

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

In the Matter of)
)
JAMES A. KAY, JR.) WT DOCKET NO. 94-147
)
Licensee of one hundred fifty two)
Part 90 licenses in the)
Los Angeles, California area)

ORDER

Adopted: December 16, 1997 ; Released: December 18, 1997

By the Commission:

1. This order grants the Motion Requesting Depositions filed November 25, 1997 by James A. Kay, Jr. Kay requests authority to question Commission personnel by oral deposition. On November 26, 1997 the Wireless Telecommunications Bureau filed comments in support of Kay's Motion and requested expeditious action in light of the fact that depositions generally have already been scheduled for December 17, 1997. In granting this Motion, we emphasize the special circumstances prevailing here and emphasize that Commission personnel generally are to be questioned by written interrogatory.

2. This proceeding, which involves an Order to Show Cause why Kay's specialized mobile radio authorizations should not be revoked, was designated for hearing on issues to determine, inter alia, whether conventional stations were operated in the trunked mode, whether his stations were constructed and operated in violation of Commission regulations, and whether Kay's operations willfully or maliciously interfered with radio communications of other systems. See 10 FCC Rcd 2062 (1994). The Bureau has identified three individuals who are field inspectors of the Compliance and Information Bureau as potential hearing witnesses. The presiding ALJ made a determination of relevance, noting that the three Commission employees have first hand knowledge through inspections of Kay's stations of significant facts that are in issue and that the most efficient manner for examining these witnesses on their expected testimony is by oral deposition with the opportunity for immediate follow-up questions. Order, FCC 97M-191 (ALJ Nov. 20, 1997).

3. While it is rare that we are willing to authorize oral depositions, we conclude that it is appropriate in this particular instance. Section 1.311(b)(2) of the Commission's rules, 47 C.F.R. § 1.311(b)(2), provides that "Commission personnel may not be deposed for purposes of discovery except on special order of the Commission, but may be questioned by written interrogatories under section 1.323." Section 1.311(b)(2) contemplates that Commission

personnel generally will be questioned by written interrogatories rather than by oral depositions. As the Commission observed in adopting its discovery procedures, "At any one time, there are numerous hearing cases pending before the Commission. A multiplicity of demands on the Commission's limited staff would seriously interfere with its capacity to discharge its regular duties. The Commission is in this respect in a different position from that of private parties who will normally be called upon to give depositions only in the single case in which they are participating." Report and Order of Part I of the Rules of Practice and Procedure to Provide for Discovery Procedures, 11 FCC 2d 185, 188 para. 9 (1968) ("Report and Order"). The Commission further noted that Section 1.311(b)(2) was intended to address the interests of Commission personnel as well as parties seeking to discover information from them.

4. Kay's request to depose Commission employees falls within the stringent standard set forth in Gerard A. Turro, FCC 97-395, released November 18, 1997, and will be granted. The ALJ has made a finding of relevance in accordance with the requirement of Scripps Howard Broadcasting Company, 9 FCC Rcd 4880 (1994). The ALJ also determined that "written interrogatories would not suffice." Order, FCC 97M-191 at 2. This hearing will determine whether Kay is qualified to retain his specialized mobile radio licenses, and the Bureau intends to call these Commission employees as witnesses to present evidence, based on their personal knowledge, on the central issues in the case. In light of these "unusual" circumstances, see Turro at 5, it is appropriate to allow the taking of oral depositions of the three Commission employees.¹

5. The scope of the deposition should, of course, be limited to the designated issues. We are confident, moreover, that the presiding ALJ, in accordance with his broad discretion under 47 C.F.R. § 1.313, will take any action that would be appropriate to avoid any demands on the three Commission employees that would significantly interfere with their ability to discharge their regular duties.

¹ The Bureau asserts that the employees should not be required to produce documents, noting that Commission records may be obtained only through the Freedom of Information Act. Although Kay originally submitted Notices of Deposition Duces Tecum, the ALJ made no ruling on the production of documents in his order, and Kay's instant request to depose the three employees makes no argument concerning production of documents. Thus, no finding has been made concerning any request for production of documents and the ruling in this order is therefore without prejudice to the Bureau's right to raise any appropriate objection to a request for production of such documents.

6. ACCORDINGLY, IT IS ORDERED, That the Motion Requesting Depositions filed November 25, 1997 by James A. Kay, Jr., IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary