

FCC MAIL SECTION

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

FCC 98M-43

80712

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: April 8, 1998 ; Released: April 10, 1998

Background

1. On March 4, 1998, the Wireless Telecommunications Bureau ("Bureau") filed a Further Motion To Compel Production Of Documents ("Further Motion"). On March 9, 1998, James A. Kay, Jr. ("Kay") filed a Motion For Extension Of Time which was granted. Order FCC 98M-29, released March 12, 1998. Kay was allowed until March 20, 1998, to respond to the Bureau's Further Motion. Kay filed a Response To The Bureau's Further Motion on March 20, 1998. The Bureau was ordered to file a further pleading. Order FCC 98M-35, released March 26, 1998. At the Bureau's request, the Bureau was granted a three day extension. Order FCC 98M-38, released March 31, 1998. On April 1, 1998, the Bureau filed its Response Concerning Motion To Compel Production Of Documents.

2. In furtherance of Order FCC 98M-35, supra, wherein the Presiding Judge ordered that Kay "produce all documents that Kay agrees to produce," on April 3, 1998, Kay filed a Further Response wherein Kay reported that under specified conditions, he would produce and/or make available certain of the documents requested. Kay filed the last responsive pleading.¹

Discovery of Documents

3. The Bureau's Further Motion is based on information that was learned through the deposition of Kay that was taken on December, 1997. The documents were originally sought by the Bureau in a Request For Documents that was served on February 17, 1995. The documents sought

¹ There is now sufficient information in the above-referenced pleadings to rule on the merits of the Further Motion. Dates for compliance are set. But there are still questions about compliance (e.g. copying costs, document organization) which could not be definitively decided based on these pleadings.

are: (a) dates of construction and operation of Kay's stations; (b) U.S. Forest Service permits for facilities that were constructed or installed on U.S. Forest Service land; (c) user or customer records which would include bills to customers. Discovery concluded by the Bureau has disclosed that Kay relied on FCC records known as "Control Files" and FCC Form 800 letters. According to Kay's deposition, Kay has been relying on the control files and the Form 800 letters, which he had submitted to the Commission, to answer Bureau interrogatories as to when stations were constructed. Kay further testified at his deposition that he has equipment invoices which were requested; that Kay's secretary had a list of stations; and that Kay had programming maps and revenue reports that identified customers using repeaters located on U.S. Forest Service lands. Also, the Bureau represents that Vincent Cordaro, a former employee of Kay, produced computer databases that contained relevant customer and loading information. The Bureau has requested production of Kay's copies of the data and related computer files.

4. Kay had represented as the reason for the request for an extension of time:

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.

See Order FCC 98M-35, released March 26, 1998. On March 20, 1998, Kay filed a Response To The Bureau's Further Motion To Compel Production Of Documents. But no documents were produced. In reviewing Kay's pleading, the Presiding Judge concluded that "it appears that Kay is not committed to producing all non-privileged and responsive documents." Order FCC 98M-35, released March 26, 1998. It was also determined that "[b]ecause of an uncertainty as to why there will not be a complete production of documents, the Bureau is to file an additional pleading." Id.

5. On April 1, 1998, the Bureau filed its Response Concerning Motion to Compel Production of Documents. The Bureau represents that at that time there had been no resolution of the dispute over these documents. The Bureau offers further explanation as to the relevancy and availability of each category of documents. Kay responded on April 3, 1998, and those responses are summarized below.

"Control Files" and FCC Form 800A Letters

6. Kay's objections that these documents are equally in the possession of the Bureau and therefore will not be produced was rejected. See Order FCC 98M-35 at 2.n.1. Kay must produce for the Bureau copies of the Control Files and Form 800A letters that are in Kay's possession or control and that are the subject of Bureau request. The Bureau has modified its request to ask for only those "reports" (or segments of reports) on which Kay relied in answering the interrogatories.

7. Kay responded that he has about 22,000 pages of control files in his possession which he will make available to the Bureau in California for inspection and copying at the Bureau's expense. Kay represents that he is unable to narrow the number of control files because he does not know

which of the control files he may have examined in responding to the Bureau's interrogatories. Kay further represents that on April 3, 1998, Kay produced certain of the Form 800A letters to Bureau counsel in Washington, D.C.

8. Kay must review and determine which documents he relied upon in responding to interrogatories. Kay must also provide the requested documents, as modified by the Further Motion, and the cover page that will identify any segmented report that is produced.

Equipment Invoices

9. It appears to the Bureau that Kay does not keep records showing when stations were placed in operation. Therefore, the Bureau seeks equipment order and delivery invoices as a proxy for determining dates of installation and operation.

10. Kay responded that his equipment invoices are irrelevant² but agrees to make the invoices (estimated at between 10,000 and 40,000 pages) available in California for inspection and copying at the Bureau's expense.

11. The Bureau, with the assistance of Kay, must arrange for an inspection and request a limited number of copies. Kay and his counsel must cooperate in the Bureau's efforts.

Ashauer Documents

12. The Bureau learned in Kay's deposition that Ms. Barbara Ashauer "may have" a list of Kay's stations. The Bureau argues that Kay has narrowly denied that she has a list containing "construction dates or in-operation dates." The Bureau seeks any documentary information "concerning which given frequencies were in operation." The request is to be read by Kay in as broad a manner as the Bureau has indicated.

13. Kay responded that he will make any lists of stations in Ms. Ashauer's possession available in California to Bureau counsel for inspection and copying. Kay states nothing with respect to payment for the copies and therefore it is assumed that these copies will be furnished at no cost to the Bureau. Kay also does not offer to deliver the documents in Washington, D.C. although it would appear from Kay's response that Ms. Ashauer's lists would not be too voluminous to deliver to Bureau counsel in D.C.

14. Kay must deliver the documents (copies) to Bureau counsel in Washington, D.C. **by April 22, 1998.**

² Kay describes the equipment invoices as showing: (a) vendor name, address and telephone number; (b) date of invoice; (c) make, model and sometimes serial number of equipment; and (d) sometimes the method of payment.

U.S. Forest Service Records

15. The Bureau contends that Kay should be deemed to have waived any objection to producing U.S. Forest Service Records because he failed to articulate any objection. The Presiding Judge concluded that it appeared that Kay would be producing the "revenue reports" to which Kay testified in his deposition.

16. Kay responded that the requested documents may be in the Bureau's possession. Kay represents that he has already produced responsive documents. But, inexplicably, neither Kay nor Kay's counsel have copies of the documents that reflect the Bates stamps (037,035 - 037-436). Kay has requested Bureau counsel to advise Kay's counsel as to whether documents already furnished do not contain the U.S. Forest Service Records that are sought by the Bureau.

17. Kay must ascertain and produce copies of such documents that are in his custody or control. Bureau counsel will cooperate with Kay's efforts. The parties shall report on the status of Forest Service Records on April 24, 1998.

Computer Databases

18. The Bureau is seeking a customer database as of March 5, 1995, or, if available, a customer database as of January 31, 1994. The Bureau had originally requested copies of all computer files relating to records of customers using Kay's stations. Examples of the language used in the Bureau's request include "computer generated files", "all documents relating to the user (customer) record, user name, business address and phone number, contact person, and number of mobile units in operation". The Bureau represents that it learned in the deposition of Vincent Cordaro, a former Kay employee, and Craig Sobel, Kay's computer consultant, that Kay maintains a computer database containing customer information that was sought by the Bureau. The information is easily retrieved according to Craig Sobel's deposition testimony.

19. Kay responds that computer records provided to the Bureau by Vincent Cordaro reflect data as of March 8, 1995, and therefore are not responsive to the Bureau's request because the Bureau asked for records as of January 31, 1994. Kay refuses to treat the Bureau's Further Motion To Compel as a new request and demands that the Bureau start its documentary request anew for seeking a customer database as of March 8, 1995.

20. Kay must produce the computer database records described and requested in the Bureau's Further Motion. Delivery will be in Washington, D.C. **by April 22, 1998.**

Programming Maps

21. The Bureau was seeking this information but it is not mentioned in the Bureau's response of April 1, 1998. Kay asserts that the Bureau has seen at least a sampling of programming maps through the deposition of Vincent Cordaro. Kay assumed in his Response of April 3, 1998, that the Bureau has accepted Kay's representation that the programming maps will not show relevant information that would establish construction or operation dates.

22. The Bureau must advise of its position on programming maps **by April 24, 1998.**

Conclusion

23. The Bureau is entitled to the documents sought by the Further Motion that are in the possession or under the control of Kay. Except for the unwillingness to bear the expenses in reproducing copies and the technical pleading objection to production of Kay's computer databases, Kay is being responsive to the Bureau's document request as it is stated in the Further Motion To Compel Production Of Documents. The Presiding Judge has the authority to resolve disputes involving the production of documents. 47 C.F.R. §1.325(a). There is no dispute as to relevance or good cause need for the documents. See 47 C.F.R. §1.311(b). Therefore, production must go forward.

24. The documents that are in the possessions of Ms. Ashauer, Kay's employee, must be produced **on April 22, 1998**, as stated above. Cf. Margoles v. Johns, 587 F. 2d 885 (7th Cir. 1978) (documents in possession of non-party son of plaintiff required to be produced). Kay also has the responsibility to identify the control file documents that he examined or consulted in responding to the Bureau's interrogatories. The Bureau will need to inspect equipment invoices on Kay's business premises and select those that are to be copied.³

25. Lost or unaccounted for U.S. Forest Service records may be the subject of an adverse inference since they are included in Kay's business records, are relevant to the issues, and were in the possession of Kay and/or counsel after the hearing commenced.

³ To insure against loss, the copies should be made on Kay's premises unless the parties agree to procedures for off-premises commercial copying. Kay, his agents (including counsel) shall cooperate in the Bureau's efforts.

Rulings

Accordingly, IT IS ORDERED that under terms and conditions noted above, the Wireless Telecommunications Bureau's Further Motion To Compel Production Of Documents filed on March 4, 1998, IS GRANTED.⁴

FEDERAL COMMUNICATIONS COMMISSION⁵



Richard L. Sippel
Administrative Law Judge

⁴ The parties are to negotiate costs for obtaining copies of documents.

⁵ Courtesy copies of this MO&O were sent to counsel by fax or e-mail on the date of issuance.