

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

FCC 98M-91

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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.)

DISPATCHED BY
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FCC MAIL SECTION

ORDER

Issued: July 1, 1998 ; Released: July 6, 1998

This Order will memorialize significant matters covered in a telephone conference call that was initiated by the Presiding Judge on June 30, 1998. 47 C.F.R §1.298 (rulings made orally may be reduced to writing).

The conference was initiated soon after the Presiding Judge had received his copy of the Direct Case exhibits that were exchanged by counsel for James A. Kay, Jr. ("Kay"). See Order FCC 98M-40, released April 2, 1998 which prescribed the exchange dates and Order FCC 98M-82, released June 22, 1998, granting Kay an extension from June 22 to June 29 to exchange his Direct Case exhibits. Counsel advised in a transmittal letter dated June 29, 1998, that he was exchanging "preliminary exhibits" thereby indicating that these exhibits were not for use as Direct Case exhibits at the Admission Session. Counsel advised in the letter and confirmed in the telephone conference that he did not intend to offer the exchanged exhibits into evidence until after the Bureau finished presenting its case-in-chief.

The Presiding Judge indicated that he was prepared to rule at the Admissions Session that has been set for August 4, 1998, that if Kay does not offer these Direct Case exhibits at that time he could waive his right to put on an affirmative case. In that event, Kay would be limited to putting on a rebuttal case after the Bureau rests and is determined to have made a prima facie case. Kay's counsel has taken the position that it would be prejudicial in a revocation case (as distinguished from comparative and renewal cases) to require Kay to put into evidence its Direct Case exhibits before the

Bureau rests. The Presiding Judge was and is not convinced that Kay would be prejudiced in this case by following the prescribed procedure of an Admissions Session which has never been the subject of an objection by any counsel for Kay until yesterday.¹

There has been no ruling made on Kay's exhibits as of this time. The parties have a month to try to reach some accord on the question, subject to approval by the Presiding Judge. The Bureau did not take a position on the question. But in the interest of advancing the litigation, Bureau counsel suggested that Kay follow the prescribed procedures for the Admission Session with the right to withdraw some or all of the documents as evidence after the Bureau rests. Kay's counsel rejected that approach. He has remained resolute in his position that there is no Commission decision in a revocation case that required introduction of the licensee's document Direct Case before the Bureau rested. Counsel should consider the Review Board's decision in Center For Study and Application of Black Economic Development, FCC 92R-39, 7 F.C.C. Rcd 3101 (Review Bd. 1992) at Paras. 5-6, aff'd 11 F.C.C. Rcd 1144 (1996). In that renewal case with disqualifying issues, the licensee exchanged Direct Case exhibits, as instructed, but defaulted by not appearing at the Admissions Session. The Presiding Judge was upheld by the Review Board and the Commission² in precluding the licensee from putting on a direct case and relying only on rebuttal evidence. Id. The basic procedural setting of Center for Study was almost identical to Kay's case in its essentials, although the substantive issues were different. See also Liberty Cable Co., Inc., FCC 98D-1, released March 6, 1998 (denial of OFS licenses for stations which were operating under temporary authorizations), now on appeal. In that case, the summary decision procedures were found to be inadequate and testimonial hearings were held. In connection with those hearings, document exchange procedures were used without objection and with full cooperation of the licensee and counsel, including a former Commission General Counsel.

The parties are to submit Status Reports on **July 30, 1998**, in which the issue of Direct Case exhibits will be addressed. Counsel for Kay should cite relevant authority for his position. The Bureau will seek to obtain an agreed date for hearing the testimony of its expert witness **W. Thomas Gerrard** immediately following the Admissions Session or on some other date in August or early September before the case is moved to Los Angeles.

¹ It is acknowledged that the attorney raising the objection entered an appearance and former counsel withdrew on April 8, 1998, just after the Admissions Session Order FCC 98M-40 was issued. However, while present counsel was not counsel of record when the exchange and Admissions Session procedures were adopted, he has been in the case as counsel of record for more than two months and he has not raised an objection about Admissions Session procedures until Kay's actual document exchange was made on a date that was extended one week at the new counsel's request.

² The case was affirmed by the Court of Appeals sub. nom Iowa Acorn v. F.C.C., Nos. 96-1066 and 96-1072, Judgment filed October 22, 1997. The narrow issue of Direct Case exhibits was not addressed. There is no formal opinion.

Counsel for both parties were reminded and acknowledged that the Los Angeles hearing session has been scheduled for September 15-24, 1998, a schedule that was based on the dates that the parties submitted. Travel and courtroom arrangements are underway. If the Los Angeles testimony is not completed by September 24, 1998, the hearing will need to resume in Washington, D.C.

Although it was not covered in the telephone conference, the Presiding Judge has decided that the parties should exchange notices for cross-examination in addition to the submission of subpoenas on **July 29, 1998**. See Order FCC 98M-40, supra. Any objections to witnesses noticed should be made in writing and will be taken up at the Admissions Session.

SO ORDERED.³

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel
Administrative Law Judge

³ Courtesy copies of this Order were sent to counsel by fax or e-mail on the date of issuance.