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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
JAMES A KAY, JR.) WT Docket No. 94-147
)
Licensee of One Hundred Sixty-)
four Part 90 Licenses in the Los)
Angeles, California Area.)

To: Hon Richard L. Sippel

MOTION FOR PROTECTIVE ORDER

James A. Kay, Jr. ("Kay"), by his attorneys and pursuant to Section 1.313 of the Commission's Rules, hereby moves that the Presiding Judge issue a Protective Order providing that Wireless Telecommunications Bureau ("Bureau") proposed witness Roy Jensen ("Jensen") be forever excluded as a witness in this proceeding. In support thereof, Kay states as follows:

1. In Order, FCC 97M-170, released October 14, 1997, the Presiding Judge required that the Bureau produce a list of witnesses that it contemplated calling at the hearing in this proceeding. The Bureau responded thereto with a document styled, "List of Contemplated Witnesses," that was submitted on October 24, 1997 and which advised the Presiding Judge and Kay as to the witnesses to expect at hearing. Jensen was among the parties listed by the Bureau in this document.¹ The Bureau listed

¹ According to the Bureau, Jensen was expected to "provide evidence concerning applications signed by Mr. Jensen and prepared and filed by Kay, as well as knowledge

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Jensen's address as 266 South Tower Drive #5, Beverly Hills, California 90211.

2. Seeking to depose Jensen during the round of depositions being held in California during the month of December, 1997, Kay tendered a proposed Subpoena to the Presiding Judge. The Subpoena provided for Jensen to appear for a deposition on December 15, 1997 in Encino, California. The Subpoena was signed by the Presiding Judge and Kay thereafter retained a private process server to serve the Subpoena.

3. In attempting to serve Jensen, Kay learned from his process server that Jensen was no longer resident at the South Tower Drive address provided by the Bureau. This information was immediately brought to the Bureau's attention in an attempt to secure from the Bureau a current address for its own witness. Kay fully expected that, based on the information contained in its submission to the Commission, the Bureau was in recent contact with this individual and knew how to locate him if need be.

4. The matter of the absence of a current address for Jensen address was also considered in open court during sessions conducted by the Presiding Judge on the issue of discovery. On the record, the Bureau informed the Presiding Judge that personnel of the Commission and the United States Postal Service were undertaking an investigation of where Jensen could be located. In fact, on December 4, 1997, the Bureau advised the

concerning Kay's loading practices and interfering with radio communications."

Presiding Judge that "we hope to have something on that [the address] either today or tomorrow" (Tr. 351). That date promptly passed with no further information and by the deposition date, no address had been proferred by the Bureau to Kay and the time Kay had set aside for a deposition of Jensen came and went with no witness available for deposition.

5. The depositions have now been over for more than two weeks and Kay has yet to hear from the Bureau on the subject of Jensen's location. It is evident that Jensen has not been found, despite the best efforts of the Commission and allied agencies.

6. Kay is disadvantaged by being unable to take the deposition of a witness that the Bureau has deemed a part of its case-in-chief. Kay was ready, willing and able to take this deposition and then begin to undertake his efforts to respond thereto. He has been unable to do so not because of any failure on his part, but because the Bureau doesn't know where its own witness can be located. This should not be allowed to continue.

7. Pursuant to Section 1.313 of the Commission's Rules, the Presiding Judge has the authority to regulate the conduct of an adjudicatory proceeding. In particular, this provision empowers the Presiding Judge to issue protective orders precluding the use of evidence "if he finds that their use will not contribute to the proper conduct of the hearing...and... to protect the abuse of parties...." Discovery Procedures, 11 RR 2d 1691, 1693 (1968). In the instant proceeding, such protection is called for and the Presiding Judge has already recognized this when he indicated

that if Jensen can't be located, then Jensen can't be called at hearing (Tr. 352).

8. At this point, it is obvious that the Bureau has lost track of its own witness. The parties were ready, willing and able to depose Jensen on December 15, 1997. He was not to be found and the Bureau, despite the many and varied resources of the United States Government, clearly can't find him. Kay is already disadvantaged by not being able to prepare a response to whatever testimony Jensen would have offered. The time to call a halt to the mysterious witness is now.

9. Under the circumstances, Kay hereby requests that, since the Bureau does not know the whereabouts of its witness, the Presiding Judge should promptly issue an order excluding Jensen's participation in this proceeding forever.

Respectfully submitted,

JAMES A. KAY, JR.

By: _____

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Dated: January 2, 1998

CERTIFICATE OF SERVICE

I, Barry A. Friedman, do hereby certify that I have, on this 2nd day of January, 1998, served a copy of the foregoing "Motion for Protective Order," upon the following parties by first-class mail, postage prepaid:

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