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Federal Communications Commission

FCC 98-207

DISPATCHED

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
JAMES A. KAY, JR.)	WT DOCKET NO. 94-147
)	
Licensee of one hundred fifty two)	
Part 90 Licenses in the)	
Los Angeles, California area)	
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MEMORANDUM OPINION AND ORDER

Adopted: August 19, 1998

Released: August 24, 1998

By the Commission:

1. This Memorandum Opinion and Order denies a Petition for Extraordinary Relief, filed June 12, 1998, by James A. Kay, Jr. (Kay) and dismisses as moot a Motion for Stay of Procedural Dates, filed June 15, 1998, by Kay. Kay asks the Commission to set aside the Hearing Designation Order (HDO) in this proceeding and investigate the conduct of the Wireless Telecommunications Bureau (Bureau) in prosecuting this case. Alternatively, Kay asks the Commission to stay the hearing in this proceeding and to instruct the Presiding Judge as to the disposition of certain matters. We find that Kay has failed to justify interlocutory action by the Commission.

I. BACKGROUND

2. On December 13, 1994, the Commission designated this proceeding for hearing to determine whether Kay, a licensee of land mobile radio facilities under Part 90 of the Commission's rules, has complied with those rules and whether he possesses the character qualifications to remain a Commission licensee. James A. Kay, Jr., 10 FCC Rcd 2062 (1994), modified, 11 FCC Rcd 5324 (1996). Kay was ordered to show cause why his licenses should not be revoked or cancelled, why he should not be ordered to cease and desist from certain violations of the Communications Act, and why an order for forfeiture

should not issue.

3. The Commission received numerous complaints about Kay's operations, including allegations that he was falsely reporting the number of mobile units he serves in order to avoid the channel sharing and recovery provisions of the rules. James A. Kay, Jr., 10 FCC Rcd at 2062 ¶ 2. On January 31, 1994, the Bureau, pursuant to 47 U.S.C. § 308(b), served Kay with a letter of inquiry requesting him to provide certain information about the loading of his stations. Id. at 2063-64 ¶¶ 6-7. After an exchange of correspondence and extensions of time, the Bureau, on June 10, 1994, repeated its request. Kay responded on June 24, 1994 that: "[T]here is no date . . . for which the submission of the requested information would be convenient." Id. at 2064 ¶ 8. The Commission thereupon designated this case for hearing on eight issues (Id.):

- a) To determine whether James A. Kay, Jr. has violated Section 308(b) of the Act and/or Section 1.17 of the Commission's Rules by failing to provide information requested in his responses to Commission inquiries;
- b) To determine whether [Kay] has willfully or repeatedly operated a conventional station in the trunked mode in violation of Section 90.113 of the Commission's rules;
- c) To determine if Kay has willfully or repeatedly violated any of the Commission's construction and operation requirements in violation of Sections 90.155, 90.157, 90.313, 90.623, 90.627, 90.631, and 90.633 of the Commission's Rules;
- d) To determine whether [Kay] has abused the Commission's processes by filing applications in multiple names in order to avoid compliance with the Commission's channel sharing and recovery provisions in violation of Sections 90.623 and 90.629;
- e) To determine whether [Kay] willfully or maliciously interfered with the radio communications of other systems, in violation of Section 333 of the Act;
- f) To determine whether [Kay] has abused the Commission's processes in order to obtain cancellation of other licenses;
- g) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether [Kay] is qualified to remain a Commission licensee;
- h) To determine if any of Kay's licenses have automatically cancelled as a result of violations listed in subparagraph (c) pursuant to Sections 90.155, 90.157, 90.631, or 90.633 of the Commission's rules....

4. Following further proceedings, Administrative Law Judge Richard L. Sippel issued a summary decision in which he revoked Kay's licenses and ordered Kay to forfeit \$75,000. James A. Kay, Jr., 11 FCC Rcd 6585 (ALJ 1996). That decision was subsequently vacated and the proceeding was remanded for a full hearing. James A. Kay, Jr., 12 FCC Rcd 2898 (OGC 1997).

II. PETITION FOR EXTRAORDINARY RELIEF

5. In the petition now before us, Kay argues that the hearing should not go forward because of alleged improprieties by the Bureau during the pre-designation phase of this proceeding. Kay claims:

- (a) The Bureau arranged for the designation of issues against Kay without any supporting evidence in the hope of using discovery as a fishing expedition.
- (b) The Bureau gives preferential and favored treatment to those who complain, inform, or testify against Kay. Substantial or even conclusive proof (indeed, very often actual under oath admissions) of their serious wrongdoing is ignored by the Bureau, while Kay, on the other hand, is subjected to star chamber proceedings.
- (c) The Bureau had already prejudged Kay and became determined to seek revocation of Kay's licenses before even advising him he was under investigation.
- (d) Certain members of the Bureau's staff engaged in ex parte communications and disseminated inside information in contested proceedings so as to damage Kay, and otherwise improperly interfered with Kay's legitimate business activities.
- (e) In the course of its investigation, the Bureau accepted unquestioningly, relied upon, and used unsupported allegations against Kay from sources known to be biased against Kay, without making even minimal efforts to verify or corroborate the charges.
- (f) The Bureau has coached witnesses against Kay, even to the point of soliciting false sworn statements against Kay.

(Petition for Extraordinary Relief at 5-6.) Kay asserts that these actions have deprived him of due process. He asks the Commission to conduct an investigation into the Bureau's conduct and to set aside the HDO. Alternatively, Kay asks the Commission to stay the hearing in this proceeding and to issue directives to the ALJ requiring him to: (1) delete, defer, or modify an issue he added; (2) order that additional discovery take place; and (3) admit evidence as to the Bureau's conduct, contrary to various rulings by the ALJ.

III. DISCUSSION

6. As Kay recognizes, the Commission's rules generally bar the relief he seeks. Under 47 C.F.R. § 1.106(a)(1), the Commission will entertain a petition for reconsideration of a hearing designation order only as to an adverse ruling with respect to petitioner's participation in the proceeding. Kay, of course, has not been excluded from participation in the proceeding here. Similarly, 47 C.F.R. § 1.301(b) generally bars the interlocutory appeal of an ALJ's rulings. These rules are designed to ensure the orderly conduct of hearings and to prevent the disruption and delay that would be caused by routinely entertaining requests for interlocutory relief. See Communications Satellite Corp., 32 FCC 2d 533, 534 ¶ 4 (1971). Moreover, even in criminal proceedings, interlocutory review is generally not required to protect a party's

constitutional rights, where post-decisional review is available. See United States v. Mechanik, 475 U.S. 66, 69-73 (1986); United States v. Eccles, 850 F.2d 1357, 1364 (9th Cir. 1988). Accordingly, the Commission will entertain such requests for relief only under extraordinary circumstances, as, for example, where a showing has been made of clear error or flagrant abuse of discretion that would inevitably result in reversal of the initial decision. See Southern Broadcasting Co., 40 FCC 2d 1109, 1113 ¶ 10 (1973); Communications Satellite Corp., 32 FCC 2d at 534 ¶ 4. Otherwise, such matters can and should be timely raised in exceptions to an initial decision.

7. We have examined the allegations raised by Kay in his petition under these stringent standards, and we conclude that he has failed to justify interlocutory review. Although voluminous, Kay's allegations essentially fall into two categories: (1) invalidity of the HDO and (2) "prosecutorial misconduct" by the Bureau. We now proceed to consider each of these in turn.

8. As to the HDO, Kay makes two basic allegations. First, he alleges that the HDO violates 5 U.S.C. § 554(b)(3) and his right to due process because the HDO does not give him adequate notice of the "matters of fact and law asserted." See also 47 U.S.C. § 312(c). He next alleges that the hearing was improvidently designated because the HDO is based on the biased and unreliable complaints of competitors without sufficient corroborating evidence. We find no clear error in either regard.

9. The issue of notice turns on the question of whether Kay has a fair opportunity to know the conduct at issue and to present his defense. See, e.g., Shaw v. Valdez, 819 F.2d 965, 968 (10th Cir. 1987); Citizens State Bank of Marshfield, Mo. v. FDIC, 751 F.2d 209, 213 (8th Cir. 1984); Soule Glass and Glazing Co. v. NLRB, 652 F.2d 1055, 1074 (1st Cir. 1981). In evaluating this question it is appropriate to look not only at the HDO itself, but also at other sources of notice available to Kay. Compare Shaw v. Valdez, 819 F.2d at 969-70 and Soule Glass and Glazing Co. v. NLRB, 652 F.2d at 1074-75 (party could not reasonably determine the nature of the issues from the material available to it) with Citizens State Bank of Marshfield, Mo. v. FDIC, and Boston Carrier, Inc. v. ICC, 746 F.2d 1555, 1559-60 (D.C. Cir. 1984) (available material adequate to inform party of nature of the issues). Here, as the Bureau points out, Kay had the opportunity to receive substantial amounts of supplementary information about the nature of the allegations against him by serving interrogatories on the Bureau and by receiving documents through Freedom of Information Act requests. He does not point to any specific issue he does not understand at this juncture. On these facts, we find no clear lack of notice.

10. We also find no merit to the contention that this proceeding was improvidently designated for hearing. We do not consider it error, as Kay suggests, to conduct an investigation based on numerous complaints of competitors. As the Bureau observes, under 47 U.S.C. § 403, the Commission enjoys wide discretion to initiate investigations with or without a complaint and has a responsibility to investigate where there is reason to believe that a licensee is violating the Commission's rules or policies. See Tidewater Radio Show, Inc., 75 FCC 2d 670, 677-78 ¶ 15 (1980). Moreover, even assuming *arguendo* that some measure of probable cause is necessary to justify the investigation of Kay, we do not find a clear lack of probable cause here. Although Kay's competitors may be biased against him, a reasonable and prudent person could conclude that "numerous complaints" of the nature presented here warranted investigation. See United States v. Davis, 458 F.2d 819, 821-22 (D.C. Cir. 1972) (circumstances suspicious in the eyes of experienced investigators support a finding of probable cause).

11. Nor do we consider it error to designate the matters under investigation for hearing after Kay failed to provide information requested by the Bureau about these matters. Kay's failure to respond is relevant to a determination that substantial and material questions of fact exist as to the matters under investigation, since a failure to respond permits the drawing of an adverse inference as to the issues involved. See Ribando v. Silhouette Optical, Ltd., 871 F. Supp. 675, 678 (S.D.N.Y. 1994); Davis v. Northside Realty Associates, Inc., 95 F.R.D. 39, 45 (N.D.Ga. 1982). As the Bureau aptly observes, it would undermine the Commission's regulatory authority if licensees could avoid a hearing simply by refusing to cooperate with an investigation. See Petition for Extraordinary Relief, Att. A. (Memorandum of W. Riley Hollingsworth, Deputy Chief, Licensing Division) ("We feel that failing to follow through with our request for information [from Kay] may jeopardize our ability to administer an effective compliance program"). The merits of the allegations against Kay will be fully tested in the evidentiary hearing, and Kay will have ample opportunity to defend himself against any charges.¹

12. Kay's allegations of "prosecutorial misconduct" fall into four categories. First, Kay asserts that the Bureau has given preferential treatment to complainants against Kay, for example, by ignoring their misconduct while pursuing allegations against Kay and by fraternizing with them.² Second, Kay complains that the Bureau's 308(b) letter requesting information from Kay had a gratuitously hostile tone. Third, Kay alleges that the Bureau has committed acts harmful to Kay, for example, by interfering with Kay's attempts to obtain a finder's preference, by discouraging local authorities from prosecuting a party for the unlawful use of Kay's facilities, and by disseminating the 308(b) letter to Kay's competitors. Kay also accuses the Bureau of threatening to make Kay's client lists available to his competitors by seeking their disclosure by the 308(b) letter. Finally, Kay maintains that the Bureau has obtained sworn statements adverse to Kay containing false and misleading representations. In Kay's view, the totality of these circumstances leads to the inference that the Bureau is biased against him and determined to seek revocation of his licenses regardless of the facts.

13. Kay must meet a heavy burden to justify the termination of this proceeding based on the improprieties alleged. The Bureau here does not stand in the same position as a judge, who must meet an exacting standard of impartiality. Rather, the Bureau is more like the prosecutor in a criminal proceeding, who, courts have recognized, may well have knowledge of non-case related information about defendants. See United States v. Lilly, 983 F.2d 300, 310 (1st Cir. 1992). Bias on the part of prosecutors is a violation of due process only where it results in outrageous conduct that offends

¹ As Kay observes, the Bureau, after discovery, has already determined not to proceed with issues (b) and (f) (Petition for Extraordinary Relief at 12-13). Kay contends that the Bureau should have known prior to designation that issues (b) and (f) were unfounded. The ultimate dismissal of an issue, however, does not imply that it was wrongly designated. The availability of summary procedures in hearing proceedings is based on the premise that it may be proper to dispose of validly designated issues without a full evidentiary hearing.

The merits of allegations made by Kay concerning the conduct of others, e.g., Harold Pick, James Doering, Liberty Paving, Inc., and Christopher C. Killian, are not before us. We note, however, that Kay presents no specific evidence in support of his allegation that the Bureau and Pick engaged in prohibited ex parte presentations in connection with the reinstatement of call signs WNZB276 and WNZB262.

fundamental fairness and shocks the universal sense of justice. See United States v. Bartels, 983 F. Supp. 507, 511 (D.Vt. 1997). The conduct must also be prejudicial. See Id.; United States v. Marshank, 777 F. Supp. 1507, 1519 (N.D.Cal. 1991). Further, as noted above (paragraph 6), interlocutory review of any such allegations is generally unwarranted.

14. We find that Kay has failed to make a showing warranting relief. The merits of the case against Kay will be fully explored in the hearing. Whether or not the Bureau has acted in an unwarranted manner towards Kay,³ it is doubtful that the conduct alleged by Kay could be considered outrageous or shocking. In any event, however, there has been no showing that any of the conduct alleged has materially prejudiced Kay in this proceeding. None of the conduct alleged by Kay would impair our ability (or the ALJ's) to consider the evidence presented in this proceeding fairly. Moreover, to the extent that the Bureau has engaged in the "selective prosecution" of Kay, there has been no showing that the Bureau's prosecution of this case is based on any impermissible factors, such as race, religion, or the desire of Kay to exercise constitutional rights. See United States v. Prytz, 822 F. Supp. 311, 319 (D.S.C. 1993); United States v. Gervasi, 562 F. Supp. 632, 643 (N.D.Ill. 1983).

15. We have also examined the two instances of alleged false statements regarding Kay in sworn declarations obtained by the Bureau that are discussed in detail in Kay's petition. Kay asserts that a January 19, 1995 sworn declaration by Harold Pick falsely implies (as one of several allegations) that Kay was responsible for the theft of some of Pick's equipment, when Pick knew that Kay was not involved. Kay also asserts that the Bureau attempted to rely on a February 16, 1995 declaration by Richard Lewis as indicating that Kay was responsible for interference to certain radio facilities and for the improper modification of the licenses of these facilities (although the statement on its face does not accuse Kay of such conduct). The Bureau, however, does not propose to call either Pick or Lewis as a witness or to use their statements for any purpose in this proceeding. There is no showing that the Bureau was aware that any statement in Pick's declaration was misleading. The Bureau denies that the Lewis statement was the basis for making charges against Kay and indicates that its charges were based on other evidence. Accordingly, we see no possibility of prejudice based on this material. As to the testimony that the Bureau will introduce in this proceeding, it is the ALJ's role in the first instance to rule upon its admissibility and credibility.

16. In sum, Kay's allegations do not warrant disrupting the orderly conduct of this proceeding by interlocutory action. We will therefore not set aside the HDO or exercise our discretion to order an investigation. The merits of the issues concerning Kay will be fully explored in the evidentiary hearing, after which the ALJ and the Commission will take whatever action is appropriate. Having determined that no further action is warranted at this time, Kay's request for a stay of this proceeding is moot.

³ We wish to note, however, that we find no merit to Kay's allegation that the Bureau sought to make Kay's confidential client lists available to competitors by requesting their submission in the 308(b) letter. The Bureau indicated to Kay in a May 27, 1994 letter (Wireless Telecommunications Bureau's Opposition to Petition for Extraordinary Relief, Att. 5) that: "[W] have no intention of disclosing Mr. Kay's proprietary business information, such as customer lists, except to the extent we would be required by law to do so." The Freedom of Information Act exempts from disclosure: "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4).

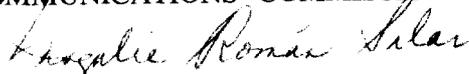
Additionally, we reject Kay's request that "certain specific directives [noted in paragraph 5] be made to the Presiding Judge regarding the conduct of the hearing." Petition for Extraordinary Relief at 71. Kay has made no showing to justify the interlocutory review of the pertinent rulings by the ALJ. See 47 C.F.R. § 1.301(b).

IV. ORDERING CLAUSES

17. ACCORDINGLY, IT IS ORDERED, That good cause having been shown, the Motion for Leave to File Petition for Extraordinary Relief, filed June 15, 1998, by James A. Kay, Jr. IS GRANTED and the Petition for Extraordinary Relief, filed June 12, 1998, by James A. Kay, Jr. IS DENIED.

18. IT IS FURTHER ORDERED, That the Motion for Stay of Procedural Dates, filed June 15, 1998, by James A. Kay, Jr. IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary