

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

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. )

FCC MAIL SECTION

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MEMORANDUM OPINION AND ORDER

Issued: November 3, 1997 ; Released: November 5, 1997

Background

1. This is a ruling on Wireless Telecommunications Bureau's Motion To Enlarge Issues filed by the Wireless Telecommunications Bureau ("Bureau") on April 9, 1997. An Opposition was filed by James A. Kay, Jr. ("Kay") on October 24, 1997.<sup>1</sup> The Bureau filed its Reply pleading on October 31, 1997. See Order FCC 97M-170, released October 14, 1997.

2. The Bureau seeks to enlarge the issues to determine whether Kay misrepresented or lacked candor by representing in this hearing that he had no interest in any of the licenses or stations held by a non-party to this case.

Facts

3. On December 13, 1994, the Commission released the Order To Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, FCC 94-147 ("Order to Show Cause"), 10 FCC Rcd 2062 (1994), modified, 11 F.C.C. Rcd 5324 (1996). In a Motion To Enlarge, Change or Delete Issues that was filed in this proceeding by Kay on January 25, 1995, he represented in an accompanying affidavit that "Kay has no interest in any of the licenses or stations held by Marc Sobel." The facts show that on December 30, 1994, Marc Sobel ("Sobel"), a Commission licensee, and Kay entered into a Management Agreement ("Agreement") which the Bureau alleges is a clear contradiction of the affidavit in which Kay denied any interest in Sobel's licenses or stations.

<sup>1</sup> There was a hiatus in the litigation of this case pending the determination by the Commission of a motion to disqualify the Presiding Judge that was filed on March 26, 1997.

Discussion

4. A motion to enlarge issues in a non-broadcast case must be filed within fifteen days of publication of the Order to Show Cause unless it is shown that it was impossible to file the motion within the prescribed period of time. 47 C.F.R. §1.229(a). In this case, the cut-off date under the Rule would be February 2, 1995. See 60 Fed. Reg. 3642 (January 18, 1995). The Bureau did not learn of the existence of the Agreement until Kay filed his motion to delete issues on January 25, 1995. The time of discovery controls and would extend the cut-off date to February 9, 1995. 47 C.F.R. §1.229(b)(3) (where there are newly discovered facts the motion must be filed within fifteen days of the discovery). The Bureau argues in Reply that it filed within fifteen days after "discovering the inconsistency." But the designation order in the Sobel proceeding<sup>2</sup> was released on February 12, 1997. The Bureau argues timely filing was made on April 9, 1997, almost two months after initiation of the Sobel proceeding. Based on the calculations of time under the Rules as applied to these facts, the Bureau has failed to file timely its Motion To Enlarge Issues seeking to litigate in this case the transfer of control under the Agreement and an alleged related misrepresentation.

5. Where a motion to enlarge the issues has been filed out of time, it may be granted if "good cause is shown for the delay in filing." 47 C.F.R. §1.229(b)(3). The Bureau asserts that counsel only recently ascertained the information (the Agreement) during "re-familiarization" with the facts of the case following a "long procedural hiatus." It is recognized that this case was suspended while on review after the granting of a motion for summary decision on May 31, 1996 (FCC 96D-02). That decision was appealed and the case was in abeyance until reversal and remand on February 20, 1997 (FCC 97I-06). It is presumed that the Bureau had actual knowledge of the Agreement on January 25, 1995. There is no precedent for finding good cause where a party forgets about key documentary evidence while an appeal is pending which could result in a remand. The Commission has held that "it is incumbent upon applicants to study their opponents cases carefully and make their arguments as early as possible." Capitol City Broadcasting Co., 8 F.C.C. Rcd 1726, 1729 (1993). It is equally incumbent on parties not to forget about the evidence that it relies on in seeking new issues. The Agreement was delivered to the Bureau by Kay in January 1995, accompanied by an affidavit which represented that Kay had no interest in Sobel's licenses even though he was acting as Sobel's agent in certain respects. There is no convincing showing of cause

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<sup>2</sup> There is a related proceeding at the Commission in which an issue was set to determine whether there has been unauthorized transfers of control from Sobel to Kay. Marc Sobel, et al. (FCC 97-38), released February 12, 1997. In that case, there will be a determination made of the operative effect of the Agreement on the question of control. The outcome of the case will control by operation of collateral estoppel. RKO General, Inc., 82 F.C.C. 2d 291 (1980) (collateral estoppel is triggered when some question of fact in dispute has finally been determined). See also Georgia Public Telecommunications Commission, et al., 7 F.C.C. Rcd 7996, 7999 n.29 (1992) (collateral estoppel applies to Initial Decisions on issues actually litigated that are essential to the outcome). Kay is actively participating in that case. It would be a misuse of Commission resources and would impose a burden on Kay to litigate the same underlying issue of control in this case.

merely because a tardy allegation is made by the Bureau of an allegedly false representation made by Kay in his affidavit. Misrepresentations which are newly discovered may support a motion to enlarge based on the public interest in truth and candor in dealing with the Commission. But allegations of misrepresentation will not save a motion that has been filed substantially out of time.

6. The Commission's Rules do permit consideration of late filed motions seeking to add new issues which fail to show good cause if an "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 Sobel's licenses, which were originally included in the universe of licenses under consideration in this case, was certified to the Commission at the Bureau's request in order to remove them as an obstacle to consideration of the Bureau's motion for summary decision. See Memorandum Opinion And Order, FCC 96M-35, released March 15, 1996. Thereafter, the Commission modified the Order to Show Cause<sup>3</sup> by removing the issues concerning Sobel's licenses, including alleged control by Kay. The question of the transfer of control under the Agreement is now being litigated in the Sobel case. See fn. 2, supra. A final determination of that issue would control here. If Sobel's licenses are cancelled because of illegal transfers of control to Kay or because Sobel misrepresented control, Kay would lose his contractual connections with the Sobel licenses and any related control. Therefore, there does not appear to be sufficient public interest in the duplicative litigation of issues related to the Sobel licenses.

7. Further, the requested issue should not be added at this time because of Commission policy to the contrary. First, the Commission expects a party "to present its arguments as early as possible." Capitol City broadcasting Co., 8 F.C.C. Rcd at 1728. In this case, for tactical reasons, the Bureau sought to disengage issues related to Sobel licenses in order to clear the decks for a summary decision on the Section 308(b) issue which was unrelated to Sobel and the Agreement. The removal of Sobel related issues required Commission approval which the Bureau sought and obtained. The control issue which is at the core of the requested issue was thereafter set to be litigated in the Sobel proceeding. After presenting evidence in the Sobel proceeding, with Kay participating as a party litigant, the Bureau now seeks in its Reply pleading to use transcript testimony from the Sobel proceeding to bolster its theory for adding the issue here. To permit such procedures would further delay an already delayed proceeding.<sup>4</sup> Second, the Sobel litigation is being raised for the first time in the Bureau's Reply pleading. The Commission's Rule governing pleadings specifically limits the

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<sup>3</sup> 11 F.C.C. Rcd 5324 (1996).

<sup>4</sup> The Bureau asked for a delay of several months to negotiate a settlement which did not succeed (FCC 95M-144 and FCC 95M-201) and then caused a second hiatus by filing a motion for summary decision on one issue which did not succeed. (FCC 97I-06) There has been no procedural or discovery misconduct shown on the part of Kay that can be attributed as a cause for the Bureau to seek an issue on the Sobel/Kay Agreement as late as April 1997.

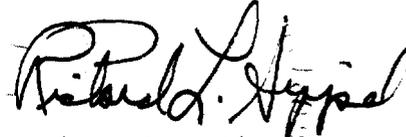
Reply in a pleading cycle to "matters raised in the opposition." 47 C.F.R. §1.294(c). The Bureau has failed to adhere to the limitations imposed on Reply pleadings.

8. In view of the articulated policies of the Commission and the added factor that the core issue sought by the Bureau is already being litigated by the Bureau and Kay in another Commission proceeding in which the licenses in question could effectively be rescinded, there has been insufficient cause shown to add the Sobel related issue at this time.<sup>5</sup>

Ruling

Accordingly, IT IS ORDERED that the Wireless Telecommunications Bureau's Motion To Enlarge Issues filed on April 9, 1997, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION<sup>6</sup>



Richard L. Sippel  
Administrative Law Judge

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<sup>5</sup> At this time, Kay's intent is speculative because there has been no determination that control over the Sobel licenses had passed to Kay and that such control was exercised by Kay. Cf. Priscilla L. Schwier, 4 F.C.C. Rcd 2659 (1989) (speculation will not support an added issue).

<sup>6</sup> Courtesy copies of this Order were faxed or e-mailed to counsel on date of issuance.