

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.)

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Honorable Richard L. Sippel
Administrative Law Judge

**OPPOSITION TO WIRELESS TELECOMMUNICATIONS
BUREAU'S MOTION TO ENLARGE ISSUES**

James A. Kay, Jr. ("Kay"), by his attorneys, and 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 ("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 instant Motion on April 9, 1997. The Motion seeks to expand on the issues contained in the HDO to include issues dealing with whether (i) Kay misrepresented material facts or lacked candor during the hearing proceeding in WT Docket No. 94-147; and (ii) 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 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 filing the Motion, February 2, 1995, passed about 32 months ago.

5. Section 1.229(b)(3) of the Commission's Rules provides that any person desiring to modify hearing issues after the expiration date set forth in Section 1.229(a) "shall set forth the reason why it was not possible to file the motion within the prescribed period." Such a motion will only be granted if "*good cause* is shown for the delay in filing" (emphasis added). If the motion is based on "new facts or newly discovered facts," it must "be filed within *15 days after such facts are discovered by the party.*" Id. (emphasis added).

6. As an initial matter, the Bureau admits that the facts which gave rise to the Motion "occurred at the outset of this proceeding." (See, Motion, ¶ 2). This proceeding began in December, 1994, almost three years ago. Kay's Affidavit and Management Agreement, cited by the Bureau as providing "new facts" warranting expansion of the previously designated issues, have been in the Bureau's possession since January, 1995 and March, 1995, respectively. Nonetheless, the Bureau advances three grounds to support its contention that the Motion was

timely filed: (i) recent discovery of the asserted facts while the Bureau “re-familiarize[d] themselves” with the case; (ii) a “long procedural hiatus” which delayed discovery of the facts and filing of the Motion; and (iii) “good cause” for modification based on the issue of Kay’s alleged lack of candor. None of these three grounds, individually or collectively, are sufficient for the Bureau to meet its burden under Section 1.229(b)(3) of the Commission’s Rules.¹

7. The Bureau claims that the Motion was timely filed by stating it only recently “re-familiarize[d] [itself] with the facts of this case following a long procedural hiatus.” *Id.* This explanation does not satisfy Section 1.229(b)(3) of the Commission’s Rules. Neither Section 1.229(b)(3) nor any cases addressing it permit a party to “re-familiarize” itself with the issues in the proceeding, and, thereafter, file a motion to enlarge after it completes its evaluation. Cases discussing motions to enlarge under Section 1.229(b)(3) of the Commission’s Rules are clear: a request for modification of issues must be made after the facts become known or could have become reasonably known. Great Lakes Broadcasting, Inc., 6 FCC Rcd. 4331, 4332 (1991). In the instant case, the Bureau knew or should have known of the facts asserted by the Bureau as grounds for the Motion in March, 1995 (when Kay provided the Bureau with a copy of the Management Agreement). Re-familiarization by the Bureau with these documents two and one-half years after they were initially submitted to the Bureau is insufficient to meet the burden under Section 1.229(b)(3) of the Commission’s Rules since “it is incumbent upon applicants to study their opponents cases carefully and make their arguments as early as possible.” Capitol

¹ In a Memorandum Opinion and Order, FCC 97M-167, released October 9, 1997, the Presiding Judge ruled that an earlier Motion to Enlarge Issues filed by the Bureau on March 19, 1997 was not timely filed. The reasoning contained in this decision is equally applicable to this matter.

City Broadcasting Co., 8 FCC Rcd 1726, 1729 (1993), quoting Liberty Productions, 7 FCC Rcd. 7581, 7584 (1992).

8. The Bureau then claims that a “long procedural hiatus” excuses delay in filing the Motion. Although there have been a few periods of inactivity during the course of this proceeding, there have been significant periods of time between March, 1995 and April 9, 1997 (when the Motion was filed), when this proceeding has been active, including, without limitation, approximately six months between October, 1995 (when the stay was terminated) and March, 1996 (when Kay filed an appeal of the Presiding Officer’s decision granting the Bureau’s Motion for Summary Decision). Even assuming, arguendo, that the Bureau was unaware of the Management Agreement in March, 1995, this and other significant periods of time during this proceeding provided sufficient time for the Bureau to file the Motion. Under Commission precedent, the Bureau must “present its arguments as early as possible; it may not rest on its rights in the hope that the passage of time will improve its position.” Capitol City Broadcasting Co., 8 FCC Rcd. at 1728, quoting Evergreen Broadcasting Co., 7 FCC Rcd. 6601, 6602 (1992). Since the Bureau knew or should have known the facts to support the Motion in March, 1995, the Motion must be denied, or alternatively dismissed, as untimely.

9. Section 1.229(b)(3) of the Commission’s Rules further provides that a motion for modification of issues submitted after the fifteen day period referenced in Section 1.229(a) will only be granted upon “good cause . . . for the delay in filing.” The Bureau asserts that sufficient “good cause” exists to excuse the Bureau’s untimely filing because of Kay’s alleged “lack of candor” in dealing with the Bureau. Mere assertions of “lack of candor”, however, are insufficient to constitute good cause under Section 1.229(b)(3). If the Commission intended to

provide that a mere assertion of “lack of candor” was sufficient to constitute “good cause” under Section 1.229(b)(3), it would have explicitly done so in its Rules. Instead, cases interpreting the “good cause” requirement in Section 1.229(b)(3) provide that “[t]he movant’s due diligence in timely discovering the alleged facts is an important consideration in the good cause assessment.” Capitol City Broadcasting Co., *supra*, 8 FCC Rcd. at 1728. The Bureau makes no showing in its Motion that it undertook any “due diligence” and, despite such diligence, was unable to discover the facts that were in its possession since March, 1995. Nor does the Bureau allege that the delay in filing was due to concealment of facts by Kay or any party. Under these circumstances, the Bureau has clearly failed to meet its burden of proving “good cause” under Section 1.229(b)(3) of the Commission’s Rules.

B. THE MOTION IS LEGALLY INSUFFICIENT TO ENLARGE THE PREVIOUSLY DESIGNATED ISSUES

10. Assuming, *arguendo*, that the Presiding Officer accepts the Bureau’s untimely and improper Motion, the Motion must be denied because it is legally insufficient.

11. The allegations of fact that the Bureau asserts provide “new facts” warranting modification of the issues are themselves untrue. In paragraphs 3 and 4 of the Motion, the Bureau asserts that the Management Agreement gave Kay an interest in the stations and licences of Marc Sobel and that this alleged interest conflicts with certain statements made by Kay in an affidavit submitted by Kay in this proceeding in January, 1995. The Bureau’s assertion is incorrect. The effect of the Management Agreement was to memorialize the understanding between Kay and Sobel that Sobel retained day-to-day control over the operation of his own stations. This was so despite the fact that Sobel leased equipment from Kay and Kay provided

sales and service for customers on Sobel's stations. Taken in the context of this proceeding (Kay's affidavit was to demonstrate that Sobel's licenses could not be revoked in the above-captioned matter, a position that both the Bureau and the Commission ultimately agreed with), Kay's affidavit did not constitute a misrepresentation. Thus, even if the Bureau had been filed within the time frame set forth in Section 1.229 of the Commission's Rules, its allegations that Kay misrepresented certain facts to the Commission or otherwise lacks candor are legally insufficient for the Presiding Judge to enlarge the issues contained in the HDO.

WHEREFORE, for the reasons set forth herein, Kay requests that the Presiding Officer dismiss or, in the alternative, deny the Motion.

Respectfully submitted,

JAMES A. KAY, JR.

By: _____

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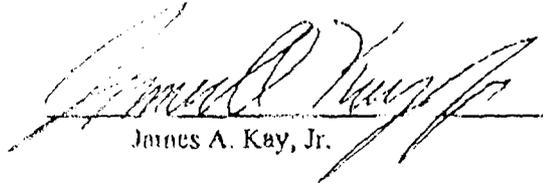
Dated: October 24, 1997

DECLARATION OF JAMES A. KAY, JR.

I, James A. Kay, Jr., state that I have read the foregoing Opposition to Wireless Telecommunications Bureau's Motion to Enlarge Issues, that I am personally familiar with the subject matters addressed therein, that the factual statements made therein are true and correct to the best of my personal knowledge and belief.

I declare under penalty of perjury that the foregoing is true and correct to the best of my personal knowledge.

October 24, 1997


James A. Kay, Jr.

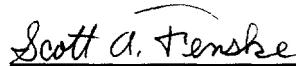
CERTIFICATE OF SERVICE

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 24th day of October, 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 24th day of October, 1997 to:

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



Scott A. Fenske