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FCC MAIL SECTION

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

FCC 98M-39

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DISPATCHED

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 30, 1998 ; Released: March 31, 1998

1. A Petition For Leave To File Appeal was filed by James A. Kay, Jr. ("Kay") on March 25, 1998. The petition objects to the rulings of the Presiding Judge that there has been no showing made of relevant evidence to be obtained from the deposition discovery of Commission employees W. Riley Hollingsworth, Anne Marie Wypijewski, Terry L. Fishel, and Robert Andary through allegations of an unrelated request that was made to the Commission by a non-party for inquiry and investigation. Memorandum Opinion And Order FCC 98M-32, released March 18, 1998. There the Presiding Judge found that Kay had not met the standards for deposing Commission employees as those standards have been articulated in Scripps Howard Broadcasting Company, 9 F.C.C. Rcd 4880 (1994) (positive showing and finding of relevance as condition precedent to authorization for deposing Commission employees) and in Gerald A. Turro, 12 F.C.C. Rcd 22358 (1997) (extraordinary circumstances must be shown to authorize depositions of Commission employees). Id.

2. The rulings for which interlocutory review is sought were made after consideration of a Consolidated Opposition to Notices of Deposition and Motion for Protective Order filed by the Bureau on February 19, 1998 ("Motion"), and Kay's Reply to Wireless Telecommunications Bureau's Consolidated Opposition to Notices of Deposition and Motion for Protective Order dated February 27, 1998 ("Reply"). Along with the Reply, and offered for the express purpose of showing relevance, Kay submitted a copy of a Request for Inquiry and Investigation that was submitted in a revocation proceeding, Marc Sobel, WT Docket No. 97-56 ("Request"). All these materials have been considered to the extent needed to make an informed determination of relevance and extraordinary circumstances.[1]

[1] There is no jurisdiction in this proceeding to consider the merits of a request to the Commission for an investigation or inquiry. That process is inquisitional and not adjudicative.

3. Kay argues that the Request supports a theory of Kay's defense of a "reasonable apprehension of bad faith" on the part of the Bureau to justify Kay's negative responses to the Bureau's Section 308(b) letter requests.

> Kay believes that his response to the Section 308(b) issue can be established to be reasonable and justified precisely because of the actions and inactions of certain Commission employees. In order to prepare this defense, Kay needs to confirm the actions and inactions of the relevant Commission employees. By depriving Kay of the opportunity to conduct discovery on this issue, including deposing Bureau personnel responsible for what Kay believes occurred, deprives him of a fair opportunity to prepare his defense.

See Petition For Leave To File Appeal at 2-3.

4. There is no application of Kay's theory to the Commission standards cited above for authorizing depositions of Commission employees. Kay argues in a conclusory manner that the Section 308(b) letter was couched in aggressive and threatening language which indicated a prejudgment on the part of the Bureau. But Kay answered the letter through counsel who were able to advise that the procedure for revocation requires a hearing designation order and not just a letter from the Bureau. In making the argument in the petition, counsel does not assert that Kay was not informed of the procedures under the APA and the Commission's rules for seeking license revocation. There is no logic to permitting discovery on an issue of Kay's frame of mind at the time that counsel wrote to the Bureau on Kay's behalf in response to the Bureau's §308(b) letter.[2] Nor is there any precedent cited in the petition for an agency authorizing such speculative deposing of agency staff members.

5. Assertions are also made in the petition that the Bureau sent "blind" copies of a §308(b) letter to six individuals in an effort to obtain information. But there is no citation to authorities showing that the Bureau was acting irregularly in conducting an investigation by contacting third persons independently of Kay, the licensee. Investigations are not adjudicatory proceedings in which there are ex parte prohibitions. Nor are investigations undertaken as a joint venture. The further assertion is made that when Kay learned that individual competitors were being contacted, "it fueled his reasonable apprehension as to the Bureau's willingness to keep confidential any information he might provide." In making this argument, there is no attempt made to tie Kay's asserted apprehensions to the language of Kay's response to the Bureau's letter or to contemporaneous

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[2] Former counsel were noted as witnesses who would testify on behalf of Kay. But they were withdrawn from Kay's witness list. Kay has affirmed without qualification that he will assert the attorney-client privilege if his former communications counsel are called to testify.

statements of Kay. There is nothing more than speculation cited to support an authorization to depose the Commission employees. To permit the depositions on the basis of speculation would be directly contrary to the Scripps Howard and Turro standards cited above.

6. The petition relies on the Request to complain of "ex parte" contacts made by the Bureau in the course of the pre-designation investigation. But there is nothing improper in conducting an ex parte investigation. It is suggested by Kay that the Bureau advised a party to another non-adjudicative proceeding on a strategy for recovering a channel in which Kay is claimed to have had an interest. Improper investigative tactics are alleged to have been used in obtaining a statement from a competitor, now deceased, wherein Kay was accused of an unauthorized taking of repeaters. Such assertion is speculative and has no relevance to the issues in this case. The petition also alleges that a witness to an incident of intentional signal interference was misled by the Bureau into signing a statement implicating Kay in the interference. These are all hearsay accusations of the Request that are based on speculative conclusions inferred by Kay's counsel from hearsay documents. Such argument based on speculative sources do not approach the standards applied by the Commission in authorizing depositions of Commission employees.

7. There has been nothing presented in the Sobel Request, the Bureau's Opposition and the Sobel Reply to show a likelihood of discovering relevant evidence that would justify the depositions of the Commission employees. Furthermore, the Commission has specifically directed the Presiding Judge 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, released December 18, 1997. It is clear that the Commission does not permit depositions of its employees on investigative techniques[3] in order to raise a speculative and unsubstantiated defense. A request for an investigation in another case that is based on hearsay allegations will not support the request for the depositions of the Commission employee. Nor does the refusal to permit the depositions meet the standard of "new or novel" question of law or policy and that a remand would be likely to occur if an appeal is deferred until the entire case is appealed. See 47 C.F.R. §1.301(b).

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[3] Kay's request for the depositions also could involve incursions into protected investigatory techniques and confidential informant sources. The proceeding would become burdened by these collateral issues that would probably arise. See Discovery Procedures, 11 F.C.C. 2d 185, 187 (1968) (the scope of examining witnesses will be limited to matters relevant to the hearing issues as originally proposed).

Ruling

Accordingly, after giving consideration to the pleadings and papers submitted by counsel, IT IS ORDERED that the Petition For Leave To Appeal that was filed by James A. Kay, Jr. on March 25, 1998, IS DENIED.[4]

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

[4] Courtesy copies of this MO&O were sent to counsel by fax or e-mail on the date of issuance.