

FCC MAIL SECTION

MAR 24 9 21 AM '98

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

FCC 98M-34

80606

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 19, 1998 ; Released: March 23, 1998

1. On March 16, 1998, a Petition For Leave To Appeal was filed by James A. Kay, Jr. ("Kay"). Kay petitions with respect to rulings in Order FCC 98M-27, released March 10, 1998, on Kay's Motion For Extension Of Time And Request For Bill Of Particulars. Except for the relief afforded for more time, Kay asks to take an interlocutory appeal to the Commission. Kay contends that the denial of the request for a bill of particulars raises a "new or novel" question of law or policy and a remand would be likely to occur if the interlocutory appeal were deferred until the whole case was appealed. 47 C.F.R. §1.301(b).

2. Kay continues to assert that he lacks sufficient notice regarding the specific issues under the Hearing Designation Order, FCC 94-315, released December 13, 1994 ("HDO"). Kay argues that he is being denied adequate notice of the charges to which he is entitled under the Communications Act and the Administrative Procedure Act. Kay concedes that it will be helpful to receive the Bureau's case in advance of trial but argues that the "value of the information is significantly reduced by the fact that Kay needs to know how the Bureau intends to proceed (in the form of a bill of particulars) prior to the conclusion of discovery." Kay's position is that the specifications of the HDO are "generalized and conclusory assertions with no specific factual allegations." Kay seemingly concedes that there is sufficient specificity with respect to the alleged failure to comply with Section 308(b) requests for information which has been the subject of an earlier motion for summary decision. But according to Kay, the remainder of the allegations concerning construction and operation of his stations are based on "unsubstantiated allegations" and Kay asserts that he needs more information to prepare his defense.

3. Kay cites remarks of the undersigned made on the record (Tr. 214) that "[relevant] information somehow or other should have been obtained before a hearing designation order was issued." That concern of the Presiding Judge should have a bearing on the notice that certain portions of the HDO provide to Kay. The Bureau is expected to provide more specific information than what is alleged in the HDO when its case is disclosed on the evidence exchange date and the exchange of trial briefs. Kay also shall have deposed each of the Bureau's hearing witnesses. Kay need only meet

what the Bureau proves and only that portion of the proof that supports a finding of a violation that is alleged in the HDO. If the Bureau fails in its proof, Kay gains a substantial advantage. The parties should proceed in completing their deposition discovery and prepare for trial.¹ There has been no new or novel issue involved in rulings which are primarily directing the progress of the case in its discovery and trial preparation.

4. However, Kay has delineated the charges of the HDO which are general allegations that are related to technical rules regarding construction and operation of stations authorized under Part 90.² Early in the case, in the interest of fairness to Kay, the specifications of the HDO were the subject of interrogatories permitted to be propounded by Kay to the Bureau. Order FCC 95M-28, released February 1, 1995. A Motion To Compel further answers was denied. Order FCC 95M-102, released April 7, 1995. It would be appropriate for the Bureau to update those interrogatories to the extent that the Bureau is able to obtain additional information with respect to the technical rule violations. It would be helpful to have the views of the Bureau with respect to those specifications that Kay has delineated in Para. 7 of Kay's Petition. Kay has cited a portion of the depositions of potential Bureau witnesses that seem to fail to support representations in earlier interrogatory answers submitted by the Bureau that "persons named [in correspondence] have direct knowledge of the facts."

5. The Bureau has agreed to review before the hearing each of the narrow fact allegations of the HDO against the evidence obtained in discovery. If the Bureau has determined (or determines before the hearing) that no proof or insufficient proof can be offered on any technical rule violation, the Presiding Judge should be advised as soon as that is determined. The Bureau has embarked on this case without the quantum of evidence needed to support each of the HDO's allegations regarding those technical rule violations. The Bureau has represented that it will back up the allegations with testimony. The depositions of the Bureau's fact witnesses have been taken. If those witnesses did not provide sufficient proof, then it would be appropriate to start cutting back on the scope of the Bureau's case in chief. It would assist in moving this case along if the Bureau were to concede, where appropriate, that it has insufficient evidence. Kay would then be entitled to seek a partial summary decision on those issues³ which could substantially reduce the scope of case preparation as well as the time and expense of the hearing.

¹ The depositions should proceed as soon as possible now that Kay has identified witnesses.

² Kay complains of an allegation of the HDO that "Kay has willfully or repeatedly violated the Commission's rules §90.155 (time in which station must be placed in operation); §90.313 (frequency loading criteria); §90.623 (limitation on the number of frequencies assignable for conventional systems); §90.627 (limitations on the number of frequency pairs/trunked systems); §90.631 (trunked systems loading, construction and authorization requirements); and §90.633 (conventional systems loading requirements). These rules are referred to above as the "technical rules."

³ For example, the HDO states in fn. 6: "Several of the rule violations discussed above are subject to an automatic cancellation condition: if the licensee does not meet his or her construction deadline, or if the licensee permanently discontinues operation, the license cancels automatically." The Bureau may be able at sometime soon to identify all or some of the specific licenses which are at risk for automatic cancellations.

6. However, in order for the Bureau to provide Kay with more specifics or to narrow issues, there must be an assurance that the Bureau has received all relevant information and documents from Kay. The Bureau's answer's of March 8, 1995, to Kay's interrogatories of February 10, 1995, reflect that the universe of Kay's licenses was obtained through a search of the Commission's licensing data base which is a reliable source for that information. There should be no dispute at this stage of the proceeding that Kay is the licensee of 152 Commission licenses.⁴ Order FCC 96-200, released May 8, 1996. The Bureau's answers are in part indeterminate as to questions which could be answered if the Bureau had adequate information from Kay. For example, the Bureau was unable to answer Interrogatory 2-4 (relating to the timely construction of licensed stations) and Interrogatory 2-6 (relating to call signs, locations and frequencies of stations where there was alleged false reporting on the number of mobile units served) because Kay did not respond to the Section 308(b) requests. This illustrates the Bureau's position that all of Kay's stations necessarily are the composite subject of allegations because of Kay's failure or refusal to provide the information that was requested by the Bureau before issuance of the HDO.

7. On the other hand, the Bureau did provide Kay with highly useful discovery in connection with the early interrogatories propounded by Kay. Where the Bureau had obtained information from non-Kay sources (except for confidential informants), the Bureau furnished Kay with copies of all complaints that the Bureau had in its possession at that time. As a result, since March 8, 1995, Kay has had copies of the non-confidential complaints that were the basis for initiating the HDO. A detailed narrative description was given to Kay of the findings of a Commission inspector at the Mount Lukens site (Interrogatory 2-7). Kay was informed that a Commission engineer had made a block diagram of all the stations interconnected on a Repeater Network Data Link ("RNDL"), noting the frequency which had been written on each station and the measured frequency outputs. Kay was informed that at the end of the inspection it was Marc Sobel who disconnected the RNDL line. Since the Bureau's interrogatory answers of March 1995, complaining persons who were identified by the Bureau have been deposed. The Bureau also identified the FCC inspectors who had first-hand knowledge of Kay's stations. They were deposed by Kay with the Commission's permission.

8. While it would be in the interest of this case to have more definitive answers from the Bureau in response to Kay's interrogatories (authorized in lieu of a bill of particulars) the Bureau seems to be stymied by the inability to obtain information and documents from Kay. The deposition of Kay taken on December 11, 1997, prompted the Bureau to seek follow-up documents from Kay that would show dates of construction and operation. The documents would include equipment invoices, receipts, canceled checks, installation receipts and lease agreements. Kay has requested additional time to respond to the request which was granted. Order FCC 98M-29, released March 12, 1998. Therefore, the requirement to update Bureau answers to Kay's interrogatories will have to await further discovery from Kay. In that regard, Kay has just recently identified witnesses who may provide testimony in Kay's defense. Those witnesses are soon to be deposed by the Bureau. It would be premature to require more specifics from the Bureau before those depositions are completed.

⁴ This observation has no bearing on the stations licensed to Marc Sobel that were found to be under Kay's control. Marc Sobel, et. al., Initial Decision FCC 97D-13.

Therefore, the Bureau should not be required to provide Kay with supplemental answers to interrogatories until the incompleting of Kay is completed. If Kay cooperates with discovery, there could be a faster assessment of the merits of the technical rule issues.

Rulings

Accordingly, IT IS ORDERED that the Bureau's review of allegations of the Hearing Designation Order and the supplementing of the Bureau's answers to Kay's interrogatories ARE DEFERRED until after status reports are submitted which report the updated discovery obtained or to be obtained from Kay by the Bureau.⁵

IT IS FURTHER ORDERED that because the rulings in Order FCC 98M-27 were discretionary rulings of the Presiding Judge relating to discovery and/or trial preparation that do not raise any new or novel issues of law, the Petition For Leave To Appeal filed by James A. Kay, Jr. on March 16, 1998, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION⁶



Richard L. Sippel
Administrative Law Judge

⁵ The Bureau should examine its discovery for information that has identified or that would identify (license number, call sign, location) each station that has been willfully or repeatedly operated in a trunked mode in violation of §90.113; each station which is the subject of willful or repeated violations of the construction and operation requirements of the technical rules with each identified station paired with the applicable rule violations; each station which is the subject of a multiple name application to avoid time-sharing and/or recovery provisions of §90.623 and §90.629; stations that were interfered with in violation of Section 333 of the Act; licenses and/or stations as to which Commission procedures were used to obtain unauthorized cancellations. See HDO at Para. 10(b), (c), (d) and (f).

⁶ Copies of this ruling were faxed or e-mailed to counsel on date of issuance.