

FCC MAIL SECTION
FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554
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FCC 98M-35

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In the Matter of)
)
JAMES A. KAY, JR.)
)
License of one hundred fifty-)
two Part 90 licenses in the)
Los Angeles, California area.)

WT Docket No. 94-147

ORDER

Issued: March 24, 1998

Released: March 26, 1998

On March 4, 1998, the Wireless Telecommunications Bureau ("Bureau") filed a Further Motion To Compel Production Of Documents. On March 10, 1998, the Presiding Judge granted a Motion For Extension Of Time that was filed by James A Kay, Jr. ("Kay") on March 9, 1998. See Order FCC 98M-29, released March 12, 1998. Kay represented:

This request, when added to the burden of locating and producing any additional documents that may be responsive to the Motion To Compel, is burdensome and time consuming. Nonetheless, Kay will produce all non-privileged and responsive documents that have not previously been produced. (Emphasis supplied.)

On March 20 1998, Kay filed a Response to the Bureau's Further Motion To Compel. From a review of the pleadings it is not clear whether Kay is producing certain of the documents that were sought by the Further Motion To Compel. But, it appears that Kay is not committed to producing all non-privileged and responsive documents. The categories of the documents and the status of the document production as represented in the pleadings are stated below. Because of an uncertainty as to why there will not be a complete production of documents, the Bureau is to file an additional pleading. See 47 C.F.R. §1.294(d). The Bureau will file a Reply to Kay's Response in the interest of clarification of the state of its further document discovery. Also, more time is allowed to negotiate the document production.

Station Construction And Operation

Documents are sought to establish station construction dates and dates of station operations. The Bureau specified documents sought to include: equipment invoices, receipts, cancelled checks,

installation receipts, contracts and lease agreements. The Bureau relied on testimony of Kay in a deposition that he had relied on a "control file" and "FCC Form 800A letters" which related to the construction of land mobile stations. Unfortunately, some of the Form 800A letters were routinely purged from Commission records prior to the designation of this case and not all of the letters were retained. The Bureau has not located the control file list or the 800A letters in Kay's document production and therefore the Bureau seeks to fill in the gap with Kay's copies of the 800A letters and control file lists.

Kay has not committed to produce the documents. Kay objects to producing the documents which Kay asserts are either in the Commission's public records or are documents that once were in the Commission's possession and therefore need not be produced by Kay.¹ Kay does acknowledge having knowledge of the "control files" but has stated as reasons why he may not respond to providing those documents: (a) he does not believe that he has a complete set of the documents; (b) he does not know which of the "control file" documents that he examined in responding to the Bureau's interrogatories; and (c) he does not know which "control reports" the Bureau is seeking to review. Many of these reasons for not providing documents could be cleared up through meaningful discussion and exchange of information between counsel.

Equipment Invoices

Kay asserts that the Bureau has significantly revised the scope of its first Motion To Compel to now ask for "equipment invoices in Kay's possession or control." It cannot be determined from Kay's papers where the revision occurred. The Bureau should fill in the gap. Kay has determined for himself that the equipment invoices that the Bureau requested would not "satisfy the main criteria" of the Bureau's document request, i.e, documents that "establish the construction date and dates of operation of each of the studio stations." Kay identifies the categories of data that appear in the invoices and represents that "construction" is not one such category. Kay does not state whether or

¹ Kay cites as authority the case of S.E.C. v. Samuel H. Sloan & Co., 369 F.Supp. 994 (SDNY 1973). In that case, a licensee in a revocation administrative proceeding was delaying the filing of proposed findings because the licensee had not purchased a transcript of the hearing from the court reporter. The licensee wanted access to the government's transcripts. The District Court credited the licensee's counsel with an "imaginative" argument that was not persuasive. *Id.* at 995. The licensee could just as readily have purchased a copy of the transcript from the court reporter as did the government. That case involving access to a hearing transcript which was resolved against the licensee provides no guidance in this situation where the Bureau is seeking documents that appear to be in Kay's possession and for which the Bureau has no other reliable source. Just because the Bureau may have once had access to the documents in Commission files but no longer has such Commission access due to document purging would not justify Kay withholding his copies of the same documents. The documents are relevant discovery and must be produced.

not the documents will be produced. The specific use for the documents must be further explained by the Bureau in its Reply to Kay's Response before their production will be ordered. In view of Kay's characterization of the documents, the statement of relevance for use as evidence must be provided by the Bureau even if Kay meant by his Response that the invoices are being produced.

List Of Kay's Stations

This should be the easiest of all information for a licensee to provide --- the identity of licensed stations. According to the Bureau, Kay testified in his deposition that his employee, Ms. Barbara Ashauer, may possess a list of stations on which service was offered. Now Kay maintains through counsel that "Ms. Ashauer has no list or lists containing call signs, construction dates or in-operation dates for any of his stations." It is "Kay's opinion" that his employee has no responsive records. An argument is also made that if the Bureau has discovery that relates to Ms. Ashauer then the Motion To Produce should be addressed to her. Why Kay would place that burden on Ms. Ashauer is not addressed and remains unknown. She is an employee of Kay's and as such Kay would have control of his business related documents that are in her possession or control.

Programming Maps

The Bureau represents that Kay testified that he had "programming maps" which indicated which frequencies were programmed into customers radios when a customer is activated on trunked systems. The Bureau contends that the maps are relevant to determining which stations were operational at what dates. Kay denies that there is any utility of the maps to show construction or in-operation dates. Kay has determined that he will not produce the maps. He does not deny their existence and Kay does not contend that he has no control over their production. There has not been a sufficient basis stated to withhold the programming maps.

U.S. Forest Service Permits

The Bureau represents that Kay testified in his deposition that there exist "revenue reports" that list customers using repeaters located at each site on land owned or controlled by the Forest Service. Kay represents in his Response pleading that he has commenced a review of extensive files to determine if responsive documents were previously produced and if not, Kay will deliver copies to the Bureau. It appears that the Bureau will receive this discovery regarding Forest Service permits.

Customer Records

The Bureau identifies Mr. Vincent Cardaro as a source for a series of computer databases containing information concerning Kay's customers. The databases would include loading information. The Bureau has seen certain of the information and contends that it is relevant. Kay does not deny

relevance. Kay asserts that Mr. Cardaro has taken "trade secrets" which Kay has decided must remain confidential. There has been a determination by the Presiding Judge that Kay has no grounds for withholding the documents. See, Order 98M-18, released February 2, 1998. Self proclamation that Kay, after consultation with his counsel, has decided that documents must remain confidential is unprecedented.

Rulings

IT IS ORDERED that counsel for the Bureau and counsel for Kay continue to negotiate the production of Kay's documents that are sought by the Bureau's Further Motion To Compel.

IT IS FURTHER ORDERED that the Bureau SHALL FILE by **March 30, 1998**, a Reply pleading to Kay's Response to the Bureau's Further Motion To Compel Production.²

IT IS FURTHER ORDERED that by **April 3, 1998**, Kay shall produce all documents that Kay agrees to produce.

FEDERAL COMMUNICATIONS COMMISSION³



Richard L. Sippel
Administrative Law Judge

² Bureau counsel shall state date(s) that have been agreed for further document production. The Bureau also shall delineate by category those documents which could not be negotiated.

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