

FCC MAIL SECTION

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DISPATCHED BY

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

FCC 98M-95

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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.)	

O R D E R

Issued: July 14, 1998 ; Released: July 16, 1998

On July 14, 1998, at approximately 9:40 a.m., counsel for James A. Kay, Jr. ("Kay") called the office of the Presiding Judge and asked the Judge's Legal Technician to advise the Judge that counsel had received informal inquiries from a member or members of the public as to whether they might give evidence. Through the Legal Technician, the Presiding Judge instructed counsel to call Bureau counsel and raise the subject with Bureau counsel and advised further that a telephone conference would be held in the afternoon to discuss the subject. Kay's counsel stated that he would not contact Bureau counsel and that he would not participate in a conference without a court reporter.

In the afternoon, Kay's counsel again called the Legal Technician and stated that he would direct all inquiries from non-parties directly to the Presiding Judge's office. For reasons stated below, such inquires must be directed by counsel only to the Commission Secretary. It is unacceptable conduct for any counsel to direct such inquires to the office of the Presiding Judge where there would be the risk of an improper ex parte communication.¹

Public Witnesses

Without strict compliance with the Commission's rules, there will be no non-party evidence received. The Commission's rules provide for the participation in hearings by non-parties.

¹ Counsel should be aware that Kay has previously raised an issue (rejected by the Commission) of ex parte communications with the Presiding Judge. See Order FCC 98-32, released March 10, 1998 (Commission denies reconsideration of an earlier ruling which found that the Presiding Judge had not reviewed or considered improper ex parte document).

Any person who wishes to appear and give evidence on any matter and who so advises the Secretary, will be notified by the Secretary if that matter is designated for hearing.

The rule provides that only relevant, material and competent testimony will be received. 47 C.F.R. §1.225(b). Certainly, there will be no such evidence considered without a complete showing of relevance, competence and materiality as well as reliability.

The parties are to set forth their respective views on public non-party witnesses in the next Status Report that is to be submitted on **July 30, 1998**.²

Informal Conferences

The parties may request a conference at any time on reasonable notice to discuss a routine, ad hoc prehearing matter. A court reporter will be provided if the circumstances require or suggest a genuine need for a reporter. Counsel for both parties should consult among themselves on how they wish to proceed in the future with respect to informal conferences in the interest of costs and convenience to the respective parties. The Presiding Judge must be advised in writing by **July 17, 1998, at 12 noon**, as to whether counsel are agreeable to continue holding non-recorded prehearing conferences via telephone for purpose of hearing preparations, with a written summarization Order from the Presiding Judge to follow.³

Counsel shall keep in mind that the Presiding Judge is authorized to regulate the course of the hearing. 47 C.F.R. §1.243(f). The Presiding Judge may "on his own initiative" direct the parties or their attorneys to appear at a specified time and place for a conference prior to or during the course of a hearing. 47 C.F.R. §1.248(b)(1). If a counsel refuses to engage in a telephone conference that is

² The Presiding Judge is authorized to require parties and their counsel to submit suggestions in writing for the purpose of regulating the hearing. 47 C.F.R. §1.248(b)(1) The Presiding Judge will be looking for analysis of significant relevance and materiality in addition to reliability. Otherwise, the evidence will not be considered or will be rejected. There should also be comment on the form the evidence might take to avoid any delay in the hearings (e.g. affidavits/declarations and/or depositions). In view of scheduling and the lesser weight to be accorded to non-party evidence, even if it is admitted in evidence, there should be no live testimony at the hearing by public non-party witnesses.

³ If counsel would prefer, any counsel may prepare a proposed Order summarizing the conference and submit it to the Presiding Judge with copy to opposing counsel. Or both counsel may collaborate on the Order.

required by the Presiding Judge to consider an ad hoc matter of routine business, the proceeding is thereby prejudiced. Therefore, reasons are to be given for counsel opposing or refusing to participate in informal ad hoc telephonic conferences.

SO ORDERED.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 Order were e-mailed or faxed on date of issuance.