

DEC 1 - 1997

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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 FOR SEQUESTRATION ORDER**

James A. Kay, Jr. ("Kay"), by counsel, hereby files this Opposition to Wireless Telecommunications Bureau's Motion for Sequestration Order (the "Sequestration Motion").

1. The Wireless Telecommunications Bureau ("Bureau") filed the Sequestration Motion on November 20, 1997. Contrary to the Certificate of Service on the Sequestration Motion, however, Kay's counsel was not served with a copy of the Sequestration Motion (either by facsimile or first-class mail) on November 20, 1997. Kay's counsel received a copy of the Sequestration Motion via facsimile at approximately 1:00 p.m. on November 26, 1997 after a member of the Bureau staff contacted Kay's counsel and confirmed that Kay's counsel never received a copy of the Sequestration Motion. Consequently, since the Sequestration Motion was not served until November 26, 1997, this Opposition is timely filed.

2. In the Sequestration Motion, the Bureau requests that the Presiding Officer issue an order that (i) prohibits any party, witness or counsel from discussing the substance of any question or answer asked during a deposition until after that witness has been deposed; and (ii)

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prohibits a witness from attending any deposition that takes place prior to the scheduled deposition of that witness.

3. The Bureau's request to prohibit Kay, a party to this proceeding, from attending and/or counsel from discussing the deposition of any witness whose testimony was given prior to Mr. Kay's deposition is overbroad and contrary to the Federal Rules of Evidence.

4. As an initial matter, the decision cited by the Bureau (Black Television Workshop of Los Angeles, Inc., 8 FCC Rcd 4192 (1993)), involved the sequestration of a director of the licensee during trial. In the instant case, the Bureau seeks to sequester a licensee from the depositions of other witnesses. The significance of this distinction is self-evident.

5. The federal case law on the issue of witness or party sequestration provides that "the burden is on the party seeking to exclude anyone from such deposition: (a) to go before the court via motion for protective order before the deposition begins; (b) to meet the burden of showing good cause for exclusion; and (c) to obtain an order of the court before the exclusion can occur." BCI Comm. Systems, Inc. v. Bell Atlanticom Systems, 112 F.R.D. 154, 159 (N.D. Ala. 1986), aff'd w/out opinion, 995 F.2d 236 (11<sup>th</sup> Cir. 1993). In applying this test,

Courts have generally held that it is insufficient for party moving for a Rule 26(c) protective order simply to allege that one or both of the parties will be harmed if the court does not grant the order. In Cipollone [v. Liggett Group, Inc.], 785 F.2d 1108 (3d Cir. 1986)], for example, the court of appeals for the third circuit said that "[b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test. Cipollone, 785 F.2d at 1121; *see also* 8 Charles Alan Wright & Richard L. Marcus, Federal Practice and Procedure § 2035 (1994) ("The Courts have insisted on a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory allegations.")

Tuszkiewicz v. Allen Bradley Co., Inc., 170 F.R.D. 15, 16 (E.D. Wis. 1996).

The Bureau has not even attempted to give particularized and specific examples of harm if the witnesses and/or party is not sequestered. The best that the Bureau can do is to allege that the sequestration order sought by the Bureau “would prevent any witness from consciously or unconsciously shading his or her testimony to correspond to or to conflict with the testimony of other witnesses.” Sequestration Motion, ¶ 3. See Also, Tuskiewicz, supra at 17 (“I agree with the defendant that without a more specific showing of harm to the plaintiff that the mere statement that there is a threat of prejudice, the court should not grant a protective order. The plaintiff offers no distinct facts that would lead the court to conclude that the witnesses cannot be trusted to tell the truth or that their attending each other’s depositions will otherwise affect their testimony.”)

6. The rule requiring that the Bureau show specific examples of harm if the sequestration order is not granted is even more strictly enforced if the person affected thereby is, as in this case, a party to the proceeding. In filing the Sequestration Motion, the Bureau attempts to invoke the “Rule of Sequestration,” Fed. R. Evid. 615, which provides:

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize the exclusion of (1) a party who is a natural person . . . (emphasis added)

In Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973)<sup>1</sup>, the Court ruled a party may be excluded from a deposition, “although such an exclusion should be ordered rarely indeed.” Id. at 997 (emphasis added). “The order [excluding a party from a deposition] is appropriate to protect the deponent from embarrassment or ridicule intended by the calling party.” Id. at n. 17. In Galella,

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<sup>1</sup> The only case found by counsel wherein a party was excluded from a deposition.

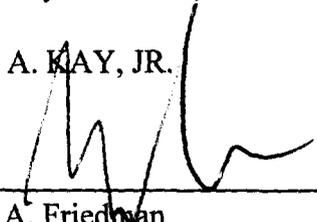
the court excluded the plaintiff from the defendant's deposition after plaintiff "had already been charged with violation of the court's temporary restraining order which was entered to protect the defendant from further harassment." Id. In the instant case, the Bureau has made no such allegation. Therefore, the Sequestration Motion must be denied.

7. Finally, in a separate case instituted by the Bureau against a Commission licensee, Marc Sobel (WT Docket No. 97-56), the Bureau sought to sequester Kay from Sobel's deposition. After the Judge in the Sobel case could not be reached via telephone, the parties proceeded and completed Mr. Sobel's deposition without interruption. The Judge in the Sobel case also denied the Bureau's request to sequester Kay from the hearing in that proceeding, which was again completed without interruption. This is further evidence that the Bureau's request is both legally and factually insufficient.

WHEREFORE, Kay requests that the Presiding Officer deny the Wireless Telecommunications Bureau's Motion for Sequestration Order.

Respectfully submitted,

JAMES A. KAY, JR.

By: 

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: December 1, 1997

**CERTIFICATE OF SERVICE**

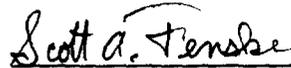
I hereby certify that a true and correct copy of the foregoing Opposition to Wireless Telecommunications Bureau's Motion for Sequestration Order was hand-delivered on this 1<sup>st</sup> day of December, 1997 to the following:

Administrative Law Judge Richard L. Sippel  
Federal Communications Commission  
2000 L Street, N.W.  
Washington, D.C. 20554

John J. Schauble, Esquire  
Federal Communications Commission  
Wireless Telecommunications Bureau  
Suite 8308  
2025 M Street, N.W.  
Washington, D.C. 20554

and sent via first-class mail, postage prepaid on this 1<sup>st</sup> day of December, 1997 to:

William H. Knowles-Kellett, Esquire  
Wireless Telecommunications Bureau  
1270 Fairfield Road  
Gettysburg, Pennsylvania 17325-7245

  
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Scott A. Fenske