovered facts, such motions must be filed within fifteen days of the discovery. 47 C.F.R. §1.229(b)(3). It is determined that the motion was not filed timely under the circumstances here. The mere fact that there was a pending motion for summary decision did not prevent the Bureau from filing its motion to enlarge within the prescribed time on the contingency that its motion for summary decision would fail. There has been no authority cited by the Bureau for granting a motion to enlarge issues that was filed on March 19, 1997, when on November 13, 1995, the moving party had knowledge of the facts on which it relies. Procedurally, the motion should have been filed by November 28, 1995, fifteen days after the discovery of the new facts. Therefore, the Bureau's motion must fail because it was not timely filed.

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<sup>2</sup> The motion for summary decision was filed on the first issue of the designation order alleging a failure to respond to a Section 308(b) request for information. The Presiding Judge granted the motion on May 31, 1996 (FCC 96D-02). That decision was appealed and the case was in abeyance until the General Counsel reversed the decision and remanded the case on February 20, 1997. Memorandum Opinion And Order FCC 97I-06, released February 20, 1997.

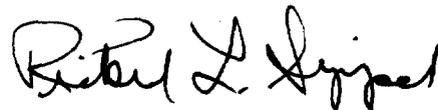
7. In addition, the Commission's rules permit consideration of late filed motions to enlarge issues only if "initial examination of the motion demonstrates that it raises a question of probable decisional significance and such substantial public interest importance as to warrant consideration in spite of its untimely filing." 47 C.F.R. §1.229(c). The question of whether Kay has fully and accurately responded to Interrogatory No. 4 may be revisited in findings after the taking of evidence is concluded and after all of the evidence has been received on Kay's record-keeping system.<sup>3</sup> It is expected that there will be evidence introduced by both parties on industry practices regarding the maintenance of records on loading data during the relevant period. Cf. 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 F.C.C. Rcd 5558 (1992) (licensees authorized to rely on ordinary business records). The responsibility is left with the licensee to operate under their own record systems provided that the records permit licensees to produce data for loading for compliance purposes. See Reports and Orders, 7 F.C.C. Rcd at 5560-61 and at 6345, Para. 5.

8. In the final analysis, it is contemplated that there will be substantial evidence received from both the Bureau and Kay on record-keeping and there will be nothing lost of evidentiary significance by denying the Bureau's motion.

Ruling

Accordingly, IT IS ORDERED that the Wireless Telecommunications Bureau's Motion To Enlarge Issues filed on March 19, 1997, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel  
Administrative Law Judge

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<sup>3</sup> It is established that "false statements in the course of the hearing process are, in and of themselves, of substantial significance." Old Time Religion News, Inc. 95 FCC 2d 713, 719 (Review Bd 1983). Discovery is an integral part of the hearing process.