

FCC MAIL SECTION

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

FCC 98M-32

80578

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.)	

MEMORANDUM OPINION AND ORDER

Issued: March 16, 1998 ; Released: March 18, 1998

Background

1. This is a ruling on Wireless Telecommunications Bureau's ("Bureau") Consolidated Opposition To Notices Of Deposition And Motion For Protective Order that was filed on February 19, 1998. A Response was filed by James A. Kay, Jr. ("Kay") on February 27, 1998. See Order FCC 98M-22, released February 26, 1998, extending the time to file. The Bureau filed a Response To Relevance Showing on March 4, 1998. See Order FCC 98M-24, released March 2, 1998, extending the time to file.¹

2. On February 12, 1998, Kay served Notices To Depose three current Commission employees and one former Commission employee: W. Riley Hollingsworth, Terry L. Fishel, Anne Marie Wypijewski and Robert G. Andary.² Pursuant to the Commission's Rules of Practice (47 C.F.R. §1.315(b)(1)), the Bureau identifies Messrs. Hollingsworth, Fishel and Andary and Ms. Wypijewski as participants in the Bureau's pre-designation investigation. None were listed by the Bureau on a list of possible witnesses. Kay has not demonstrated any relevance of the testimony of these Commission employees in the notices to depose which were filed and served. The Bureau contends that Kay has

¹ On March 2, 1998, Kay's counsel delivered to the Presiding Judge for use in deciding the deposition issues under consideration a courtesy copy of "Supplement To Response To Wireless Telecommunications Bureau's Consolidated Opposition To Notices Of Deposition And Motion For Protective Order." There is no front to back pagination of attachments to that copy of the Sobel Request. Over 100 of the assembled unpaginated pages were inverted both from top to bottom and front to back. From the stamped filed copies that were later forwarded by the Secretary, it is readily determined that the copies of the Supplement that were filed on March 2, 1998, at the Secretary's Office were properly assembled and filed without the distraction of inverted pages.

² Kay also noticed the depositions of William (Tom) Gerrard, the Bureau's expert witness, and Roy Jensen, a potential Bureau fact witness. Those depositions are not contested by the Bureau and are not the subject of this ruling.

failed to make a sufficient showing of relevancy. The Bureau also argues that these four individuals were involved in the predesignation investigation as attorneys and therefore their knowledge about the case would not be discoverable because of applicable privileges.

Standards For Deposing Commission Employees

3. There must be a showing of "extraordinary circumstances" to justify deposing Commission employees. Gerald A. Turro, 12 F.C.C. Rcd 22358, 22351 (1997). Before Commission employees can be deposed orally there also must be a threshold determination of relevance made by the Presiding Judge. If there is a positive determination of relevance, the Commission may thereafter approve the taking of the oral deposition. See Scripps Howard Broadcasting Company, 9 F.C.C. Rcd 4880 (1994) and Commission Rules of Practice 47 C.F.R. §1.311(b)(2). Kay was instructed on these procedures in connection with the deposition of other Commission employees who had inspected Kay's stations and for that reason were determined to have relevant information to justify deposition testimony. Order FCC 97M-191, released November 20, 1997. Therefore, it should come as no surprise that these depositions cannot be taken. Also, as in previous rulings there will be no requirement that Commission documents be produced that were requested by Kay in connection with the deposition notices. Kay may seek Commission documents only under FOIA. 47 C.F.R. §1.311(b)(3), see Order FCC 95M-209, released November 24, 1995; and Order FCC 98M-14, released January 23, 1998 at 3.

Insufficiencies Of Kay's Notices Of Deposition

4. The deposition notices that were served by Kay on February 12, 1998, utilized standardized language that would be more applicable for a witness who had engaged in business with Kay as an employee, business supplier, or competitor. For example, the deposition notice for W. Riley Hollingsworth ("WRH") prescribes as the subject matters of the contemplated deposition: (a) WRH's relationship with and knowledge of Kay and Kay's business; (b) the business conducted by WRH or any employer of WRH; (c) WRH's business; (d) WRH's knowledge of any acts of Kay or his agents that violated the Communications Act or the Commission's regulations; (e) all communications between WRH and Kay and with Kay's competitors; (f) WRH's knowledge of investigations undertaken by him and others at the Commission; (g) such other matters relevant to the issues of the designation order. The subject of subparagraph (e) would seek discovery of investigative witnesses. The subject of subparagraph (f) would ask for investigative information. But the information contemplated by subparagraphs (a) through (d) would have no relevance to the work or duties of a Commission employee. There could not be an analysis made of the relevance of the discovery of Mr. Hollingsworth except for investigative matters which qualify for a judicially recognized investigation privilege. Therefore, it is unintelligible from the deposition notices exactly why Kay would contemplate examining these Commission employees and why there is a perceived need for their depositions. Kay did not delineate any "extraordinary circumstances" and did not attempt in the deposition notices to meet the threshold standard for seeking permission to orally depose Commission employees. 47 C.F.R. §1.311(b)(2).

5. The specific Commission rule has been cited by the Commission and by the Presiding Judge in earlier rulings where "extraordinary circumstances" were found relating to the depositions of Commission employees: Recall that under 47 C.F.R. §1.311 (b)(2) a Commission employee may be orally deposed only to ascertain: (1) the existence, description, nature, custody, condition and location of relevant documents and things, (2) the identity and location of persons having knowledge of relevant facts, and (3) facts of the case to which they have direct personal knowledge. The four Commission employees were involved in investigating the Bureau's predesignation case. They are not identified as potential witnesses by the Bureau for any purpose and therefore they will not be testifying as to facts. Kay alleges that these persons had interviewed potential fact witnesses and therefore Kay wants to explore through depositions whether those witnesses were coached by the Commission employees. Depositions for such a purpose will not be permitted. It is appropriate for non-party witnesses to be interviewed in the course of an investigation. Kay has no right to depose Commission employees who have been carrying out these proper functions as predesignation investigators and who are in a different category than Messrs. Paul Oei and James Lafontaine. Cf. Order FCC 97-412, released December 8, 1997. Kay's highly speculative suggestions of witness coaching remain highly speculative and are groundless reasons for the requested depositions.

Kay's Inadequate Showing Of Relevance

6. On February 27, 1998, in accordance with instruction from the Presiding Judge³, Kay filed a Response to the Bureau's Consolidated Opposition which included a section on relevance for deposing the Commission employees.⁴ Kay argues that Section 1.311(b)(2) does not apply to Mr. Andary because he no longer is a Commission employee.⁵ Kay submitted as a separate document a pleading that was filed in another case by a non-party to this proceeding, Mr. Marc Sobel ("Sobel"). The pleading is dated February 27, 1998, the same date as Kay's Response, and is styled Request for Inquiry and Investigation (the "Sobel Request"). Exhibits to the Sobel Request were later filed by Kay

³ See Order FCC 98M-21, released February 24, 1998, as modified by Order FCC 98M-22, released February 26, 1998.

⁴ The Presiding Judge also required the Bureau to respond to Kay's Response insofar as it addresses the relevance of Commission employee deposition testimony. Kay argued that the Presiding Judge erred in requiring the Bureau's reply. But the Bureau's views on relevances are helpful for determining relevance and clearly can be required to be filed under Commission rules. 47 C.F.R. §1.294(c)(4).

⁵ Kay does not deny that §1.311(b)(2) applies to Mr. Hollingsworth, Mr. Fishel or Ms. Wypijewski. But Kay fails to make the Scripps Howard/Turro analysis as to each.

on March 2, 1998.⁶ Kay argues that "its relevance to this proceeding is obvious from a reading of the [Sobel] Request and Kay's need to depose [the Commission employees] becomes self-evident." Kay makes no effort to link his subjectively perceived "need" with the substantive merits of the issues of this case. And after limited consideration of the Sobel Request as it was submitted, there is revealed no "self-evident" relevance to the substantive merits of this case which may explain why Kay relied only on his own one-sided subjective view of "self-evident." The reasons cited by Kay for the relevance of the Sobel Request to deposing Commission employees are conclusory and speculative. Therefore, the core concerns of the Commission to conserve the time of government employees would not be met if the depositions were allowed. Also, if Kay's speculations were allowed to be pursued in depositions, it would expand the scope of this case far beyond the issues which the Commission has set for hearing. See Order FCC 97-412 (scope of depositions limited to designated issues).

7. By adopting the Sobel Request as his reliable source, Kay has inexplicably asked the Presiding Judge to accept a "self-evident" premise of relevance for subjective views directed against Commission employees. Kay asserts without stating any basis whatsoever that these four Commission employees have knowledge of:

- (a) wrongful prejudgment of Kay;
- (b) ex-parte communications that interfered with Kay's business;
- (c) designation of certain issues with the hope of acquiring supporting evidence during discovery;
- (d) reliance on the testimony of biased witnesses with out effort to verify or corroborate the allegations of such witnesses;
- and (e) coaching of witnesses.

Kay offers no rationale that could justify an inquiry in this proceeding into such allegations against Commission employees in an unsubstantiated Request for Inquiry and Investigation. In effect, Kay seeks to use this proceeding through Sobel's Request to depose Commission employees in the highly speculative hope of learning information that might relate to unfounded aspersions (a) through (e) above. There is no relevance or reason shown for using this proceeding and the time of government

⁶ The exhibits to the Sobel Request are too voluminous for crafting focused arguments of relevance expected in the narrow context of contemplated deposition witnesses who are Commission employees. In addition, the order of the exhibits and their relation to any reasoned argument is difficult and cumbersome to decipher without the benefit of a focused explication and, as noted above, about one half of the attachments were assembled and submitted to the Presiding Judge in an inverted order. Notwithstanding those deficiencies, the Presiding Judge will deal with the Sobel Report as submitted by Kay for the limited purpose of considering the pleadings of the parties that are now under consideration. But the willingness of the Presiding Judge to consider the Sobel Request for the sole, limited purpose of this ruling does not mean that there has been a proper filing of the Sobel Request in this proceeding or that there is any substance at all to the Sobel Request as a Commission filing in another case.

employees for such a misdirected, highly speculative and potentially inflammatory inquiry calculated to intimidate Commission employees. Nor can this proceeding be used directly or indirectly for any discovery that relates to the five assertions of the Sobel Request that are referred to above.⁷

8. Kay's argument at one point crosses into the realm of the non-sequitur. Point (d) of the Sobel Request as presented by Kay is an alleged "reliance [by the Bureau] on the testimony of biased witnesses without effort to verify or corroborate the allegations of such witnesses." That bare assertion is assigned a footnote which ascribes duplicity to the Bureau by identifying 19 fact witnesses in answering Kay's first set of interrogatories over one year ago and then later reducing that number of fact witnesses to 12 who (except for one) by now have been deposed. Kay points to the obvious - that the Bureau found 7 of the 19 to be lacking in credibility or to be having less knowledge of relevant facts than originally believed. There is a third alternative not mentioned which is a responsible paring down of duplicative testimony by Bureau counsel as the case gets closer to hearing. Whatever the reason, Bureau counsel was engaged in the legal profession's time-honored effort of reducing the amount of testimony to the minimum needed to present its case in chief. It would be to the credit of Kay if his trial counsel would soon do the same. In any event, it is a total non-sequitur to ascribe to the four Commission employees or to the Bureau an intentional reliance on "testimony of biased witnesses" under Kay's unfounded criticism of the Bureau's counsel for the salutary paring down of the Bureau's case from 19 to 12 fact witnesses.

Depositions Are Not Authorized To Explore The Viability Of Defenses

9. Kay argues that the depositions are needed "to explore the viability" of Kay's affirmative defense to the alleged violation of Section 308(b) of the Communications Act. The defense, if found by Kay to be "viable" after "exploratory" discovery, would hope to show that Kay had not received sufficient assurances of confidentiality with respect to the Bureau's receipt of Kay's business information that was the subject of the Section 308 inquiry. Kay offers no authority for a self-help use of confidentiality as an affirmative defense to the substantive charges of violations of the Act and regulations. Confidentiality assurances were in fact made in the Section 308 correspondence which the Bureau has attached to its pleading of March 4, 1998. That correspondence shall become a part of the documentary evidence of record at the hearing for consideration in findings. There has been no showing of the need for testimony of Commission employees with respect to those assurances of confidentiality that are contained in the correspondence. Specifically, Kay was advised by a letter from the Bureau dated April 7, 1994, that "we will not make those materials which are specifically listed under the provisions of Rule 0.457, 47 C.F.R. §0.457, routinely available for inspection to the public." Kay was later informed by Bureau letter of May 27, 1994, that "we have no intention of disclosing Mr. Kay's proprietary business information, except to the extent we would be required by law to do so." There could be sufficient information in the letters to assess the "viability of Kay's defense" directed to the confidentiality that the Bureau would afford to Kay's business information. Oral deposition

⁷ The Bureau cites a finding in an Initial Decision that Kay pays Sobel's legal fees with respect to the stations licensed to Sobel. Marc D. Sobel, FCC 97D-13, released november 28, 1997 at para. 43. This case will not be permitted to be used as a vehicle for discovery related to the Sobel Request.

discovery of Commission employees would be totally speculative, a classic "fishing expedition" that would be highly unlikely to lead to relevant evidence, a total waste of time, and therefore impermissible.

Robert Andary May Not Be Deposed For Speculative Purposes

10. Mr. Andary is no longer a Commission employee. He is presently employed as the Inspector General of the Government Printing Office. An Inspector General of a federal agency is a position that carries substantial responsibilities and requires the carrying out of significant governmental functions. Therefore, although Mr. Andary does not literally fall within the prohibition against deposing Commission employees, the position held by Mr. Andary at GPO will be afforded the same treatment as a Commission employee. Cf. Scripps Howard Broadcasting Company, supra at 4881. Also, it is noted that Mr. Andary is not identified as a possible Bureau witness and there has been no showing that Mr. Andary would have any relevant testimony to give at a deposition or at the hearing. The conditions for his oral deposition have not been met.

Courts Of General Jurisdiction Have Raised Substantial Concerns Relating To Kay's Discovery

11. Another forum with jurisdiction over the same discovery subject matter forcefully denied Kay the depositions of Commission employees and Commission documents. James A. Kay, Jr. v. Harold Pick, Superior Court for the District of Columbia, C.A. No. Misc. 96-279, issued October 16, 1996.⁸ The Superior Court concluded that there had been a proper assertion by the Commission of the law enforcement privilege which required the withholding of Commission documents from Kay. Of relevance and of legitimate concern to this proceeding, the Superior Court found "evidence that Kay has called or intimidated other witnesses whose identity was revealed to him." Id. at 3. The Commission has ordered the Presiding Judge in this case, under the broad discretion afforded presiding judges under 47 C.F.R. §1.313, "[to] take any action that would be appropriate to avoid any demands on --- Commission employees" who may be noticed for depositions. Order FCC 97-412, released December 18, 1997. In furtherance of the Commission's stated concerns for its employees as witnesses, the Presiding Judge will heed carefully the finding of the Superior Court that witnesses have been intimidated by Kay.

12. Another court dismissed a civil action for damages brought by Kay against Mr. Hollingsworth and Ms. Wypijewski based on allegations related to the Bureau's predesignation investigation for which Kay now seeks their testimonial depositions. The U.S. District Court for the Middle District of Pennsylvania found "grave questions about whether the instant action is any more than a thinly veiled and frivolous attempt to improperly influence or subvert the pending administrative proceedings." James A. Kay, Jr. v. W. Riley Hollingsworth, et al., Civ. No. CV-94-1787, Memorandum

⁸ A copy of the Superior Court decision is attached to the Bureau's Consolidated Opposition and Motion for Protective Order.

(M. D. PA. filed March 31, 1995) at 14.⁹ Chief Judge Rambo's warning shall be heeded in this proceeding with respect to Kay's unsupported, wholly speculative seeking of depositions of Commission employees, and the "thinly veiled" frivolous nature of the Sobel Request cited by Kay as "self-evident" showings of relevance.

Conclusion

13. Based on previous judicial findings, witness protection from possible intimidation is an acknowledged concern that is consistent with denying Kay's request for speculative, time-consuming depositions of Commission employees on alleged accusations made by Kay through selective use of the Sobel Request that have no basis in fact. In view of the Commission's direction to limit the scope of any depositions of Commission employees to "designated issues" and to "avoid any demands that would significantly interfere with their ability to discharge their regular duties" (Order FCC 97-412, supra) the depositions of the four Commission employees shall not be taken.

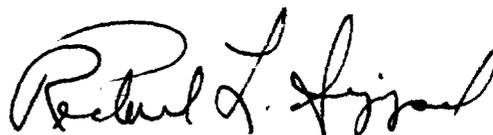
Rulings

Accordingly, IT IS ORDERED that the Consolidated Opposition to Notices of Depositions and Motion for Protective Order filed by the Wireless Telecommunications Bureau on February 19, 1998, IS GRANTED.

IT IS FURTHER ORDERED that due to a failure to show relevance and/or extraordinary circumstances, the depositions of W. Riley Hollingsworth, Anne Marie Wypijewski, Terry L. Fishel, and/or Robert G. Andary SHALL NOT BE TAKEN or further noticed by James A. Kay, Jr. in this proceeding.

IT IS FURTHER ORDERED that the Request for Inquiry and Investigation filed by Marc D. Sobel in proceeding WT Docket No. 97-56 SHALL BE STRICKEN as baseless and speculative accusations against Commission employees which will be given no further consideration in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION¹⁰



Richard L. Sippel
Administrative Law Judge

⁹ A copy of the U.S. District Court Memorandum decision is attached to the Bureau's Response To Relevance Showing.

¹⁰ Copies of this ruling were faxed or e-mailed to counsel on date of issuance.