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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
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 his 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 "HDQ") in the above-captioned matter.

2. The Wireless Telecommunications Bureau ("Bureau") filed the Motion on December 30, 1997. The Motion seeks to expand on the issues contained in the HDQ to include issues pertaining to: (i) Kay's alleged participation in an unauthorized transfer of control that, according to the Bureau, leads to the conclusion that Kay is unqualified to remain a Commission licensee; (ii) Kay's alleged misrepresentation of facts or lack of candor in connection with an affidavit submitted in support of a "Motion to Enlarge, Change, or Delete Issues" filed by Kay's counsel in January, 1995; and (iii) Kay's alleged misrepresentation of facts or lack of candor in his June, 1994 response to a Commission letter of inquiry.

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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.

ARGUMENT

A. THE MOTION IS PROCEDURALLY DEFECTIVE AND MUST BE SUMMARILY DISMISSED

4. Section 1.229(a) of the Commission's Rules mandates 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 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 almost 3 years ago.

5. Section 1.229(b)(3) of the Commission's Rules, which the Bureau relies on as the basis for its Motion, 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). The Bureau has no basis for the requested hearing issues on either ground.

6. This proceeding was commenced by the Commission in December, 1994, over three years ago. The Bureau now seeks to use the following documents, long in the Bureau's possession, to expand the previously designated issues: (a) Kay's Affidavits, filed in conjunction

with his “Motion to Enlarge, Change or Delete Issues” on or about January 12, 1995 and again on January 25, 1995; (b) the Management Agreement between Marc Sobel and Kay, produced by Kay to the Bureau in March, 1995; and (c) the June 2, 1994 letter prepared by Kay’s former counsel, the firm of Brown and Schwaninger, and verified as true and correct by Kay. These documents have been in the Bureau’s possession since January, 1995; March, 1995; and June, 1994, respectively. Nonetheless, the Bureau alleges that the Motion is timely because it is being filed prior to the January 9, 1998 deadline for motions to enlarge issues set by the Presiding Judge in his Memorandum Opinion and Order, FCC 97M-201, released December 9, 1997 (the “Order”). However, the Order was improperly issued¹, was based on an initial decision in another proceeding that is not effective, and is stayed, and is insufficient for the Bureau to meet its burden under Section 1.229(b)(3) of the Commission’s Rules. Neither the Bureau nor the Presiding Judge has the authority on which to waive the requirements of Section 1.229(b).

7. As an initial matter, the Presiding Judge previously denied the Bureau’s prior Motion to Enlarge the Issues in this proceeding (filed on April 9, 1997), based on Kay’s alleged misrepresentation of facts or lack of candor in the “Motion to Enlarge, Change, or Delete Issues” filed in January, 1995. See Memorandum Opinion and Order, FCC 97M-183, released November 5, 1997 (in ruling that the Bureau’s Motion to Enlarge Issues was untimely, the Presiding Judge correctly stated that “[t]here has been no procedural or discovery misconduct

¹ On March 26, 1997, Kay filed a Motion to Disqualify the Presiding Judge, alleging, *inter alia*, personal bias. In the Motion to Disqualify, Kay alleged that the Presiding Judge was acting as a “coach” for the Bureau. Since the sua sponte Order was based on the Initial Decision of Administrative Law Judge John M. Frysiaj, 97D-13, released November 28, 1997 (the “Sobel ID”), issued in Marc Sobel, WT Docket No. 97-56 (a decision that is not effective (see discussion *infra*)) and lays the groundwork for the Bureau to expand the previously designated issues, the Order provides further evidence of the Presiding Judge’s bias against Kay.

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”).² There is no legal basis for the Bureau to again request that the Presiding Judge enlarge the issues in this case based on the Sobel/Kay Agreement in late December 1997, particularly since the Bureau failed to undertake the necessary predicate of filing a timely appeal of the order.

8. The Commission’s treatment of motions to enlarge issues under Section 1.229(b)(3) of the Commission’s Rules is consistent: 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 that allegedly disclosed Kay’s “interest” in Sobel’s stations). The Order is an insufficient basis for the Bureau to circumvent this requirement, as the Order, itself, cannot service as a “reason why it was not possible to file the motion within the prescribed period,” having been issued well after the cut-off date for such motions.

9. In fact, the Bureau cites no reasons (as required by Section 1.229(b)(3) of the Commission Rules) why the Motion was not timely filed. Such failure is inconsistent with the Commission’s rulings 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 FCC

² 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 in that decision applied to the Presiding Judge’s order denying the motion to enlarge filed by the Bureau in April, 1997 and is equally applicable to the instant Motion.

Rcd 1726, 1729 (1993), quoting Liberty Productions, 7 FCC Rcd. 7581, 7584 (1992). See also, Capitol City Broadcasting Co., 8 FCC Rcd. at 1728, quoting Evergreen Broadcasting Co., 7 FCC Rcd. 6601, 6602 (1992) (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.”).

10. The obligation to act promptly is clearly applicable to the Bureau as the prosecutor in this case. The Bureau knew or should have known the facts to support the Motion in March, 1995. Now, the Motion must be denied, or alternatively dismissed, as untimely. A sua sponte order from the Presiding Judge cannot take the extraordinary action of changing Commission rules and precedent. If the Commission intended to provide that a Judge may issue a sua sponte order removing the strict time frames set forth in Section 1.229(b)(3) of the Commission’s Rules, 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 attempt at demonstrating 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. See also, Memorandum Opinion and Order, FCC 97M-183, released November 5, 1997. The Bureau has failed to meet its burden of proving “good cause” under Section 1.229(b)(3) of the Commission’s Rules and the Motion must be dismissed.

B. JUDGE FRYSIK'S INITIAL DECISION IS NOT EFFECTIVE AND CANNOT FORM THE BASIS FOR THE ORDER

11. Even assuming that the untimely Motion is considered, it is substantively without merit. In issuing the Order, the Presiding Judge relied exclusively on the Sobel ID. Pursuant to Section 1.276(d) of the Commission's Rules, however, the Sobel ID is not effective (and has never been effective) and is stayed due to the filing of exceptions by Kay and Sobel on or before January 12, 1998.

12. Section 1.276(d) of the Commission's Rules provides as follows:

No initial decision shall become effective before 50 days after public release of the full text thereof is made unless otherwise ordered by the Commission. The timely filing of exceptions, the further review or consideration of an initial decision on the Commission's initiative, or the taking of action by the Commission under paragraph (c) of this section shall stay the effectiveness of the initial decision until the Commission's review thereof has been completed. If the effective date of an initial decision falls within any further time allowed for the filing of exceptions, it shall be postponed automatically until 30 days after time for filing exceptions has expired.

(emphasis added)

13. In accordance with Section 1.276 of the Commission's Rules, the Sobel ID does not become effective until January 19, 1998. Moreover, as anticipated by the Bureau itself (See Pg. 9 of the Motion), both Kay and Sobel will be filing timely appeals of the Sobel ID. By the Commission's own rules, the Sobel ID will not be effective until Commission review is completed. The Presiding Judge, therefore, has no basis upon which to rely on the Sobel ID in issuing the Order or enlarging the issues, due to the lack of effectiveness of the Sobel ID.

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

14. Even assuming that the Presiding Judge wishes to entertain the untimely and improper Motion presented by the Bureau, the Motion is defective. A Motion to Enlarge Issues, especially on misrepresentation grounds, requires the movant to meet strict procedural and substantive tests. The Bureau, having failed to do so, is not entitled to enlargement.

15. In the first place, the Bureau has failed to meet its obligations under Section 1.229(d). That provision mandates that motions to enlarge “shall be supported by affidavits of a person or persons having personal knowledge thereof.” The Motion, which relies on factual claims involving Kay, is devoid of the required affidavit and cannot be considered. Barry Skidelsky, 70 RR2d 722, 730 (Rev. Bd. 1992), rehearing denied, FCC 92-398, released September 2, 1992.

16. As for the substance of the Motion, Section 1.229(d) mandates that the pleading “shall contain specific allegations of fact sufficient to support the action requested.” Once again, the Bureau has failed to meet the test. It was the Bureau’s obligation to present a prima facie case and it has failed to do so. Las Americas Communications, Inc., 62 RR 2d 644, 647 (Rev. Bd. 1987).

17. Turning to the facts, the Bureau requests that misrepresentation and unauthorized transfer of control issues be added to the HDO. It makes summary claims on both. These claims are insufficient to warrant the addition of these issues, as they fail to meet the requisite test of setting out a prima facie case. See, e.g., The Lutheran Church/Missouri Synod, 10 FCC Rcd

9880, 9921 (ALJ 1995) (“[T]he mere opinion of the NAACP as to the significance of the facts alleged in its Motion to Enlarge is not a sufficient basis for the addition of the issues.”)

18. In connection with the misrepresentation claims, there is “a prerequisite that there be motive and intent shown where issues are added relating to misrepresentation, lack of candor or abuse of process.” In re Mark L. Wodlinger, 62 RR 2d 888, 896 (A.L.J. 1987), citing In re Riverside Broadcasting Co., Inc., 104 FCC2d 644 (1986) (circumstantial evidence failing to demonstrate intent to deceive will not support a finding of misrepresentation).

19. Despite this mandate, the Bureau neither alleges that Kay intentionally misled the Commission nor articulates any motive for Kay to mislead the Commission. The Bureau merely attempts to bootstrap its allegation of misrepresentation on to the Sobel ID. In addition to the fact that the Sobel ID is not effective, the Sobel ID provides no evidence of motive or intent. Having failed to provide the requisite evidence of motive or intent, issues of misrepresentation or lack of candor may not be added to the HDO.

20. Even if one is to rely on the Sobel ID, it does not establish that Kay made any misrepresentations, much less intentional misrepresentations, to the Commission in either the Affidavit or the June 2, 1994 letter. Both documents were prepared by Kay’s attorney on behalf of Kay, and were signed by Kay after being informed by his attorney that they complied with Commission rules. While there may be errors in the documents, there has been no showing by the Bureau that either Kay or his counsel intended to lie or deceive the Commission.

21. Additionally, the Affidavit was prepared in order to have Sobel’s licenses removed from this proceeding. Putting the Affidavit in its proper context, Kay was not required to provide the Commission with a detailed description of his relationship with Sobel and the

Management Agreement, and consequently, Kay did not make any intentional misrepresentations.

22. The Bureau also seeks to add an unauthorized transfer of control issue against Kay. The Bureau fails to recognize, however, that the Presiding Judge cannot designate a transfer of control issue against Kay, who was not the licensee of the stations involved. Instead, the issue to be added, were it proper in this case, is the unauthorized assumption of control. See, e.g., CanXus Broadcasting Corp., 71 RR 2d 136, 7 FCC Rcd 3874 (1992) (forfeiture imposed on licensee for its unauthorized assumption of control), reconsideration denied, 8 FCC Rcd 4323 (1993), affd., 10 FCC Rcd 9950 (1995); Liability of Macau Traders, Inc., DA 97-2738, released January 8, 1998. The Bureau's error is a fatal defect.

23. Moreover, the relationship between Sobel and Kay did not effectuate a transfer or assumption of control under either the controlling statutes or case law. The Management Agreement between the parties, which the Bureau alludes to, governs the business relationship between Sobel and Kay and fully complies with Commission rules and makes good business sense for the parties. Nowhere in the Motion is there a showing of the controlling law³ and any fact that support a prima facie case of assumption of control. As the movant, the Bureau was required to make the showing and failed to do so. Scott & Davis Enterprises, 88 FCC 2d 1090 (Rev. Bd. 1982). It is not entitled to have the issue added to the HDO.

24. Pursuant to the Management Agreement, Sobel has complete control over daily operations of his stations. The only functions Kay performs are to obtain customers for Sobel's stations and to bill and collect from these customers. Sobel controls key daily operations such as

³ In fact, the Bureau cites no relevant law violations.

billing rates, station maintenance, and the placement of customers. Sobel also has complete access to the billing records. Kay only provides a customer base for Sobel's stations and administrative support in billing and collection.

25. Under the Management Agreement, Sobel also leases equipment and space from Kay. But for this arrangement, Sobel would have taken out a loan to purchase such equipment and be making equivalent, if not greater, payments to his lender. The arrangement with Kay makes financial sense not only for Sobel, but also for Kay, who had much of the inventory that Sobel needed to construct Sobel's stations in his shop. If Kay and Sobel had not made this type of arrangement, Sobel would still have likely subleased space from Kay, coordinated services with Kay, and purchased and used equipment compatible with Kay's because of the convenience of servicing and maintaining it. The sound business decision made by Sobel, by which he has undertaken to provide for his stations on favorable terms, cannot be used to infer any type of transfer of control to Kay.

26. 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 and participated in an alleged transfer of control are legally insufficient for the Presiding Judge to enlarge the issues contained in the HDO. As a result, the Motion must be dismissed or denied. The Lutheran Church/Missouri Synod, supra (motion to enlarge denied after movant failed to make a prima facie case).

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: January 9, 1998

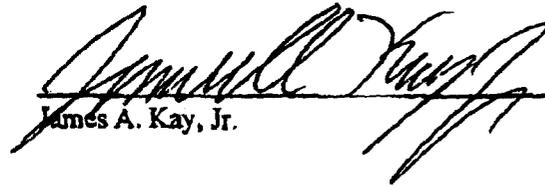
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DECLARATION OF JAMES A. KAY, JR.

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.

January 9, 1998


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 9th day of January, 1998 to the following:

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

and by first-class mail, postage pre-paid on this 9th day of January, 1998 to:

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



Scott A. Fenske