

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

FCC 98M-85

81083

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: June 24, 1998

Released: June 26, 1998

1. This is a ruling on a Motion For Stay Of Procedural Dates that was filed by James A. Kay, Jr. ("Kay") on June 15, 1998. An Opposition was filed by the Wireless Telecommunications Bureau ("Bureau") on June 19, 1998.

2. Kay asks for a stay based on the status of a Petition for Extraordinary Relief ("Petition") directed to the Commission that Kay filed on June 12, 1998.¹ In the Petition, Kay alleges "improprieties" that he contends had occurred in the "investigation, designation and prosecution of the instant proceeding." Kay concludes that as a result, he has been "prejudiced and substantial [sic] damaged." Kay asserts that the "integrity of the Bureau's investigation and the legitimacy of the Bureau's charges are being called into question."

3. The Bureau argues that Kay actually is seeking an unauthorized interlocutory appeal; Kay fails to make a legally recognized showing as to how he is being irreparably harmed; Kay's complaints of the propriety of the investigation have no relevance to the evidence (including witnesses) that the Bureau intends to present at hearing; the public interest in finality of this litigation equates with the Bureau's interest to have this case heard and that interest would be substantially harmed if a stay were granted.

4. Since the Petition is before the Commission, the Presiding Judge will limit this ruling to an analysis of the requirements for a stay. It has not even been established that the Commission will consider the Petition. Kay has filed with the Commission a Motion for Leave to File Petition for Extraordinary Relief. Therefore, without further direction from the Commission on whether it will consider the Petition, there can be no basis for issuance of a stay.

¹ Kay also filed a Motion For Stay Of Procedural Dates that was addressed to the Commission which is the mirror image of the Motion For Stay Of Procedural Dates that is directed to and is under consideration by the Presiding Judge.

5. Standards for a stay are set forth in the case of Virginia Petroleum Jobbers Ass'n v. F.P.C., 259 F. 2d 921 (D.C. Cir. 1958), as modified in Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977). Under these authorities Kay must show:

- a. a strong likelihood of prevailing on the merits of the Petition;
- b. irreparable injury without the stay;
- c. the stay will not substantially harm other parties;
- d. the stay is in the public interest.

Id. See also Hanover Radio, Inc. 91 F.C.C. 2d 849, 850-50 (Review Bd 1982). For reasons stated below, Kay's Motion fails to meet the burden of persuasion as to each element of this test.

6. Kay has not demonstrated any degree of a likelihood of success on the merits of his Petition.² The matters alleged in the Petition are mainly conclusory and argumentative. The conclusions appear to be reached by conjecture and surmise. Nor is there any precedent for staying a license revocation proceeding based on allegations of irregularities in a Bureau's investigation. Kay merely relies primarily on the modification language in Washington Metro, supra, i.e., even if Kay should be less likely to prevail on the merits of the Petition, a stay can still be issued when there are "other factors" requiring a stay. On that point, Kay argues that never before has a Commission hearing been held where "allegations of gross misconduct by an Operating Bureau are pending." There is no citation of authority provided for that statement. Kay further argues that the Commission has intervened in a hearing "to provide relief and correct improprieties" citing Westel Samoa, Inc., 13 F.C.C. Rcd 6342 (1998) and Radio WAVS, Inc., 92 F.C.C. 2d [137] 1037 (1982). Kay makes no analysis of these authorities which, when analyzed, provide no authority for a stay of this case.

7. In Westel Samoa, the Commission ordered a hearing on designated issues that included allegations of wrongful overbidding in an auction by a person who was not a licensee or an applicant. The Commission had no jurisdiction to conduct a hearing as to that person under Section 309 of the Act. But the Commission relied on its broad statutory authority to issue orders that are not inconsistent with the Act and that may be necessary in the execution of the Commission's statutory functions. United States v. Southwestern Cable Co., 329 U.S. 157, 180-81 (1968).³ The ultimate

² The Petition is submitted to the Commission by Kay with a Motion for Leave to File Petition for Extraordinary Relief. The Presiding Judge does not have jurisdiction to rule on the merits of the Petition. The contents of the Petition only have been considered for the limited purpose of determining in this interlocutory ruling whether there appears to be any likelihood of success.

³ See also 47 U.S.C. §309(e) (If --- for any reason the Commission is unable to make the finding it shall formally designate the application for hearing ---. Any hearing subsequently held upon such application shall be a full hearing ---). Westel Samoa, supra at Para. 14. Such broad authority further supports the Commission setting this case for hearing and argues against the grant of a stay.

conclusion in Westel Samoa was that findings of a Notice of Apparent Liability ("NAL") were not binding as to a person named in the NAL who had not paid the forfeiture and who had not had a "full hearing" as provided in Section 309 of the Act. Even though not an applicant or licensee, that person was assured a "full hearing" in the pending proceeding and the designation order was clarified to reflect that conclusion. Id. Kay gives no analysis of that case as applicable to a stay, there is no procedural similarity to the case here, and the Westel Samoa rulings are not applicable to Kay's Motion for Stay.

8. In Radio WAVS, Inc., supra the Commission reviewed the evidence without receiving an initial decision. The case involved issues of a licensee's basic qualifications and the qualifications of an assignee. The Commission found after its independent review of the evidence that there had been no transfer of control or related misrepresentation as was alleged in the designation order. Id. at 1048-49. The Commission specifically ruled:

The ample undisputed evidence developed through discovery satisfies us that [the assignee] did not assume de facto control --- and that neither party made deliberate misrepresentations to the Commission.

Id. at 1040. Because the Commission in Radio WAVS was readily able to make the above-quoted determination from the discovery record, there was no need for further hearing or an initial decision. Id. at n 11. The Commission decided the merits of the issues that were set in the designation order. There was no stay of the hearing to consider the pre-designation conduct of the Bureau that had conducted the investigation. Therefore, there is nothing in the analysis of Radio WAVS, Inc. that would support any theory of stay in this case.

9. Kay has not demonstrated an irreparable injury. The Commission has held that litigation expenses do not constitute an irreparable injury that would justify a stay of a proceeding. Rio Grande Broadcasting Co., 6 F.C.C. Rcd 7464 (Review Bd 1991). Moreover, since Kay could still possibly prevail on the merits of this case before the Presiding Judge, the Commission or the Courts, he does not lack an adequate legal remedy. Wisconsin Gas Co. v. F.E.R.C., 758 F. 2d 669, 674 (D.C. Cir. 1985).

10. Without making any analysis, Kay asserts that the "remainder of the 'balance of equities' test clearly requires a stay." The Presiding Judge has determined that the Bureau's analysis supports the conclusions that the Commission's mission to enforce the Act and the corresponding public and Bureau interest would be harmed by a stay, particularly in view of the fact that this case has been in litigation since December 1994, and much remains to be done, including a hearing, proposed findings and an initial decision.

Accordingly, IT IS ORDERED that the Motion For Stay Of Procedural Dates that was filed by James A. Kay, Jr. on June 15, 1998, IS DENIED.⁴

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, appearing to read "Richard L. Sippel". The signature is written in a cursive, flowing style.

Richard L. Sippel
Administrative Law Judge

⁴ Courtesy copies of this MO&O were sent to counsel by fax or e-mail on the date of issuance.