

FCC MAIL SECTION

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

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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)	

ORDER

Issued: March 6, 1998

Released: March 10, 1998

This is a ruling on a Motion For Extension Of Time And Request For Bill Of Particulars that was filed by James A. Kay, Jr. ("Kay") on March 3, 1998. Wireless Telecommunications Bureau's ("Bureau") Opposition was filed on March 5, 1998.

In Order FCC 98M-21, released February 26, 1998, it was ruled that:

Kay must disclose to the Bureau the identity of witnesses who are presently intended to be called by Kay either as a defense witness or as rebuttal witnesses.

Counsel for Kay had informally asked to present the Bureau with a list of witnesses on March 6, 1998. The Presiding Judge acknowledged that it would be appropriate to allow Kay's counsel the additional time in view of an imminent change of procedural and hearing dates. Order FCC 98 M-22, released February 22, 1998. There is no good cause shown or reason given for further delay of identification of witnesses. Such identification is necessary in order for Bureau counsel to prepare for and schedule depositions.

At no point in his pleading does Kay differentiate between witnesses that would be called by Kay in defense and witnesses which he may ask to call in rebuttal. Kay requests only "an extension of time to identify his rebuttal witnesses." Since Kay has deposed all but one of the Bureau's probable fact witnesses, there should be rebuttal witnesses that can be identified. More importantly, Kay has been aware of the allegations in the designation order since December 1994. He has had discovery since that date, including answers of the Bureau to interrogatories that were addressed to the specifications of the designation order in lieu of particulars. See Order FCC 95M-

28, released February 1, 1995.¹ The added issues (FCC 98M-15) are based on the findings in another proceeding (97D-13) in which Kay participated as a party and as a witness. Kay has also filed exceptions to the ID. Therefore, Kay has knowledge of the facts and circumstances concerning the added issues.

Kay knows the identity of every potential Bureau fact witness and with one exception, Roy Jensen. Kay has deposed each such potential witness. Kay also will have the opportunity to depose Mr. Jensen in the near future. There has been ample time for Kay, who is a licensee and has actual knowledge of the operative facts concerning the conduct of his licensed businesses, to learn the facts sufficiently well to craft a defense. That knowledge would include construction and operation of assigned stations and record keeping. He also gained knowledge of the testimony of all witnesses deposed to date. That deposition discovery of the Bureau's witnesses readily facilitates the identity by Kay of probable defense witnesses that he will present at hearing. He should also have rebuttal witnesses in mind since deposing the Bureau's witnesses. Kay is presently required only to identify rebuttal witnesses which are presently known. However he may characterize his witnesses, there is no basis for Kay to take the position that he is unable or unwilling at this time to identify any witnesses who will be testifying at the hearing in Kay's case in chief and/or as rebuttal witnesses of the Bureau's witnesses who have been deposed.

Kay states as additional reason for continuing in delaying his witness identification, awaiting answers to interrogatories which he propounded to the Bureau on February 23, 1998, or a statement of the particulars as to each count of the designation order which is sought by the second leg of the motion that is under consideration here. There is no basis for considering the interrogatories which are yet to be addressed by the Bureau as a factor for delay. And there is absolutely no basis shown for revisiting and considering further a redundant request for exceedingly broad particulars which would intrude on the Bureau's trial preparation. Cf. Order FCC 95M-102, released April 7, 1995 at 2.

Kay has knowledge from past prehearing conferences and rulings that he will obtain the Bureau's evidence in advance of the exchange of his evidence and that trial briefs have been prescribed to aid in trial preparation and to avoid surprise. There are no further rights that Kay has to discovery than those that have been afforded under the Rules of Practice. By his re-request for

¹ The Rules of Practice limit the scope of interrogatories that may be directed to the Bureau. See 47 C.F.R. §1.311(b)(4). Substantial discovery has been provided to Kay through Commission documents furnished under FOIA requests, the depositions of two investigators that were authorized by the Commission, and the interrogatories already permitted under Order 95M-28, supra.

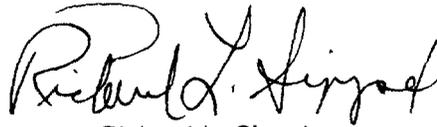
particulars, Kay seeks to expand discovery far beyond the pale of that which is reasonably expected under the Commission's discovery rules.²

The Bureau has agreed to review each factual charge of the designation order after deposing Kay's witnesses and, if the discovered evidence warrants, the Bureau will not offer evidence concerning an event which qualifies. This review can only be accomplished after discovery has closed and before the trial briefs are exchanged. It is to Kay's advantage to be candid and forthright with the Bureau in the Bureau's discovery of Kay's witnesses so that the deposition phase of pretrial discovery and preparation can be concluded as soon as possible, thereby enabling the Bureau to contract its universe of evidence to be offered at the hearing.

Accordingly, for all of the foregoing reasons, IT IS ORDERED that the Motion For Extension Of Time And Request For Bill Of Particulars that was filed by James A. Kay, Jr. on March 3, 1998, IS DENIED.

IT IS FURTHER ORDERED that in order to permit a focused identification of witnesses, James A. Kay, Jr. shall have additional time until **March 9, 1998**, to provide the Wireless Telecommunications Bureau with the prescribed witness list.³

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel

Administrative Law Judge

² Kay would have the Bureau virtually turn over its case preparation through a request for particulars that would include, *inter alia*, "detailed facts" on each violation, when and where each violation occurred and the name of each person having knowledge of each violation. These are the details that appear in proposed findings and conclusions that are exchanged by parties after the hearing evidence has been received and the record closed. Such "discovery" sought by Kay through his expansive bill of particulars would be invasive in the extreme

³ Copies of this ruling were faxed or e-mailed to counsel on date of issuance.