

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
JAMES A. KAY, JR.) WT DOCKET NO. 94-147
)
)
Licensee of 152 Part 90 Stations in the)
Los Angeles, California Area)

To: The Commission

**WIRELESS TELECOMMUNICATIONS BUREAU'S OPPOSITION
TO MOTION FOR LEAVE TO FILE PETITION FOR
EXTRAORDINARY RELIEF**

1. The Chief, Wireless Telecommunications Bureau, by his attorneys, now opposes the "Motion for Leave to File Petition for Extraordinary Relief" (Motion) filed by James A. Kay, Jr. (Kay) on June 15, 1998.

2. In his motion, Kay asserts, "Acceptance and consideration of this *Petition* is warranted, notwithstanding any procedural rules to the contrary, because Kay therein requests extraordinary relief designed to remedy extreme and severe due process violations in connection with this hearing."¹ Kay does not identify or discuss the procedural rules he seeks to avoid, but instead simply describes his allegations using hyperbolic language in an effort to avoid the consequences of the Commission's procedural requirements. In his Petition for Extraordinary Relief (Petition), Kay seeks three categories of relief: (1) a stay of the revocation proceeding while his allegations of Bureau misconduct are investigated; (2)

¹ Motion at 1.

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reconsideration of the Order to Show Cause, Hearing Designation Order and Notice of Opportunity of Hearing for Forfeiture (HDO); and (3) reversal of orders issued by the Presiding Judge. As the Bureau will show, with respect to each of Kay's requests for extraordinary relief, there is no basis to waive the Commission's procedural rules requiring Kay to wait until exceptions are filed to raise these matters before the Commission.

Stay Request

3. On June 15, 1998, Kay filed a separate "Motion for Stay of Procedural Dates" requesting that the procedural dates in the revocation proceeding be stayed pending an investigation of his allegation. The Bureau filed an opposition to that motion on June 19, 1998, in which the Bureau pointed out Kay's failure to demonstrate that his request meets the standard necessary to stay a Commission proceeding. Kay has failed to justify an investigation of the Bureau's conduct or why an investigation, if any is required, is a necessary precursor to a hearing on whether he violated the Commission's rules.

Reconsideration of the HDO

4. With respect to Kay's request that the Commission reconsider the designation of issues in the HDO, Kay fails to explain why he should be excused from the provisions of 47 C.F.R. § 1.106(a), which states that the Commission will consider petitions of reconsideration of designation orders insofar as they relate to adverse rulings relating to participation in the hearing proceeding. He states that there are severe allegations of irregularities, improprieties, and illegalities, but does not explain why the consideration of his allegations cannot wait until an initial decision is issued. Further, Kay previously requested almost identical relief. On January 12, 1995, approximately one month after the Commission issued the designation

order, Kay filed a Motion to Enlarge, Change, or Delete Issues with the Commission. The motion asserted that the HDO improperly designated certain issues, and failed to give sufficient notice of facts constituting violations.² The General Counsel, on behalf of the Commission, denied the motion stating that under 47 C.F.R. § 0.341(a), the Presiding Judge has exclusive jurisdiction over matters of this type until he has issued an initial decision. Order, FCC 95I-05 (Released February 3, 1995)(by the General Counsel, William E. Kennard).

5. The applicable case law shows that an HDO or charging document is not required to set forth specific details so long as the licensee is placed on notice of the nature of the alleged wrongdoing. In Boston Carrier, Inc. v. Interstate Commerce Commission, 746 F.2d 1555 (D.C. Cir. 1984), an applicant for motor common carrier authority received, thirteen days before a hearing, the following notice of issues to be tried at the hearing:

In their verified statements, protestants Larrabee and Bedel contend, among other things, that applicant has been conducting interstate property transportation without the requisite authority from this Commission; that it has been engaging in fraudulent practices relative to the Commission's fuel surcharge program; and that it may knowingly have submitted false information to the Commission and otherwise unlawfully interfered with Commission investigation of its operations. Although applicant denies the allegations, it appears that questions exist concerning applicant's fitness....

746 F.2d at 1557. The Court of Appeals rejected the carrier's argument that the ICC violated Section 554(b)(3) of the APA because it failed to give adequate notice of "the matters of fact and law asserted." The Court noted the specific references to the types of violations described above, and then wrote:

² Motion to Enlarge, Change, or Delete Issues at 6.

The Commission is not burdened with the obligation to give every applicant a complete bill of particulars as to every allegation that carrier will confront. The agency need not anticipate every charge that will be made. Nor did the letters convey an impression that they contained the complete roster of objections which BC would encounter.

746 F.2d at 1560. Thus, the Court concluded that although the notice of issues was not specific as to when, where, and how the alleged violations occurred, the agency complied with Section 554(b)(3) of the APA. As with the notice in Boston Carrier, the HDO placed Kay on specific notice as to the types of violations he was alleged to have engaged in. The HDO was not required to have listed every specific fact underlying the alleged rule violations.³

Requests for Unauthorized Interlocutory Appeals

6. Kay also seeks interlocutory review of orders issued by the Presiding Judge in this case. Where, as here, the Presiding Judge has not granted authority to file an immediate interlocutory appeal, the appeal will not be considered unless there exists:

a flagrant abuse of discretion as would inevitably require a reversal of the Initial Decision and a hearing de novo; or where the proceeding involves basic and far reaching considerations of public policy and vital concerns relating to the public interest which could not otherwise adequately be protected.

Communications Satellite Corporation, 32 FCC 2d 533, 534 (1971). This standard is "very stringent." Id. A careful review of Kay's pleading shows that he has not met this test. For

³ Similarly, Kay's reliance upon Section 312(c) of the Act, which requires thirty days notice of the issues at a hearing, is misplaced. If one assumes for the sake of argument (and the Bureau does not agree with this assumption in the slightest) that Kay has not received adequate notice of the issues until this date, the hearing will not begin until August 4, which is the beginning of the admissions session. Thus, even under Kay's assumptions, there would be no violation of Section 312(c).

the most part, and as the Bureau will show in its opposition to Kay's petition, Kay is in reality challenging the Commission's decision to designate his licenses for hearing in the first place. Section 1.106(a)(1) of the Commission's Rules provides that, except to the extent a hearing designation order adversely affects a party's right to participate in a hearing, interlocutory petitions for reconsideration of a hearing designation order shall not be entertained. Trinity Broadcasting of Florida, Inc., 9 FCC Rcd 2567 (1994).

7. Kay seeks review regarding three issues: (1) the Presiding Judge's order adding issues relating to an unauthorized transfer of control and misrepresentations relating to Kay's interest in Sobel's stations, (2) the Presiding Judge's orders limiting Kay's discovery requests, particularly limiting the number of interrogatories he could propound on the Bureau, and (3) the Presiding Judge's determination that the Bureau's predesignation conduct was not at issue.

a) Sobel Issues

8. Kay asserts that the Presiding Judge improperly added issues relating to an unauthorized transfer of control and to misrepresentations of Kay's interest in Sobel's stations. He also asserts that the Presiding Judge has improperly indicated he will apply collateral estoppel regarding portions of those issues which were decided by Judge Frysiak in Marc Sobel, WT Docket 97-56 (exceptions pending). Kay asks the Commission to either delete, defer action on, or modify the issues the Presiding Judge added by Memorandum Opinion and Order, FCC 98M-15 (released February 2, 1998). The issues in question are as follows:

To determine, based upon the findings and conclusions reached in WT Docket No. 97-56 concerning James A. Kay, Jr.'s (Kay) participation in an unauthorized transfer of control, whether Kay is basically qualified to be a Commission licensee.

To determine whether James A. Kay, Jr. misrepresented facts or lacked candor in the "Motion to Enlarge, Change, or Delete Issues" filed by Kay on January 12, 1995 and January 25, 1995.

To determine whether in light of the evidence adduced under the aforementioned added issues whether James A. Kay, Jr. is qualified to hold a Commission license.

Kay was denied leave to appeal the Presiding Judge's ruling. Memorandum Opinion and Order, FCC 98M-26 (released March 5, 1998). Kay argues that the issues be deleted because the Bureau's petition to enlarge issues was allegedly untimely. Kay Petition, p. 72. Kay fails to inform the Commission that after the Initial Decision in the Sobel proceeding was released on November 30, 1997, the Presiding Judge gave the Bureau until January 9, 1998 to file a motion to enlarge issues concerning the effect of that decision on Kay's qualifications. Memorandum Opinion and Order, FCC 97M-201 (released December 9, 1997). The Bureau's motion was filed on December 30, 1997 and was therefore timely under the Presiding Judge's order. Second, when the Bureau had earlier filed a petition to enlarge issues on this matter, the Presiding Judge had denied the petition because, inter alia, "the underlying factual issues were being litigated in the Sobel proceeding." Id. If the Bureau had filed its petition back in 1995, when Kay urges the petition should have been filed, he could have argued the petition should have been denied on that basis. Third, even if the petition is considered untimely, it would still meet the test for consideration contained in Section 1.229(c) of the Commission's Rules.

9. Alternatively, Kay argues that litigation of these issues should be deferred while the Sobel Initial Decision is being reviewed. Kay Petition, pp. 72-73. While Kay claims that it would be "unfair" for the hearing on these issues to go forward, he utterly fails to explain the

nature of the unfairness. In contrast, if the hearing were deferred, it would disserve the public interest by delaying the ultimate resolution of this proceeding, which has already been excessively delayed.

10. With respect to Kay's argument that he should be allowed to relitigate the question of whether he acquired de facto control of Sobel's stations, Kay's argument fails to distinguish the precedent relied upon by the Presiding Judge, Ocean Pines FM Partnership, 4 FCC Rcd 3490, 3491 (Rev. Bd. 1989), in which it was ruled that it was appropriate to add an issue in one proceeding based upon findings and conclusions reached in another proceeding, so long as any changes in the findings and conclusions reached in the other proceeding were taken into account. In this case, the Presiding Judge explicitly held that if the Commission modifies or reverses the findings and conclusions in the Sobel proceeding, he will take those changes into account. Memorandum Opinion and Order, FCC 98M-15, supra, at ¶5. Since Kay has had a full and fair opportunity to litigate the transfer of control question in the Sobel proceeding, he has no right to relitigate that question in this proceeding (although he can litigate the question of the effect of that finding on his qualifications to be a licensee). Accordingly, Kay's attempt at an interlocutory appeal does not meet the Communications Satellite standard and should be dismissed.

b) Additional Discovery

11. Kay asserts that because the HDO did not give specific factual predicate, the discovery period should be reopened. Kay previously argued to the Presiding Judge that additional interrogatories are needed in order to remedy that deficiency. Kay has failed to meet the Communications Satellite standard. Indeed, the Presiding Judge's rulings (which are

listed below) were eminently correct.

12. The Presiding Judge has repeatedly considered and ruled on the issue of the notice provided by the HDO. Indeed, the Presiding Judge allowed Kay to ask a large number of interrogatories of the Bureau. Unfortunately, many of Kay's interrogatories were improper. Order, FCC 95M-102 (released April 7, 1995). The Presiding Judge also recently considered the notice issue when he denied yet another "Petition for Leave to File Appeal" filed by Kay. Memorandum Opinion and Order, FCC 98M-34 (released March 23, 1998). The issue was also recently considered when the Presiding Judge denied two separate motions to compel answers to interrogatories filed by Kay. Memorandum Opinion and Order, FCC 98M-55 (released May 15, 1998), Memorandum Opinion and Order, FCC 98M-42 (released April 7, 1998). The Presiding Judge also denied Kay's request to file an interlocutory appeal of the second ruling. Memorandum Opinion and Order, FCC 98M-69 (released June 9, 1998).

13. As the Bureau has repeatedly shown, the claim that Kay does not have notice of the matters at issue is just not true. The Bureau answered the original interrogatories offered by Kay which complied with the Commission's Rules. For example, in connection with an interrogatory concerning the trunking issue, the Bureau provided a very detailed answer setting forth in detail the date, methodology, and conclusions of a station inspection. Moreover, in response to Kay's interrogatories, the Bureau provided Kay with copies of over forty complaints alleging that Kay had violated the Commission's Rules or otherwise acted improperly. Kay has also received thousands of pages of documents the Commission provided him pursuant to the Freedom of Information Act. On October 24, 1997, the Bureau provided Kay with a list of potential witnesses who the Bureau believed had knowledge

relevant to the designated issues. Kay had the opportunity to depose those individuals, and with one exception, he took advantage of that opportunity. The Bureau deposed Kay for three and one-half days, and he was asked many questions about specific incidents and documents. Under those circumstances, Kay's claim that his "right to know just what the issues are" has been violated is preposterous. Accordingly, he has utterly failed to meet the Communications Satellite standard, and his unauthorized interlocutory appeal should be dismissed.

c) Allegations of Wireless Telecommunications Bureau Misconduct

14. The Presiding Judge has refused to allow Kay to enlarge the hearing to try the Bureau's allegations of misconduct. When the Presiding Judge in this proceeding reviewed the allegations in the context of Sobel's filing, he struck the pleading as "baseless and speculative accusations against Commission employees which will be given no further consideration in this proceeding." Memorandum Opinion and Order, FCC 98M-32 (released March 18, 1998) at 7. Notwithstanding that warning, and notwithstanding the Bureau's detailed refutation of these charges in the Sobel proceeding, Kay has continued to make these same specious allegations.

15. As the General Counsel stated in his Order, FCC 95I-05, (released February 3, 1995), pursuant to 47 C.F.R. § 0.341, the Presiding Judge has jurisdiction over all motions, petitions and other pleadings (except for matters not pertinent here) until an initial decision is rendered. Kay has not shown why he should be permitted an unauthorized interlocutory appeal from the Presiding Judge's determination that his allegations are baseless and speculative and not at issue. Kay has also failed to show how his petition meets the Communications Satellite standard.

16. Neither of the cases cited by Kay supports consideration of his petition. In Westel Samoa, Inc., 13 FCC Rcd 6342 (1998), the petition for reconsideration was properly before the Commission because the Presiding Judge had certified that portion of the proceeding pertaining to the petitioner to the Commission for resolution. Accordingly, with respect to that party, the petition was not an interlocutory action. Radio Station WAVS, Inc., 92 FCC 2d 1037 (1982) involved the unusual situation in which all of the parties believed that a hearing was unnecessary. In contrast, the Bureau believes a hearing on Kay's qualifications should take place as expeditiously as possible.

17. Accordingly, the Bureau asks the Commission to deny Kay's "Request for Leave to File Petition for Extraordinary Relief."

Respectfully submitted,
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CERTIFICATE OF SERVICE

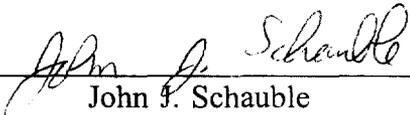
I, John J. Schauble, an attorney in the Enforcement and Consumer Information Division, Wireless Telecommunications Bureau, certify that I have, on this 24th day of June, 1998, sent by hand delivery (unless otherwise indicated), copies of the foregoing "Wireless Telecommunications Bureau's Opposition to Motion for Leave to File Petition for Extraordinary Relief" to:

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