

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.⁴ 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, 1998.⁵ 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

⁴ 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.

⁵ 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.

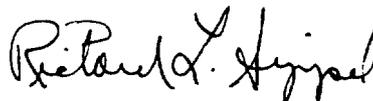
Conclusion

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

ATTACHMENT C

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

FCC 98M-91

81112

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.)

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.

ATTACHMENT D

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

FCC 98M-40

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.)	

ORDER

Issued: March 31, 1998 ; Released: April 2, 1998

Hearing Schedule¹

- May 18, 1998 - Discovery Ends.
- June 12, 1998 - Exchange of Bureau's Direct Case (Exhibits with Witness Summaries).²
- June 22, 1998 - Exchange of Kay's Direct Case (Exhibits with Witness Summaries).

¹ Dates are intended to accommodate the schedules of all counsel for both parties. These dates were submitted by the licensee James A. Kay, Jr. ("Kay") and the Wireless Telecommunications Bureau ("Bureau"). See James A. Kay, Jr.'s March 1998 Status Report filed on March 12, 1998. See also letter dated March 6, 1998, from Bureau counsel to Kay's counsel.

² Since a summary of the experts' testimony will be included in the Trial Briefs, the experts need only be identified as to name, experience/education, subject matter of the expert testimony, and ultimate conclusion of the opinion(s). An estimate will be made of the time expected to complete the direct examination of each witness, including experts.

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- July 29, 1998 - Trial Briefs³ Exchanged and Hearing Subpoenas Submitted.
- August 4 - 5, 1998 - Admissions Session, Washington, D.C.
- September 2 - 11, 1998 - D.C. Phase (to include experts and Kay).⁴
- September 15 - 24, 1998 - L.A. Phase.⁵
- October 1 - 7, 1998 - Courtroom Reserved in D.C. (if needed to complete testimony/receipt of evidence).⁶

Hearing Exhibits

Hearing exhibits must be serially numbered, separately paginated, and assembled in a binder with a tab preceding each document. A prefix will be used to identify the party or witness sponsoring the exhibit. An index shall be included that contains a descriptive title of each exhibit and an identification of the sponsor of each exhibit. Since documentary evidence will be admitted in an admission session, each exhibit (or series of exhibits of a common sponsor) must be accompanied by the declaration under penalty of perjury of the sponsoring witness. If official notice is to be requested of materials in the Commission's files, the materials shall be separately assembled, tabbed, identified by source, assigned an exhibit number, and exchanged on the exchange date.

³ Trial Briefs are to include: (a) summary of the case (e.g. opening argument); (b) summary of testimony and description of the category (categories) of documents to prove or rebut each issue of the HDO; (c) identity of witnesses who will sponsor and explain the meaning of technical documents; (d) sanctions sought by the Bureau including appropriate forfeiture; (e) stipulations that can be agreed to or that either side wishes to have considered; (f) glossary of technical terms that will appear in testimony, documentary evidence and/or argument; and (g) statement of legal points and authorities limited to cases primarily relied on for substantive or procedural points. Trial Briefs shall also include complete summaries of expert witness testimony and any objections that a party expects to raise or anticipates will be raised with respect to expert testimony. See Order FCC 98M-21, released February 24, 1998. Trial Briefs also shall state whether the parties will stipulate at the admissions session to the qualifications of the respective experts which would save hearing time during voir dire.

⁴ The mid-week starting date of September 2 is set to accommodate the schedule of Kay's counsel. Counsel acknowledge that September 7 is a federal holiday. No hearing will be conducted on Labor Day.

⁵ September 14 and 26 are expected to be used for travel. It appears after a review of witness lists of both parties that with the cooperation of counsel and the parties, the L.A. testimony can be completed in 8 working days.

⁶ The location of the L.A. courtroom will be announced as soon as an appropriate courtroom is obtained.

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Courtroom Hours

So long as hearing sessions proceed at a reasonable pace and without any inordinate delays, the court day will begin at 9:00 a.m. and will conclude at 6:00 p.m.

Time Outs

There are expected to be 10 minute a.m./p.m. breaks. Lunch will be taken from 12 noon to 1:00 p.m. (meaning back in the courtroom with witness in witness chair at 1:00 p.m.).

Experts Session - Washington, D.C.

For continuity of subject matter, it would be best to hear all expert testimony during the same session in Washington, D.C. September 2 - 11, 1998. One of Kay's experts is located in L.A. Another of Kay's experts is located in Minnesota. There will be travel and living expenses for the Minnesota based witness regardless of where he testifies. But Kay would need to bear the added expense of travel and lodging of the L.A. expert witness who would testify in D.C. If Kay and the Bureau will agree, the deposition testimony of Kay's west coast expert could be received or read into evidence. Objections that are preserved at the deposition would be ruled on in open court during the D.C. hearing session.

Kay And Sobel Testimony

It would be beneficial for Kay and Marc Sobel to testify in the D.C. session of September 2 - 11, 1998.⁷ Sobel is represented to be familiar with Kay's business practices, the SMRS industry in the L.A. area, and several of the issues of the HDO. It appears that Sobel will be called as a witness. But he has objected to giving testimony in Washington, D.C. because he is not willing to bear the expenses. It is not clear whether Kay would be willing to pay or share the expenses for Sobel to testify in D.C. The Bureau should consider advancing travel expenses if Sobel is subpoenaed.

⁷ There is a pending Petition For Leave To Appeal a ruling on setting Sobel's testimony in D.C. that was filed by Kay on March 26, 1998. That pleading raises what is essentially a scheduling issue that counsel may resolve without the need for further pleadings or intervention by the Presiding Judge.

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by the Bureau as a hearing witness. If Kay also intends to call Sobel as a witness, then Kay should consider sharing in those expenses. A report on the resolution of Sobel's testimony will be filed and submitted by April 9, 1998.

SO ORDERED.*

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

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

ATTACHMENT E

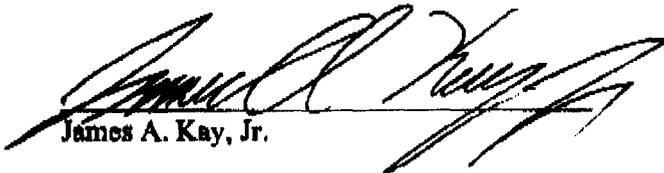
**DECLARATION
OF
JAMES A. KAY, JR.**

I, James A. Kay, Jr., state the following under penalty of perjury:

I have reviewed the Motion to Recuse Presiding Judge and for the arguments articulated therein believe that Administrative Law Judge Richard L. Sippel has displayed a bias which renders him incapable of rendering a fair decision in WT Docket No. 94-147.

Furthermore, it is my sincere belief that Judge Sippel has prejudged the case and has determined prior to the hearing that the decision he will draft would be adverse to me. Accordingly, I feel uncomfortable in having Judge Sippel continue as the Presiding Judge. In fairness I believe a new judge should be appointed.

July 21, 1998


James A. Kay, Jr.

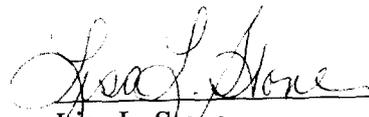
CERTIFICATE OF SERVICE

I, Lisa L. Stone, a secretary in the law firm of Shainis & Peltzman, Chartered, do hereby certify that on this 22nd day of July, 1998, copies of the foregoing document were sent, via hand delivery to the following:

Honorable Richard Sippel
Administrative Law Judge
Federal Communications Commission
Suite 218
2000 L St., NW
Washington, DC 20554-0003

John Schauble, Esq.
Enforcement Division
Wireless Telecommunications Bureau
Federal Communications Commission
Suite 8308
2025 M Street, NW
Washington, DC 20554-0002

William H. Knowells-Kelltt, Esq.**
Gettysburg Office of Operations
Wireless Telecommunications Bureau
Federal Communications Commission
1270 Fairfield Road
Gettysburg, PA 17325-7245



Lisa L. Stone

** Via Facsimile