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

FCC 98M-45

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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.	)	

**ORDER**

Issued: April 10, 1998

Released: April 13, 1998

Bureau counsel are about to embark on a week of west coast depositions. On March 5, 1998, Kay had been alerted to the Bureau's deposition scheduling. The Bureau's Notices to Depose were served on March 23, 1998.

Mr. Jim Hanno, one of Kay's experts, is to be deposed in Washington, D.C. The second witness identified by Kay as an expert, Mr. John Bryant, is scheduled to be deposed next week in L.A. on April 15, 1998. On April 6, 1998, Kay filed a Motion To Modify List Of Witnesses And Add Expert Witness. If that motion were granted on the eve of west coast depositions, Kay would relegate Mr. Bryant from expert to fact witness and add Mr. R. Douglas Smith as Kay's second expert whom the Bureau would need to depose next week as a last minute expert.

On April 7, 1998, the Bureau filed its Opposition. The Bureau argues that the identification of experts has been a known requirement since the Fall of 1997 (Order FCC 97M-170). On November 28, 1998, Kay "tentatively" listed Messrs. Hanno and Bryant as expert witnesses. Before depositions of experts were to be taken, it was expected that counsel would exchange their qualification (resume' or vita) and a brief description of the subject of their opinion that conforms with FRCP 26(b)(4)(A)(i) which could not occur before next week's depositions.<sup>1</sup>

Kay has chosen a particularly inopportune time to interchange and add an expert witness on the eve of a week of depositions. Based on the pleadings, it can only be determined today that Mr. Smith would testify as a CPA on matters "regarding Kay's record keeping and billing practices." The Bureau notes that while Kay's "record keeping" is tied directly to the 308(b) compliance issue, Kay's "billing practices" were not directly placed in issue under the HDO.

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<sup>1</sup> Kay attached to the motion only a brief biography for Mr. Smith and a general description of his CPA firm. There is no statement of his opinion or the scope of his testimony as an expert. There would be no time for Bureau counsel to utilize that minimal information before leaving for the west coast.

The Presiding Judge finds that the Bureau has been placed in the untenable position of having insufficient notice of the proposed expert testimony of Mr. Smith and insufficient time to prepare for Mr. Smith's deposition next week.<sup>2</sup> Kay's Motion will be denied with the right to renew the motion on condition that: (1) the renewed motion is filed and hand-served by April 24, 1998; (2) Kay will have provided Bureau counsel with Mr. Smith's resume/vitae and a FRCP 26(b)(4) summary by April 22, 1998; (3) that Mr. Smith will be made available for deposition in Washington, D.C. on a date and at a place<sup>3</sup> to be designated by Bureau counsel; and (4) that Mr. Smith's deposition be concluded on or before the close of discovery on May 18, 1998.

While Kay is free to withdraw Mr. Bryant as an expert, he still will be deposed next week as a fact witness. The Bureau is authorized to ask questions on voir dire as to his preparation as expert, identity of the documents considered, all opinions formed (even preliminarily), and what his opinion would be had he remained in the case as Kay's expert.

Subject to the foregoing, IT IS ORDERED that the Motion To Modify List of Witnesses And Add Expert Witness filed by James A. Kay, Jr. on April 6, 1998, IS DENIED.<sup>4</sup>

FEDERAL COMMUNICATIONS COMMISSION<sup>5</sup>



Richard L. Sippel  
Administrative Law Judge

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<sup>2</sup> The suggestion by Kay of a telephone deposition of Mr. Smith is rejected by the Bureau as unacceptable for an expert. There will be no further consideration of deposing Mr. Smith by telephone.

<sup>3</sup> It is expected that date and place will be agreed to by counsel for both parties and Mr. Smith.

<sup>4</sup> The Presiding Judge is aware that the Bureau presently is encountering difficulty in locating fact deposition witnesses at the addresses that were provided by Kay. There will need to be a good explanation and a strong showing of cause to permit the testimony of any witness sponsored by any party who could not be located for a deposition. It is in the interest of developing a credible record in this case that there be opportunity to depose all witnesses who will be cross-examined. The parties are free to waive cross-examination and deposition of any witness who is considered to be neutral or who is merely authenticating documents or testifying to non-controversial facts. But no such "neutral" witnesses have yet been identified.

<sup>5</sup> Courtesy copies of this Order were sent to Messrs. Robert J. Keller and Aaron Shanis (new counsel for Kay) and to Bureau counsel by fax or e-mail on the date of issuance.