

FCC MAIL SECTION

Before the  
MAY 20 9 25 AM '98 FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FCC 98M-55

80849

In Matter of	DISPATCHED BY	)	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: May 14, 1998

Released: May 15, 1998

1. This is a ruling on a Motion To Compel Answers To Interrogatories that was filed by James A. Kay, Jr. ("Kay") on May 6, 1998.<sup>1</sup> See Order FCC 98M-54, released May 1, 1998 (pleading cycle set). An Opposition was filed by the Wireless Telecommunications Bureau ("Bureau") on May 13, 1998. Id.

2. At issue are Kay's Further Written Interrogatories that were served on April 14, 1998. There are twelve interrogatories asked with varying subparts.<sup>2</sup> The Bureau has made an overall objection to all of the interrogatories as unauthorized discovery and makes specific objections to several of the interrogatory requests. Kay argues that he is being deprived of sufficient notice of the issues and that he needs the answers in order to prepare and present a defense at the hearing.

<sup>1</sup> Kay has noted that his pleading exceeds ten pages in length by a factor of three and requests relief from furnishing the prescribed summary. See 47 C.F.R. §1.49(b)(c). The parties shall not need to provide a summary for any pleading that is less than twenty pages in length.

<sup>2</sup> By comparison, the Federal Rules of Civil Procedure (as amended) now provide for only twenty five written interrogatories "including all discrete subparts." See FRCP 33. Leave of court is necessary to serve additional interrogatories which are limited by FRCP 26(b)(2) (limitations apply where discovery is, inter alia, more burdensome than beneficial). Here, Kay has not requested any leave to seek additional interrogatory discovery. The limitations of the Commission's rules apply [47 C.F.R. §1.311(b)] and the twelve interrogatories are found to be far more burdensome to the Bureau and this proceeding than the answers would be beneficial to Kay for use in connection with this proceeding.

3. Substantially similar interrogatories were sought by Kay and denied by the Presiding Judge last month. See Memorandum Opinion And Order FCC 98M-42, released April 7, 1998. The current interrogatories seek in part to obtain information that would be expected to be included in a designated notice to show cause why SMR licenses should not be revoked. The frustration of Kay for more specificity of designated charges is understandable and was so recognized at the outset of the hearing. For that reason, the Presiding Judge adopted two palliative procedures: First, Kay was authorized to propound ten interrogatories for each issue (which was more than would be allowed under the FRCP). The Bureau provided timely and responsive answers. That discovery was completed over three years ago. See Order FCC 95M-28, released February 1, 1995. See also Order 95M-102, released April 7, 1995. Second, the Bureau is required to submit and exchange its case approximately ten days before Kay submits his own case. See Order FCC 95M-28, released February 1, 1995; Order FCC 95M-106, released April 17, 1995; Order FCC 97M-170, released October 14, 1997; and Order FCC 98M-40, released April 2, 1998. That extraordinary procedure of staggered evidentiary exchanges gives only to Kay the privilege to examine the Bureau's entire case for ten days before Kay commits to any defense. Kay will not be heard further to complain about the adequacy of the Commission's notice.

4. As an added assurance to Kay that there will be no surprise at the hearing, the parties also are required to file simultaneous Trial Briefs which will even further lock in their respective cases. And, in even further fairness to Kay, the burdens of proceeding and were assigned to the Bureau as a matter of law. Thus, at every critical stage of the proceeding the Bureau goes first. Kay thereby has the opportunity to see the Bureau's case before he puts on any evidence.<sup>3</sup> The Rules of Practice provide that Kay is only entitled to answers from the Bureau staff regarding: the existence, nature, description, custody, condition and location of Commission records; the identity and location of persons having knowledge of relevant facts; and facts as to which they have direct personal knowledge. 47 C.F.R. §1.311(b)(4). There is no showing in the Motion To Compel and no authority cited by Kay that would require the Presiding Judge to rule contrary to the Commissions discovery rules or to grant the additional discovery which Kay seeks by these further interrogatories.

5. In support of his request for more discovery, Kay cites a Bureau staff memorandum dated September 15, 1994, which preceded the designation of this case for hearing. The memorandum noted in part that: "discovery will reveal that not all of Kay's stations are constructed, and that he exaggerates his loading to avoid the consequences of our channel sharing and channel recovery provisions." This internal document suggests that the case was set for a hearing without the Bureau having sufficient evidence of Kay having actually violated the Commission's construction and loading rules. But the Bureau has committed after discovery closes on May 18, 1998, to disclose those fact issues on which it will offer no proof at the hearing. See Memorandum Opinion and Order FCC 98M-42 n.3, supra. Therefore, there is no purpose to be served in using the disclosures of an internal memorandum as a basis for requiring answers to further interrogatories.

---

<sup>3</sup> If the burdens of proceeding and proof had been assigned to Kay, the due process arguments which Kay advances might have some merit. But as illustrated above, there have been customized procedures adopted since the beginning of the litigation of this case to overcome any notice that may be lacking in the designation order.

6. The specific issues as to which Kay still seeks further information are addressed below. Those limited issues concern:

- a. willful or repeated operation of a conventional station in the trunked mode;
- b. willful or repeated violations of the construction and operation requirements;
- c. abuse of process by filing multiple applications to avoid channel sharing and/or channel recovery;
- d. willful or malicious interference with radio communications of other systems; and
- e. abuse of Commission processes to obtain cancellation of licenses.

Kay appears to be satisfied that he has obtained sufficient discovery and has sufficient facts in his own records and testimony on the remaining issues of whether he has violated Section 308(b) of the Act and on whether he is qualified to remain a Commission licensee, the ultimate issue for determination.

7. The substantive reasons for the requested further discovery are found to be insufficient because they are speculative and/or assume an unproven bad faith on the part of the Bureau in withholding exculpatory evidence. Compelling the Bureau to provide answers to the questions will be denied for the following reasons:

- (a) Motion at paras. 9-10. Kay asks for the identity of persons whom the Bureau has characterized as informants. Kay asks the Bureau to provide justification for the informant exclusion. The only workable remedy would be an in camera consideration of the informant privilege which would be wasteful and time-consuming. There is no reason to believe that the Bureau is withholding the identity of sources of evidence through a bad faith application of the informant privilege.
- (b) Motion at paras. 11-12. Kay argues that he is not to be limited by the "personal knowledge" limitation of the Rules of Practice. There can be no exception to the Commission's policy with respect to the authorized discovery of Bureau personnel. Nor will the Bureau be required to demonstrate to Kay's satisfaction the bona fides and completeness of its representations in earlier discovery that there have been "an extensive number of communications with individuals" relating to the allegations against Kay or Kay's business practices. The arguments advanced by Kay for this discovery are too speculative to compel the Bureau to provide answers.

- (c) Motion at paras. 13-14. These arguments for the identification of sources are essentially the same as those addressed above. It is noted that Kay was provided with a list of the Bureau's potential witnesses and that Kay has deposed those persons. Kay has not been denied a right to the most complete and thorough forms of discovery.
- (d) Motion at para. 16-18. Kay seeks an order that would require the Bureau to prepare a categorized index of 8,000 documents which the Bureau has produced in discovery.<sup>4</sup> Kay also suggests that the Bureau is holding back relevant documentary evidence. To date, Kay has been represented by three teams of attorneys. There must have been some form of internal indexing that was prepared by subject matter of the documents when they were received from the Bureau. There has been no cause shown to require the Bureau to take on the task of now creating for Kay an index that should have been prepared earlier by Kay. That would not be a fair use of the Bureau's time while preparing for the exchange of its case on June 12, 1998.<sup>5</sup> The accusation by Kay that the Bureau is holding back relevant and exculpatory documentary evidence is woven from Kay's interpretations of selected excerpts taken from the Bureau's pleadings. But there are no facts to support the charge and mere supposition will not suffice to compel the Bureau to identify documents that Kay only believes may exist.
- (e) Motion at paras. 19-20. Kay alleges that the Bureau may have discriminated in its treatment of persons who provided information in this case and who also are parties to other unrelated Commission proceedings. Kay's theory is not sufficiently convincing to place a burden on the Bureau to justify its position in other Commission cases and to undertake far-reaching speculative and disruptive discovery one week from the close of discovery.
- (f) Motion at paras. 22-24. Kay makes a broad request for the identification of potential witnesses statements. Those statements would be protected attorney work product. The Rules of Practice provide for their protection. The use of such statements at hearing occurs only after a witness has given testimony. See

---

<sup>4</sup> The Bureau would need to relate each document to one or more of eight categories: construction, trunking, loading, channel sharing, recovery, abuse of process-multiple names, abuse of process-cancellations, and malicious interference. That would be an exceedingly burdensome task to impose on an opposing party a month before that party must exchange evidence.

<sup>5</sup> The request also must be denied because it would require the Bureau to analyze documents on an issue basis and then furnish to Kay the resulting work product. Kay has not shown a substantial need for the Bureau's work product. See FRCP 26(b)(3).

47 C.F.R. §1.362. There is no basis shown for requiring the Bureau to identify statements which Kay is not entitled to obtain in discovery. Furthermore, as the Bureau notes in its Opposition, Kay could have asked each deponent at deposition whether there was a statement.

Conclusion

8. It appears from the nature of the issues for which Kay seeks further interrogatory discovery, that Kay can reasonably ascertain whether or not there are factual merits to the charges and whether or not he has a defense with which to meet them. Specifically, it seems that Kay would know after three years of litigation and from his knowledge of the conduct of his business: whether he operated in the trunked mode; whether he constructed or deconstructed stations; whether there were avoidances of the sharing and recovery rule; and whether any of his stations interfered with other communications systems. If these ultimate facts exist and are known to Kay, then the issues to be contested through litigation should be whether the actions were willful and/or repetitive. The notice given to Kay at the time of designation may not have been perfect but it was adequate under the law. 47 U.S.C. §312(c)(statement of the matters as to which the Commission is inquiring) and 5 U.S.C. §554(b)(3) (timely informed of the matters of facts and law asserted). If the Bureau has insufficient evidence to offer on any of the issues, that will soon be known under the prehearing schedule and appropriate remedial relief that shortens this proceeding can be formulated. There is no basis at this stage of the proceeding for further interrogatory discovery.

Ruling

For the foregoing reasons, the Motion To Compel Answers To Interrogatories that was filed by James A. Kay, Jr. on May 6, 1998, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel  
Administrative Law Judge