

FCC MAIL SECTION

Jul 17 10 27 AM '98 Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FCC 98M-94

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DISPATCHED BY  
 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: July 14, 1998 ; Released: July 15, 1998

Preliminary Statement

1. This is a ruling on a Motion For Partial Summary Decision that was filed by James A. Kay, Jr. ("Kay") on June 18, 1998. Comments on Motion for Partial Summary Decision were filed by the Wireless Telecommunications Bureau ("Bureau") on July 2, 1998.

2. Kay seeks summary decision on designated issues<sup>1</sup> concerning his SMR operations in the trunked mode; abuse of process to obtain cancellation of licenses; and the filing of applications in multiple names to avoid channel sharing. The Bureau does not object to limited summary decision on those issues provided that it still can offer evidence concerning Kay's system configuration.

Issues

3. The specific issues as set forth in the designation order are:

Issue 10(b) - To determine whether James A. Kay, Jr. has wilfully or repeatedly operated a conventional station in the trunked mode in violation of Section 90.113 of the Commission's Rules.

<sup>1</sup> Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing and Forfeiture, FCC 94-315, 10 F.C.C. Rcd 2062 (1994) ("designation order").

Issue 10(d) - To determine whether James A. Kay, Jr. has abused the Commission's processes by filing applications in multiple names --- in violation of --- Section 90.629.

Issue 10(f) - To determine whether James A. Kay, Jr. has abused the Commission's processes in order to obtain cancellation of other licenses.

4. Kay's Motion for Partial Summary Decision is based entirely upon representations in the Bureau's Statement of Readiness for Hearing ("Statement") which was filed on June 3, 1998. In that pleading, the Bureau represented that it had insufficient evidence to offer at hearing with respect to the aforesaid issues.

#### Trunked Mode

5. The Part 90 Rules consider a "trunk" as having a common traffic artery.<sup>2</sup> Kay testified in his deposition that his trunked systems<sup>3</sup> do not use a common traffic artery. Rather, the Bureau represents that under Kay's system:

[T]he mobile unit selects a channel from a group of channels by monitoring the repeater side output of the channels to determine if any of the channels in the group is available. The mobile then transmits on an available channel.

The Bureau does not believe there is sufficient evidence to show that Kay utilized conventional channels in an impermissible trunked configuration to warrant proceeding on this issue.<sup>4</sup>

See Bureau Statement at Paras. 9-11.

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<sup>2</sup> Trunk is defined as a "one or two-way channel provided as a common traffic artery between switching equipment." 47 C.F.R. §7.

<sup>3</sup> Trunked radio system is a "method of operation in which a number of radio frequency channel pairs are assigned to mobile and base stations in the system for use as a trunk group." 47 C.F.R. §90.7.

<sup>4</sup> The Bureau represents that in June 1993, the former Private Radio Bureau had advised: "[I]f the system included use of proper monitoring equipment, using conventional channels in a group without a dedicated trunk is permissible under Part 90." See Statement at 5-6.

Limitations On Assignable Pairs

Trunked Systems (Section 90.627)

6. The Bureau concedes that it will offer no evidence under the Commission rule which imposes "limitations on the number of frequency pairs" that may be assigned for trunked systems and on the number of trunked systems. 47 C.F.R. §90.627. The rule limits to twenty (20) the number of frequency pairs that may be assigned at a given time and no additional trunked system is authorized within 40 miles of an existing trunked system. 47 C.F.R. §90.627(a)(b).<sup>5</sup> It appears from the Statement of Readiness that the Bureau cannot prove that Kay assigned in excess of twenty frequency pairs and that there is no evidence of a violation of the 40 mile requirement.

Conventional Systems (Section 90.623)

7. The Bureau represents that the designation order erroneously charged Kay with violating Section 90.629 (implementation period up to five (5) years for becoming operational). The Bureau concedes the error in its Statement of Readiness. See Statement at 8 and Bureau Comments at 2 (the Bureau does not intend to present evidence with respect to Section 90.629). The Bureau characterizes the error as "harmless" because the Bureau now intends to only offer evidence under Issue 10(d) on alleged violations of Section 90.623. See 47 C.F.R. §90.623(a) (only five (5) frequencies are assignable in a given area for "conventional systems"). Issue 10(d) already contains an allegation of violations of Section 90.623. Thus, there has been sufficient notice to Kay for proceeding under Section 90.623.

8. The Bureau identified the following evidence that it intends to offer under Section 90.623:

The Bureau intends to present evidence that Kay convinced and/or coerced Carla Pfeifer, Roy Jensen, Kevin Hessman and Vincent Cordaro to sign applications where Kay was in fact the real party in interest. See Statement at 8.

The Bureau also intends to present evidence that similar arrangement[s] existed between Kay and Marc Sobel, as well as between Kay and Jerry Gales. Id.

Notwithstanding partial summary decision in Kay's favor under this ruling, the Bureau will not have waived its right to offer such evidence under Issue 10(d).

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<sup>5</sup> The 40 mile rule provides for an exception in that a system may be added where an existing trunked system is loaded to at least 70 mobile and control stations per channel. see C.F.R. §90.627(b)(2).

### Abuse Of Processes

9. Issue 10(f) under the designation order relates to alleged abuse of the Commission's processes by Kay relating to the cancellation of other licenses. The Bureau represents that "[it] has reviewed the available evidence and has decided not to proceed on this issue." See Statement at 9. The Bureau represents that it has taken discovery on the issue and concluded that any resolution of the cancellation of licenses of which the Bureau is aware involve allegations of "civil fraud or contractual disputes [that are] more appropriately resolved in civil courts of competent jurisdiction." Id. It is possible that a deliberate unauthorized cancellation of another's license could present an issue of abuse of Commission process that would be justiciable in a revocation proceeding, assuming that the evidence would support the charge. But under the circumstances of this case, the Presiding Judge will defer to the prosecutorial discretion of the Bureau in the interest of expediting the taking of evidence on the remaining issues.

### Discussion

10. The Commission's rule with respect to any form of summary decision provides:

Any party --- may move for summary decision of all or any of the issues set for hearing. --- The party filing the motion may not rest upon mere allegations or denials but must show, by affidavit or by other materials ---, that there is no genuine issue of material fact.

47 C.F.R. §1.251(a)(1). (Emphasis added.) Kay has shown "by other materials" that there are no genuine issues of material fact to litigate on the aforementioned issues. The record is clear by "other materials" that the Bureau will not offer any evidence on the issues. Also, the Bureau does not oppose the grant of summary resolution of these issues. Therefore, the "other materials" standard that has been provided by the Bureau and relied on by Kay may be applied by the Presiding Judge.

11. A partial summary decision under these circumstances would be consistent with Commission policy because:

[Summary Decision] is designed to operate as a pretrial determination of what material facts do exist without substantial controversy and what material facts are actually and in good faith controverted.

Summary Decision Procedures, 34 F.C.C. 2d 485, 487-88 (1972), citing Professor Ernest Gellhorn's "Summary Judgment in Agency Adjudication." As a result of pretrial candor on the part of the Bureau with respect to these issues on which it can offer no proof, there is an ability for a pretrial determination of the absence of facts which cannot be controverted. And where there has been and will be no

evidence introduced on the issues, the hearing will be expedited by considering the motion as a "pretrial determination" which follows the Commission's policy to allow partial summary decision with respect to issues on which no evidence will be offered. Id. at 490. For there can be no genuine issue of material fact to litigate in the absence of evidence.

12. Alternatively, Kay asks for substantially the same relief under Section 1.229 of the Commission's rules which provides for the deletion or modification of issues.

Motions for modification of issues which are based on new facts or newly discovered facts shall be filed within 15 days after such facts are discovered by the moving party.

47 C.F.R. §1.229(b)(3). On June 3, 1998, the Bureau filed and served its Statement of Readiness in which for the first time it disclosed to Kay that it lacked evidence and/or had no intention to offer evidence on these issues. The filing and service of that Statement was a newly discovered significant development. On June 18, 1998, Kay filed timely the Motion for Partial Summary Decision which filing was within the prescribed period for justifying a modification or deletion of issues. Id.

13. Due deference must be shown for issues that are set in a designation order:

[T]he [Presiding Judge] would be expected, in the absence of new facts or circumstances, to follow [the Commission's] judgment as the law of the case.

(Emphasis added.) Atlantic Broadcasting Co., 5 F.C.C. 2d 717, 720 (1966). See also Frank H. Yemm, 39 Radio Reg. 2d (P&F) 1657 (1977). In the case under consideration here, there was an admitted error by the citation in the designation order of the wrong section of the rules. See Para. 7, supra. More importantly, the Bureau has made a candid disclosure of a lack of proof to offer on the charges. That admission and disclosure would be a significant "new fact or circumstance" authorizing a deletion in the interests of fairness and administrative efficiency.

#### Order

Accordingly, IT IS ORDERED that in accordance with the Bureau's Statement of Readiness for Hearing under the foregoing analysis, the Motion For Partial Summary Decision that was filed by James A. Kay, Jr. on June 18, 1998, IS GRANTED.

IT IS FURTHER ORDERED that there will be no evidence received at the Admissions Session or at the Hearing Sessions on Issue 10(b); and/or Issue 10(d) with respect to Section 90.627 or Section 90.629 of the Rules; and/or on Issue 10(f).

IT IS FURTHER ORDERED that the Wireless Telecommunications Bureau is not precluded from offering relevant evidence under Issue 10(d) as it pertains to alleged violations of Section 90.623 of the Rules.<sup>6</sup>

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, appearing to read "Richard L. Sippel". The signature is fluid and cursive, with the first name being the most prominent.

Richard L. Sippel  
Administrative Law Judge

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<sup>6</sup> Courtesy copies of this Memorandum Opinion and Order were sent to counsel by fax or e-mail on the date of issuance.