

FCC MAIL SECTION

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

FCC 98M-69

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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: June 5, 1998

Released: June 9, 1998

1. On May 19, 1998, James A. Kay, Jr. ("Kay") filed Request For Leave To File Interlocutory Appeal. On May 20, 1998, Kay filed, without seeking leave, a Supplement To Request For Leave To File Interlocutory Appeal. The ruling denied a Motion To Compel Answer To Interrogatories that was filed by Kay on May 6, 1998. Memorandum Opinion and Order, FCC 98M-55, released May 15, 1998. The Presiding Judge asked for a responsive pleading from the Wireless Telecommunications Bureau ("Bureau"). Order FCC 98M-59, released May 22, 1998. The Bureau filed an Opposition on May 29, 1998.

2. Kay again seeks an interlocutory appeal from rulings of the Presiding Judge which have denied additional interrogatory discovery by Kay of the Bureau. See Memorandum Opinion and Order FCC 98M-55, supra, which provides a more detailed description of the various rulings and the interrogatories sought and of the information that has been provided by the Bureau. To recapitulate briefly, Kay served Further Written Interrogatories on April 14, 1998, which include twelve focused interrogatories, with subparts, that seek further specific facts which relate to the issues that are set in the designation order.<sup>1</sup> Previously, in 1995, the Presiding Judge authorized ten deposition questions for each issue. Order FCC 95M-28, released February 1, 1995. Kay was not satisfied and substantially the same discovery was recently requested and denied. Memorandum Opinion and Order FCC 98M-42, released April 7, 1998. At the insistence of the Presiding Judge, the Bureau has agreed to update its 1995 answers at the conclusion of discovery and before the hearing. The Bureau also will submit its case-in-chief on June 12, 1998, approximately ten days in advance of Kay's exchange.

<sup>1</sup> Order To Show Cause, Hearing Designation Order, And Notice of Opportunity For Hearing Forfeiture, FCC 94-315, released December 13, 1994, is referred to herein as the "designation order").

Both parties are required to submit Trial Briefs which will further specify the evidence. The Presiding Judge determined that under all the circumstances, Kay had obtained all of the discovery of the Bureau for which the Commission's Rules provide. Id.<sup>2</sup> See also Memorandum Opinion and Order, FCC 98M-55, supra.

3. The request for an appeal must be filed within five days of the release of the ruling and the request must contain:

a showing that the appeal presents a new or novel question of law or policy and that the ruling is such that error would be likely to require remand should the appeal be deferred and raised as an exception.

47 C.F.R. §1.301(b). There is no new or novel question of law or policy in the contested ruling. The ruling of the Presiding Judge from which Kay seeks to take an appeal was merely a procedural denial of a motion to compel answers to interrogatories that are not authorized under Commission policy. The ruling was made in conformance with Commission policy prohibiting such discovery. 47 C.F.R. §1.311(b)(4). See also Memorandum Opinion and Order, FCC 98M-55, supra. Such a non-controversial ruling which adheres to Commission policy does not present a new or novel question.<sup>3</sup> Nor would it be likely to result in a remand for the same reason. Kay cites no authority to support a conclusion that remand is likely to result from the ruling.

4. The Presiding Judge previously considered the same questions about adequate notice, when he afforded Kay ten interrogatories for each designated issue, Order FCC 95M-28, supra, and when he ruled on the adequacy of the Bureau's responses. Order FCC 95M-102, released April 7, 1995. Notice was again addressed in a ruling that denied a similar petition for leave to file an appeal. Memorandum Opinion and Order, FCC 98M-34, released March 23, 1998. The issue was considered

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<sup>2</sup> See 47 C.F.R. §1.311(b)(4) (Commission personnel may be questioned by interrogatories "regarding the existence, description, nature, custody, condition and location of relevant documents and things and regarding the identity and location of persons having knowledge of relevant facts, and may otherwise only be examined regarding facts of the case as to which they have direct personal knowledge.")

<sup>3</sup> In the unauthorized Supplement, Kay argues that "[t]here are not factual allegations relating to issued [sic] (b) through (f) --- and the Bureau has never offered any bill of particulars or otherwise provided any specific factual allegations on those issues." Because the Presiding judge refused to allow additional interrogatories, Kay contends there arises a "new or novel question" under the Constitution, Communications Act and the Administration Procedure Act. In general, questions raised under the Constitution or the Administrative Procedure Act are beyond the purview of an administrative adjudicative proceeding. Cf. Georgia Public Telecommunications Commission, 7 F.C.C. Rcd 2942 at paras. 2, 10 (Review Bd 1992). Only questions under the Communications Act and the Administrative Procedure Act where there is a direct link with the Act or the rules, are addressed below.

again in denying a further motion to compel the Bureau to answer Kay's interrogatories. Memorandum Opinion and Order, FCC 98M-42, released April 7, 1998. There has been nothing new raised in Kay's latest request for interlocutory appeal.

5. The Bureau is correct in arguing that the current request for an interlocutory appeal appears to be an unauthorized petition for reconsideration. See 47 C.F.R. §1.106(a)(1) (reconsideration of a hearing designation order only allowed for an adverse ruling on the right to participate). Under the clear meaning of that Rule, there is no authority for a reconsideration of the ruling from which Kay now seeks an appeal. Moreover, the Presiding Judge has no authority to rule on the sufficiency of a Commission designation order. Atlantic Broadcasting Company, 5 F.C.C. 2d 717, 721 (1966) (where reasoned analysis appears in a designation order, the Presiding Judge is bound by the analysis). Therefore, Kay is seeking enforcement of an unauthorized use of the Commission's discovery process.

6. Kay sidesteps the Commission's rules and relies exclusively on the Administrative Procedure Act ("APA"), citing Section 554(b)(3) which provides the right to be "timely informed of -- the matters of fact and law asserted" in the designation order. (Emphasis furnished by Kay.) Kay links that provision of the APA with Section 312(c) of the Communications Act which provides that an order to show cause must provide notice which contains "a statement of the matters with respect to which the Commission is inquiring." Id. The issues cited against Kay in the Commission's designation order include a statement of the matters at issue. What it lacks is the specificity of identified dates, places and persons or entities who were allegedly effected and the locations of stations that were not constructed or that were deconstructed. It has been held that an agency is not required under the APA to include a "bill of particulars as to every allegation" in a show cause order. Boston Carrier, Inc. v. I.C.C., 746 F. 2d 1555, 1560 (D.C. Cir. 1984). It is not required by the APA that a notice specify when, where and how each violation occurred. Id. Those specifics are the subject of proposed findings and conclusions after the evidence is received and the record is closed. See 5 U.S.C. §557(c) and 47 C.F.R. §1.267(b).

7. The Commission's designation order sets forth "matters" which Kay must prepare to meet at the hearing. More information was obtained by Kay in FOIA discovery, other litigation initiated by Kay, and through the ten interrogatories authorized by the Presiding Judge. For example, in 1995, the Bureau provided Kay with a detailed answer to the matter of "trunking". The Bureau also provided Kay with numerous documents, copies of complaints, and details of dates and conclusions of an inspection report.<sup>4</sup> The Bureau even furnished the inspection report to Kay and made the inspectors available for deposition discovery which Kay has completed. Kay was deposed by Bureau counsel for over three days as a result of which Kay and his counsel became further educated on the Bureau's

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<sup>4</sup> It is noted that on April 17, 1995, Kay filed a Motion For Partial Summary Decision on the ground that there were no genuine issues of material fact alleged in the designation order. Kay's motion was denied in part based on specific information that had been provided by the Bureau in response to Kay's interrogatories. Memorandum Opinion and Order FCC 95M-141, released June 14, 1995.

factual concerns under the issues. Finally, as it has promised to do, the Bureau has analyzed its evidence and prepared a report on matters that it will seek to prove at the hearing. See Wireless Telecommunications Bureau's Statement Of Readiness For Hearing filed June 3, 1998.

8. To provide further illustration of Kay's formidable discovery, in a recent decision of the District of Columbia Court of Appeals, affirming a trial judge's quashing of a discovery subpoena issued by Kay for a former Commission employee, Kay's discovery of facts concerning the issues set for litigation in this case were marshalled by the court. The court noted that Kay has initiated forty-nine FOIA requests as a result of which he has received 7,000 pages of documents from the Commission. The court also noted that Kay has filed multiple lawsuits in response to Commission assertions of FOIA exemptions as to certain matters which have generated numerous "Vaughn" indices detailing the documents withheld and explaining the reasons for claimed exemptions. Kay v. Pick, et al., No.96-CV--1727, Slip Op. decided May 21, 1998. These findings of an appellate court of record are convincing reasons for concluding that Kay has had access to a substantial amount of the Commission's evidence concerning the issues. The specific information sought by the further interrogatories would require the Bureau to analyze much of the same evidence that the Commission has provided to Kay in various forums since 1995. To require answers from the Bureau to such interrogatories would impinge on counsel's work product, require legal analysis by opposing counsel, and impose an unreasonable burden on the Bureau's trial resources. In fact, the interrogatories are virtually mooted by the analysis of evidence provided by the Bureau's Statement of Readiness preceding its evidentiary case-in-chief that is to be furnished to Kay on June 12, 1998.

9. The Presiding Judge observed that after three years of litigation and from Kay's knowledge of the conduct of his business, "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". Kay asserts that the Presiding Judge has concluded that "the Commission need not give notice on the theory that an accused would surely know whether he committed the alleged wrongs." See Memorandum Opinion and Order, FCC 98M-55, supra at 5 and Kay's Motion at 3. Kay is a licensee who is responsible for operating his business in accordance with the Commission's rules and regulations. Kay knows how he has been operating his business through those licenses. The Bureau even relied on aspects of Kay's deposition testimony concerning his business practices in the preparation of its Statement of Readiness. The interlocutory conclusion reached here is that the notice of the designation order was adequate in light of Kay's knowledge of his business practices and the history of his discovery.

10. The limited question under consideration here is the sufficiency of notice to Kay in light of all the discovery obtained in various ways since 1995. There are no intermediate or ultimate issues on the merits to be decided under the challenged interlocutory ruling. In recognizing that Kay operated a licensed business which is the subject of the proceeding, the assumption that Kay has knowledge of his own business practices is a reasonable assumption in considering a motion to compel additional discovery under issues of how Kay has conducted his business. The above

observation of the Presiding Judge as fact finder, in light of all that has transpired since 1995 in the way of discovery, is related only to the denial of the motion to compel. See Memorandum Opinion and Order, FCC 98M-55, supra at Para.8.<sup>5</sup>

11. The Bureau has the burden of proceeding and the burden of proof. If the designated issues are not proven by a preponderance of substantial evidence, the issues against Kay will not have been proven. See Steadman v. SEC, 101 S.Ct. 999 (1981) (establishes the preponderance of the evidence standard of proof in license revocation adjudications). There has been no prejudgment made by the Presiding Judge on the merits of the designated issues as to which the Bureau carries the burdens.

Accordingly, IT IS ORDERED that the Request For Leave To File Interlocutory Appeal filed by James A. Kay, Jr. on May 19 - 20, 1998, IS DENIED.<sup>6</sup>

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel  
Administrative Law Judge

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<sup>5</sup> The Presiding Judge also instructed that "Kay will not be heard further to complain about the adequacy of the Commission's notice". Id. at 2. That prohibition was directed at putting a halt to the repeated relitigation of the notice issue as an interlocutory matter before the Presiding judge. The ruling simply shows that there is nothing more for the Presiding Judge to consider with respect to the adequacy of notice afforded by the designation order. Certainly, Kay is free to raise the notice issue anew in proposed findings and at all stages of any appeals.

<sup>6</sup> Courtesy copies of this Order were sent to counsel by fax or e-mail on the date of issuance.