

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
JAMES A. KAY, JR.) WT DOCKET NO. 94-147
)
)
Licensee of 152 Part 90 Stations in the)
Los Angeles, California Area)

To: The Commission

**WIRELESS TELECOMMUNICATIONS BUREAU'S OPPOSITION
TO PETITION FOR RECONSIDERATION**

1. The Chief, Wireless Telecommunications Bureau, by his attorneys, and pursuant to Section 1.106(g) of the Commission's Rules, now opposes the "Petition For Reconsideration" (Petition) filed by James A. Kay, Jr. (Kay) on September 23, 1998.

2. In his Petition, Kay seeks reconsideration of the Commission's Memorandum Opinion and Order, FCC 98-207 (released August 24, 1998) (MO&O), which denied his "Petition for Extraordinary Relief". Kay's Petition fails to add anything to his earlier voluminous request. Reconsideration will not be granted "merely for the purpose of again debating matters on which the tribunal has once deliberated and spoken," WWIZ, Inc., 37 FCC 685, 686 (1964), aff'd sub nom. Lorain Journal Co. v. FCC, 351 F.2d 824 (1965), cert. denied, 383 U.S. 967 (1966). Section 1.106(b)(3) of the Commission's Rules provides, "A petition for reconsideration of an order denying an application for review which fails to rely

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on new facts or changed circumstances may be dismissed by the staff as repetitious."¹ Kay's Petition should be summarily dismissed on those grounds. Furthermore, Kay fails to even discuss the Commission's decision that he has failed to meet the high threshold for obtaining interlocutory relief. Under these circumstances, Kay's pleading appears to be another frivolous pleading designed to delay this proceeding.

3. While the Bureau believes Kay's pleading should be summarily dismissed, we will nonetheless briefly address each of his arguments. Kay repeats three arguments. First, he argues that the Hearing Designation Order, 10 FCC Rcd 2062 (1994) failed to give Kay due notice of the issues against him. Kay Petition, pp. 1-3. Second, Kay argues that this proceeding was improvidently designated for hearing. Kay Petition, pp. 3-7. Finally, Kay repeats his allegations of prosecutorial misconduct on the part of the Bureau. Kay Petition, pp. 7-10. As the Bureau has shown in its "Opposition to Petition for Extraordinary Relief" filed on June 24, 1998, none of these arguments have any merit whatsoever.

¹ While Kay's original filing was styled as a "Petition for Extraordinary Relief," it was essentially a premature application for review of various interlocutory rulings of the Presiding Judge, as well as a petition for reconsideration of the Hearing Designation Order in this proceeding.

I. KAY'S INSUFFICIENT NOTICE ARGUMENT

4. Kay asserts that the HDO did not provide him with sufficient notice of the charges against him. Kay raised this argument in his petition for extraordinary relief.² The Bureau responded in its opposition that Kay misstated the facts regarding the sufficiency of the notice he has received and misapplied the applicable due process standard.³ The Commission rejected Kay's argument,⁴ and Kay merely repeats arguments previously rejected. Ironically, one of the cases Kay cites, Soule Glass and Glazing Co. v. NLRB, 652 F.2d 1055, 1074 (1st Cir. 1981),⁵ actually undercuts his argument. Soule Glass holds that Section 554(b)(3) of the Administrative Procedure Act⁶ requires that the respondent in an administrative hearing have sufficient notice of the conduct at issue such that the issues are fairly litigated, but that the notice need not be in the initial complaint.⁷ Kay's reliance on this case implicitly

² Petition for Extraordinary Relief, pp. 7, et seq.

³ Opposition to Petition for Extraordinary Relief, pp. 9-13.

⁴ MO&O, ¶¶ 8-9.

⁵ Kay previously cited Soule Glass and the Commission discussed the holding therein when it when it rejected Kay's claims. Kay also cites Block v. Ambach, 73 N.Y. 2d 323, 332 (1989) again. This case deals with the due process notice due in a New York disciplinary proceeding and rejects the argument that the respondent had insufficient notice; the opinion thus has no applicability to this proceeding.

⁶ 5 U.S.C. § 554(b)(3).

⁷ [C]ourts have recognized "the Board's power to decide an issue that has been fairly and fully tried by the parties, despite the fact that issue was not specifically pleaded," Drug Package, Inc. v. NLRB, 570 F.2d 1340, 1345 (8th Cir. 1978); and have gone so far as to state that the Board "has an obligation to decide material issue"...

acknowledges that any deficiency in the notice can be cured during the hearing. Thus, his due process claim is inherently premature.

5. Kay's second assertion is that the matter was improvidently designated. He asserts that the Commission relied on unsworn and unsubstantiated statements without investigating the accuracy of those statements.⁸ Kay previously raised this claim in his initial request.⁹ The Bureau explained in its opposition that it attempted to investigate the accuracy of the complaints against Kay, and Kay refused to comply with its requests for information.¹⁰ The Commission held in its MO&O that Kay's refusal to provide information during the Bureau's predesignation investigation is evidence that substantial and material questions of fact are present, and that "it would undermine the Commission's regulatory authority if licensees could avoid a hearing simply by refusing to cooperate with an investigation."¹¹ Kay's Petition fails to even address this critical holding. Furthermore, Kay's claims that the Bureau knew that Kay's use of LTR technology was proper¹² ignores the fact that until depositions in this proceeding, Kay would not tell the Commission how his various stations

652 F.2d at 1074 .

⁸ Petition for Reconsideration, p. 3.

⁹ Petition for Extraordinary Relief, pp. 45-50.

¹⁰ Opposition to Petition for Extraordinary Relief, pp. 5-8.

¹¹ MO&O, ¶11.

¹² Kay Petition, pp. 5-6.

were configured into trunked groups. As to Issue (f), Kay's bare and unsupported claim to know that "[t]he real reason the Bureau dropped this issue is because the alleged victims of Mr. Kay's crimes are nowhere to be found"¹³ shows how frivolous his argument is.

II. KAY'S ATTACK ON THE DESIGNATION ORDER

6. Kay asserts that the Bureau abused the hearing discovery provisions by designating then investigating. This assertion was raised in Kay's initial request.¹⁴ The Bureau explained that Kay is correct that the Bureau did not obtain critical information from Kay before designation.¹⁵ The Commission did not specifically address the use of discovery to obtain information from Kay, however it did state that Kay's refusal to provide information relating to the allegations in the complaints resulted in adverse inferences being drawn with respect to those allegations.¹⁶ Kay continues to ignore the fact that the reason the Bureau did not continue its predesignation investigation was that Kay refused to provide the information requested. Kay ignores his affirmative duty to provide the Commission with the information the Commission needed. RKO General, Inc. v. FCC, 670 F.2d 215, 239 (D.C. Cir. 1981).

¹³ Kay Petition, p. 7.

¹⁴ Petition for Extraordinary Relief at 6-13.

¹⁵ Opposition to Petition for Extraordinary Relief, pp. 7-8, 12-15.

¹⁶ MO&O, ¶11.

III. KAY'S ALLEGATIONS OF PROSECUTORIAL MISCONDUCT

A. Preferential Treatment of Informants and Complainant against Kay

7. Kay previously asserted that he is entitled to relief because the Bureau allegedly gave preferential treatment to informants.¹⁷ The Bureau briefly addressed Kay's allegations of favorable treatment; however, many of the matters complained of are not final and are currently before the Bureau making it inappropriate for the Bureau to address the issues.¹⁸ The Commission found that Kay's allegations did not shock the universal sense of justice, and therefore do not demonstrate a due process violation.¹⁹ Further, the Commission found that none of Kay's allegations have materially prejudiced Kay in this proceeding; therefore, he has not made a showing warranting relief at this time.²⁰ Kay argues that the Bureau's role is not akin to a prosecutor because it is obligated to serve the public interest,²¹ but that argument ignores the fact that prosecutors also have a fundamental duty to serve the ends of justice.

B. Improper Communication With Kay's Competitors

8. Kay asserts that the Commission treated too lightly his assertion that the Bureau was likely to disclose competitively sensitive information to his competitors.²² Kay had asserted the

¹⁷ Petition for Extraordinary Relief, pp. 13 et seq.

¹⁸ Opposition to Petition for Extraordinary Relief, pp. 16-21.

¹⁹ MO&O, ¶¶12-16.

²⁰ MO&O, ¶14.

²¹ Kay Petition, p. 8.

²² Petition for Reconsideration, p. 8.

claim in his earlier request,²³ the Bureau had responded,²⁴ and the Commission found no merit to Kay's allegations.²⁵ Kay's Petition simply regurgitates his prior defective arguments and provides no basis for reversing the Commission's prior decision.

C. Reliance on and Solicitation of False Statements

9. Kay again alleges that the Bureau solicited and relied on false statements.²⁶ He adds nothing to his previous arguments regarding the same allegations.²⁷ The Bureau has previously responded to the allegations.²⁸ The Commission held that because the Bureau does not intend to rely on the statements case and does not intend to call any of the persons who allegedly gave false statements as witnesses, "we see no possibility of prejudice based on this material."²⁹ Kay utterly fails to rebut the Commission's conclusion that no prejudice exists.

IV. CONCLUSION

10. Kay's Petition offers no new material and wholly fails to comply with Section 1.106 of the Commission's Rules. Kay also completely fails to demonstrate an entitlement to

²³ Petition for Extraordinary Relief, pp. 35 et seq.

²⁴ Opposition to Petition for Extraordinary Relief, pp. 23-28.

²⁵ MO&O, n.3.

²⁶ Petition for Reconsideration, pp. 9-10.

²⁷ Petition for Extraordinary Relief, pp. 45 et seq.

²⁸ Opposition to Petition for Extraordinary Relief, pp. 29-31.

²⁹ MO&O, ¶15.

interlocutory relief. Accordingly, the Commission should dismiss Kay's "Petition For Reconsideration."

Respectfully submitted,

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October 5, 1998

CERTIFICATE OF SERVICE

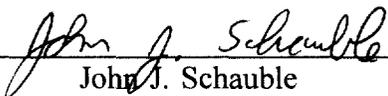
I, John J. Schauble, an attorney in the Enforcement and Consumer Information Division, Wireless Telecommunications Bureau, certify that I have, on this 5th day of October, 1998, sent by hand delivery (unless otherwise indicated), copies of the foregoing "Wireless Telecommunications Bureau's Opposition to Petition for Reconsideration" to:

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