

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

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: Honorable Joseph Chachkin
Chief Administrative Law Judge

RECEIVED

JAN 28 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

WIRELESS TELECOMMUNICATIONS BUREAU'S
MOTION TO STRIKE WITNESSES AND
NOTIFICATION OF WITNESSES FOR CROSS-EXAMINATION

1. The Acting Chief, Wireless Telecommunications Bureau, by his attorneys, now asks the Presiding Judge to rule that James A. Kay, Jr. (Kay) may not call certain witnesses as direct case witnesses in this proceeding. Specifically, the Bureau asks that the Presiding Judge rule that Kay may not call Anne Marie Wypijewski or Gail Thompson as witnesses because their testimony would not be relevant to any of the designated issues. The Bureau also notifies the Presiding Judge and Kay that it intends to cross-examine each of the witnesses that Kay offers as part of his direct case.

Testimony of Commission Employee

2. Initially, the Bureau must emphasize that the focus of this hearing is Kay's conduct, not the conduct of the Bureau. Kay has repeatedly attempted to distract the

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Commission and the Presiding Judges by making specious allegations that the Bureau acted improperly or had an intention to obtain his customer information and pass that information to his competitors. Judge Sippel, the Inspector General, and the Commission have all reviewed Kay's allegations to one extent or another and found them to be meritless. Both Judge Sippel and the Commission have refused to authorize Kay to inquire into these matters at hearing. Notwithstanding those clear rulings, Kay has now called witnesses for the express purpose of taking testimony concerning these matters. The Presiding Judge should categorically reject Kay's attempt to dredge up his discredited allegations.

3. The Commission has made clear that requiring Commission personnel to involuntarily testify in a hearing proceeding is an extraordinary act which should only be required when the need is manifest. As the Commission observed in adopting its discovery procedures,

At any one time, there are numerous hearing cases pending before the Commission. A multiplicity of demands on the Commission's limited staff would seriously interfere with its capacity to discharge its regular duties. The Commission is in this respect in a different position from that of private parties who will normally be called upon to give depositions only in the single case in which they are participating.

Report and Order of Part I of the Rules of Practice and Procedure to Provide for Discovery Procedures, 11 FCC 2d 185, 188 (1968). Indeed, in the case of a deposition, Section 1.311(b)(2) of the Commission's Rules prohibits the deposition of a Commission employee without express permission of the Commission. Since it is well established that parties have

greater latitude to inquire into matters in discovery than at the actual hearing, parties that would require a Commission employee to testify at hearing should be required to meet an even higher standard than what would be required to obtain a deposition of a Commission employee.

4. Anne Marie Wypijewski is currently an attorney employed by the Public Safety and Private Wireless Division of the Bureau. In 1993 and 1994, she participated in the Private Radio Bureau's investigation of Kay. In that connection, Kay filed a lawsuit personally against Ms. Wypijewski and two other Commission employees alleging violations of his constitutional rights. In dismissing Kay's lawsuit, the Chief Judge for the United States District Court for the Middle District of Pennsylvania stated:

This court has grave questions about whether the instant action is any more than a thinly veiled and frivolous attempt to improperly influence or subvert the pending administrative proceedings.

James A. Kay, Jr. v. W. Riley Hollingsworth, et al., Civil No. 1:CV-94-1787 (M.D. PA filed March 31, 1995) (attached as Attachment 1 to this motion).

5. It is the Bureau's understanding that Kay wishes to examine Ms. Wypijewski to pursue allegations that Ms. Wypijewski violated the ex parte rules in a finder's preference case involving Kay and Ralph Thompson d/b/a Thompson Tree Service (Thompson Tree), who was formerly the licensee of Business Radio Station WIH275. Apparently, Kay claims

that these allegations are somehow relevant to Kay's state of mind in his refusal to respond to the Commission's 308(b) letter. This argument has no merit whatsoever.

6. Kay has made this same argument in attempting to take Ms. Wypijewski's deposition. The allegation was originally made in a "Revised Request for Inquiry and Investigation" filed by Marc Sobel (represented by one of Kay's counsel) on March 2, 1998 in WT Docket No. 97-56.¹ Kay filed that pleading in this proceeding on March 2, 1998 as part of his attempt to persuade Judge Sippel to rule that a deposition of Ms. Wypijewski and other Commission employees would be relevant to the issues in this proceeding. Judge Sippel reviewed the request and then ordered that it "SHALL BE STRICKEN as baseless and speculative accusations against Commission employees which will be given no further consideration in this proceeding." Memorandum Opinion and Order, FCC 98M-32 (released March 18, 1998). He also held that Kay had failed to show any relevance to the depositions of Ms. Wypijewski or other Commission employees and that their depositions shall not be taken in this proceeding. Id.

7. Kay then made the same arguments concerning Thompson Tree in a "Petition for Extraordinary Relief" he filed with the Commission on June 15, 1998 (at pp. 38-42).² Kay argued that this incident "vindicat[ed] his determination that it would have been competitive

¹ A copy of the pertinent portion of the pleading relating to Thompson Tree is submitted as Attachment 2 to this motion.

² A copy of the pertinent portion of the "Petition for Extraordinary Relief" is submitted as Attachment 3 to this motion.

suicide to turn over his business information to the Bureau." Petition for Extraordinary Relief, p. 39. Kay has argued that a phone call made between Ms. Wypijewski and Gail Thompson, the wife of Ralph Thompson, was an improper ex parte communication that somehow showed an improper inclination to harm Kay's business by turning his business records over to his competitors.

8. Kay's arguments ignore several elementary facts. On September 20, 1993, Kay filed a letter dated September 18, 1993, seeking cancellation of the Thompson Tree license because the station had allegedly discontinued operation. Kay Petition, p. 39. In response, on December 27, 1993, Mr. Hollingsworth sent a letter to Thompson Tree seeking to determine whether the licensee had discontinued operation.³ The letter was sent as part of the Bureau's independent investigation into Thompson's operation. The Bureau initiated that investigation at the request of Kay. On February 2, 1994, after the investigation began, Kay filed a finder's preference request for the channel.

9. The distinction is important because, as Kay admits, the finder's preference request was dismissed "on the grounds that the Commission was already investigating the matter prior to receipt of Kay's finder's preference request." Kay Petition, p. 40. The investigation was not a restricted proceeding for ex parte purposes. Kay's finder's preference was a nullity which did not convert the Bureau's independent investigation of Thompson into a restricted proceeding. If Kay had wanted a formal restricted proceeding, he should have filed his

³ A copy of this letter is submitted as Attachment 4 to this motion.

finder's preference request first. Ironically, Kay's displeasure is caused by the fact that the Commission acted on his complaint before he filed his finder's preference request.

Accordingly, any conversations Ms. Wypijewski had with Mrs. Thompson did not violate the ex parte rules. Moreover, nothing in Ms. Thompson's recollection of the conversation (contained in an affidavit submitted as Attachment 5 to this motion) suggests that Ms. Wypijewski did anything improper. The information that anybody could apply for a frequency once a license was canceled was simply a recitation of the Bureau's processing procedures.

10. As the Bureau understands Kay's argument, Kay believes that Ms. Wypijewski's conversation with Ms. Thompson somehow gave him reason to be concerned that the Bureau would distribute to his competitors the information required in the January 31, 1994, 308(b) letter directed to Kay. After reviewing Kay's allegations, however, the Commission held:

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 [WTB Ex. 10] that '[W]e 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).

James A. Kay, Jr., FCC 98-207 (released August 24, 1998) at n.3. The record in this proceeding shows that the Bureau made numerous attempts to meet Kay's stated concerns

about confidentiality. Nonetheless, Kay refused to provide the information he was required to provide.

11. The question of whether Ms. Wypijewski acted improperly in some way is not relevant to the designated issues in this proceeding. In any event, the parties have been informed by the Office of General Counsel that the Commission's Inspector General has reviewed Kay's and Sobel's allegations and concluded that there were not acts of misconduct on the part of FCC employees. Accordingly, there is no basis for concluding that Ms. Wypijewski acted improperly.

12. Finally, even if there was any basis (which there is not) for arguing that this matter was relevant to the issues in this proceeding, Kay has not explained why it was necessary to have Ms. Wypijewski testify concerning this matter. Ms. Wypijewski did not speak to Kay concerning this matter and has no personal knowledge concerning his state of mind. Kay and Ms. Thompson could testify concerning their conversation.

13. Accordingly, since Ms. Wypijewski's testimony would not be relevant to the designated issues, there is no basis for taking her testimony. Similarly, since the only apparent purpose of Ms. Thompson's testimony is to discuss her conversations with Ms. Wypijewski and Mr. Kay, she should not be required to testify. Accordingly, the Presiding Judge should order that Ms. Wypijewski and Ms. Thompson shall not be required to testify.

Failure to List Witnesses

14. The Bureau was ordered to list its potential fact witnesses in October 1997. By Order, FCC 98M-27 (released March 27, 1998), Judge Sippel ordered Kay to list his potential fact witnesses. In his Order, FCC 98M-37 (released March 26, 1998), Judge Sippel explained that the procedure would ensure that "there should be no surprise witnesses." On March 10, 1998, Kay filed his "List of Contemplated Witnesses" listing 28 contemplated witnesses. The Bureau used that list to determine which individuals to depose.

15. Kay's January 5, 1999 witness list names four individuals who were not on Kay's list of contemplated witnesses: Debbie Marshall, Tony Marshall, Jeffrey Cohen, and Gail Thompson. Kay has provided no explanation why these individuals were not identified as potential witnesses when directed by Judge Sippel. Because Kay did not list these individuals as potential witnesses, the Bureau did not depose these individuals. If Kay had not been aware of those individuals, or if there had been some element in the Bureau's testimony which Kay could not have been anticipated, the Bureau would not oppose testimony from these individuals. The witnesses in question, however, are all individuals that Kay previously knew of, and Kay had multiple opportunities either to talk to or to depose the individuals in question. The Bureau was not provided the required notice that these individuals may be called as witnesses. Accordingly, it would be fundamentally unfair to allow Kay to have these individuals testify when he did not give the required notice that they might be called as witnesses.

16. Accordingly, the Bureau asks the Presiding Judge to order that Kay may not call Anne Marie Wypijewski, Gail Thompson, Debbie Marshall, Tony Marshall, or Jeffrey Cohen as witnesses in this proceeding.

Respectfully submitted,

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Acting Chief, Wireless Telecommunications Bureau



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January 8, 1999

ATTACHMENT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JAMES A. KAY, JR.
d/b/a LUCKY'S TWO WAY-RADIOS,

Plaintiff,

v.

W. RILEY HOLLINGSWORTH,
TERRY L. FISHEL, and
ANNE MARIE WYPIJEWski,

Defendants

CIVIL NO. 1:CV-94-1787

FILED
HARRISBURG, PA

MAR 31 1995

MARY E. D'ANDREA, CLERK
Per Y.S.

MEMORANDUM

Presently before the court is Defendants' motion to dismiss or in the alternative for summary judgment, and Plaintiff's motion to strike Defendants' statement of material facts.' The issues have been briefed and the motions are ripe for disposition.

1. Plaintiff originally filed two other motions to strike, which have since been withdrawn. The crux of these motions was that Defendants failed to follow the Middle District Local Rules when making their filings. See, e.g., Local Rules 7.7 (setting deadlines for time period within which brief must be filed), 7.8 (exhibits must be filed separately from brief), 7.4 (filing of statement of material facts with motion for summary judgment). Defendants have apologized to the court and made appropriate corrections in their filings. The court accepts Defendants' apologies, but also admonishes both parties that the Local Rules must be followed in all future filings.

I. Background

Plaintiff, a resident of California, is the holder of 16 land mobile radio licenses issued by the Federal Communications Commission ("FCC"). "Land mobile radio services are 'radio communication services, based on land, where either the transmitting or receiving station is mobile.'" (Def. Brief in Sup. of Mot. to Dismiss at 1 n.1 (quoting National Ass'n of Regulatory Utility Comm'rs v. FCC, 525 F.2d 630, 634 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976)).) Defendants are employees of the Wireless Telecommunications Bureau,² a division of the FCC, located in Gettysburg, Pennsylvania. Defendant W. Riley Hollingsworth is Deputy Associate Bureau Chief of the Office of Operations; Defendant Terry L. Fishel is the Chief of the Land Mobile Branch; and Defendant Anne Marie Wypijewski is a staff attorney in the Office of Operations. The bulk of the complaint alleges causes of action against Defendant Hollingsworth

In the complaint,³ Plaintiff alleges that Defendants violated his constitutional rights when acting on various license

2. Contrary to Plaintiff's assertion, the Wireless Telecommunications Bureau is a division of the Federal Communications Commission. A Westlaw search conducted by the court revealed that after December 15, 1994, the Wireless Telecommunications Bureau was listed in the Federal Register as the Bureau to contact for information concerning, inter alia, broadcast licensing procedures. It would serve no purpose for the FCC to list such a bureau as a source contact if the Bureau did not exist.

3. The court struggled to discern the nature of the claims stated by Plaintiff. The foregoing discussion represents the court's best effort to interpret the cause of action being alleged by Plaintiff.

renewal applications and other applications pending before the FCC Plaintiff claims that Defendants, acting outside the bounds of their authority, improperly dismissed the renewal applications for many of his licenses. Further, Plaintiff opines, he has lost profits, business opportunities, and suffered damage to his good name as a result of Defendants' actions. Finally, Plaintiff avers that no appropriate administrative remedy exists since the FCC can only renew his licenses, not provide him with monetary damages. The court surmises that Plaintiff is pursuing a Bivens action, Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (holding that under certain circumstances federal officers may be sued for monetary damages for committing constitutional torts), although Plaintiff never makes direct reference to Bivens.

To the contrary, Defendants contend that an appropriate administrative remedy does exist, and that Plaintiff is not entitled to monetary damages. Defendants assert that they have done nothing in contravention of the constitution. Defendants claim that they merely attempted to investigate approximately 23 separate allegations of improper FCC-related conduct lodged against Plaintiff by other FCC licensees and users. Moreover, Defendants continue, hearing dates have been scheduled where an Administrative Law Judge will review the dismissal of Plaintiff's applications. Thus, an administrative remedy not only exists, but is being actively pursued by the parties. It is Defendants contention that "this case is an attempt to utilize this Court in an effort to

chill vigorous enforcement of the law and FCC regulations by federal officials," (Def. Reply in support of motion to dismiss a 2), and that the suit has no basis in fact or law.

The genesis of Plaintiff's claims appears to be a letter sent to Plaintiff by Defendant Hollingsworth dated January 31, 1994. The letter requested that Plaintiff provide the FCC with certain information as a supplement to his pending applications. It appears that the information was requested to help the FCC determine whether any of the complaints lodged against Plaintiff had merit. Defendant Hollingsworth notified Plaintiff that his pending applications would not be acted upon until he provided the requested information. Plaintiff elected to be uncooperative with and refused to provide the FCC with the information requested. Eight months and many letters after the initial request for information, and without a hearing, Defendant Hollingsworth dismissed Plaintiff's pending applications. Plaintiff then filed this lawsuit.

Defendants initially filed with this court a "motion to dismiss or in the alternative for summary judgment." Defendants did not file a statement of material facts with the initial motion as Local Rule 7.4 requires; however, Defendants have since filed the statement. Plaintiff has filed a motion to strike Defendants' statement of material facts, claiming that Defendants' violation of the Local Rules should preclude them from pursuing the summary judgment motion. Despite Plaintiff's express objections to the

II. Discussion

A. Jurisdiction

Before it can reach the merits of Defendants' motion, this court must discern whether it has jurisdiction over the captioned action. Pursuant to 28 U.S.C. § 2342(1) (1982), exclusive jurisdiction of FCC final orders is vested in the United States Court of Appeals for the District of Columbia Circuit ("District of Columbia Circuit"). Moreover, although the precedent is somewhat convoluted, the District of Columbia Circuit has held that "where a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court's further jurisdiction is subject to the exclusive review of the Court of Appeals." Telecommunications Research and Action Center, et al. v. Federal Communications Commission, 750 F.2d 70, 75 (D.C. Cir. 1984) ("TRAC").

The narrow jurisdictional issue before this court is whether a district court may entertain a Bivens action, collateral to a pending administrative law proceeding, before a final order has been issued in the administrative proceeding. There is no

4. Neither party has given adequate consideration to the jurisdictional questions raised by asking a district court to consider matters relating, however tangentially, to a pending administrative proceeding. The parties assume that this court may reach the merits of the captioned action prior to the conclusion of the pending administrative proceedings. The court is not as comfortable with this assumption.

Third Circuit law directly on point. Accordingly, the court will look to the law of other jurisdictions.

In TRAC, the District of Columbia Circuit examined the nature of a district court's jurisdiction as it related to actions pending before the FCC. The plaintiff in TRAC sought a writ of mandamus from the district court to compel the FCC to act upon its pending applications. Finding that Congress placed jurisdiction over FCC appeals exclusively with the federal courts of appeals, the district court sua sponte transferred the action for the writ to the United States Court of Appeals for the Ninth Circuit. The plaintiff then appealed to the District of Columbia Circuit questioning the validity of the lower court's transfer order.

The District of Columbia Circuit was faced with determining both whether the district court had jurisdiction to hear the matter it transferred to the Ninth Circuit, and whether the District of Columbia Circuit had jurisdiction to hear the pending appeal. The Circuit Court first addressed the implications of the "finality doctrine" on the captioned action. Finding that the doctrine did not "automatically preclude" the District of

5. "[T]he relevant considerations in determining finality are whether the process of administrative decision-making has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action." Carter/Mondale Presidential Committee, Inc. v. Federal Election Comm'n, 711 F.2d 279, 286 (D.C. Cir. 1983) (quoting Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970)); see id. at n.12.

Columbia Circuit from hearing the appeal, the court noted "[a]lthough the finality doctrine does limit judicial action, it does not do so in a precise and inflexible way . . . a federal court should apply the finality requirement in a 'flexible' and 'pragmatic' way." TRAC, 750 F.2d at 75-76 n.27.

Next, the District of Columbia Circuit found that the district court did not have jurisdiction over the action, and that transfer was appropriate. "By lodging review of agency action in the Court of Appeals, Congress manifested an intent that the appellate court exercise sole jurisdiction over the class of claims covered by the statutory grant of review power." Id. at 77. Furthermore, the circuit court expressly overruled a prior decision that held that a district court had jurisdiction over an agency bias claim collateral to an administrative proceeding. Id. at 77 n.30 ("Past suggestions that the District Court has general federal question jurisdiction under 28 U.S.C. § 1331 over some of these claims were in error.")

TRAC is not directly on point with the instant action as the plaintiff in TRAC was seeking a writ of mandamus, not monetary damages. The court, however, finds TRAC to be instructive as to the jurisdictional questions currently before the court. At a bare minimum, TRAC counsels that this court should be cautious in asserting jurisdiction over the captioned action. Congress has unambiguously created a forum in which a party may seek redress from FCC actions. That forum is within the FCC, and subject to

final appeal to the District of Columbia Circuit. Nothing within the FCC's enabling statute, 47 U.S.C. § 155, leads the court to believe that this court is a part of the regulatory framework that Congress has created. Accordingly, this court can only assert jurisdiction over the captioned action if the action falls within a narrow exception to the TRAC holding.

In Ticor Title Ins. Co. v. F.T.C., 814 F.2d 731 (D.C. Cir. 1987), the court briefly addressed the exceptions to the TRAC rule. Issues pertaining to the exhaustion of administrative remedies and district court jurisdiction were before the court. Noting first that "exhaustion of available administrative remedies is a prerequisite to obtaining judicial relief for an actual or threatened injury," id. at 738, Judge Edwards went on to discuss the narrow exceptions to the exhaustion rule. Under the first exception, a party may seek immediate review "of a challenge to agency authority where the agency's assertion of jurisdiction 'would violate a clear right of a petitioner by disregarding a specific and unambiguous statutory, regulatory, or constitutional directive." Id. at 740 (emphasis in original). Pursuant to the second exception, a party may seek "immediate judicial review where postponement of review would cause the plaintiff irreparable injury However, . . . '[m]ere litigation expense . . . does not constitute irreparable injury.'" Id. (quoting Renegotiation Board v. Bannerkraft Clothing Co., 415 U.S. 1 (1974)) (other citations and footnotes omitted).

Finding that the Ticor petitioners did not fit within either of the abovementioned exceptions, the District of Columbia Circuit affirmed the lower court's dismissal of the action on the ground that the plaintiff had failed to exhaust its administrative remedies. The appellate court then declined to reach the merits of the jurisdictional issues on which much of the lower court's decision turned. With respect to the jurisdictional issues, Judge Edwards merely noted as follows:

I need not stop to consider here whether a constitutional challenge could ever be so separate from the underlying agency proceedings that the district court would have jurisdiction under section 1331. Under the principles articulated in the opinions issued today it is doubtful in any event that such a "separate" constitutional challenge would be subject to review prior to the conclusion of the agency proceedings.

Ticor, 814 F.2d at 743-44 (footnote omitted) (emphasis added). Thus, this court must address two issues: (1) whether Plaintiff falls within one of the exceptions to the exhaustion rule, and (2) whether this Bivens action is sufficiently separate from the underlying agency proceeding to warrant this court's exercise of jurisdiction.

B. The Captioned Action

1. Exhaustion of Administrative Remedies

It is undisputed that Plaintiff has not pursued his administrative remedies related to the captioned action. Plaintiff

contends that the administrative remedies are inadequate to compensate him for his losses, and therefore, he should not be required to exhaust them. Defendants maintain that the administrative remedies are adequate. Because Plaintiff has not exhausted his administrative remedies, the court must consider whether Plaintiff falls within one of the narrow exceptions to the exhaustion rule.

Under the first exception, Plaintiff must show that Defendants violated a "clear" right of his by disregarding explicit and unambiguous statutory directives. It is undisputed that Plaintiff has a Fifth Amendment right to due process. Assuming arguendo that Defendants did deprive Plaintiff of this right, Plaintiff must also demonstrate that Defendants' actions violated an unambiguous statutory directive. The court is unable to find, and Plaintiff is unable cite, any provision within the United States Code, Code of Federal Regulations, or Federal Register that Defendants have directly violated. By dismissing Plaintiff's applications, Defendants were acting within the scope of the authority delegated to them by the FCC. See 47 C.F.R.

§ 73.3591(a)(3).⁶ Thus, the captioned action does not fit squarely within the first exception to the rule.

To fall within the second exception, Plaintiff must demonstrate that postponement of review by this court would cause him irreparable harm. Mere litigation expenses do not constitute irreparable harm. See *Ticor*, 814 F.2d at 740. The gravamen of Plaintiff's claim is that he has been deprived of a property interest without a fair hearing. If this court postpones its review of the captioned action, an Administrative Law Judge will have the opportunity to conduct a post-deprivation hearing. Instead of irreparably harming Plaintiff, then, the delay by this

6. In relevant part, the FCC rule reads:

(a) In the case of any application for an instrument on authorization, other than a license pursuant to a construction permit, the FCC will make the grant if it finds (on the basis of the application, the pleadings filed or other matters which it may officially notice) that the application presents no substantial and material question of fact and meets the following requirements:

. . .

(3) The applicant is not in violation of provisions of law, the FCC rules, or established policies of the FCC.

Id. At the time Plaintiff's applications were pending, there were 23 separate reports that Plaintiff had acted in violation of FCC rules and policies. The FCC was entitled to investigate these charges before granting the applications. As an aside, the court is aware that some of the pending applications were pursuant to a construction permit, and therefore, were not governed by this provision.

court will actually allow Plaintiff access to a fair hearing before the FCC. The court finds that Plaintiff will not suffer irreparable harm if this court delays in exercising jurisdiction over the captioned action until the FCC has issued a final order in the pending agency proceeding.

Because Plaintiff has not shown that this action falls within either of the exceptions to the exhaustion requirement, Plaintiff is required to exhaust all administrative remedies before seeking a remedy from this court. Moreover, even if the instant case did fall within one of the noted exceptions, the court would still be unable to exercise jurisdiction at this time.

2. Distinctness of Agency and Collateral Claims⁷

This court can envision an improbable, though not impossible, set of circumstances under which it would have jurisdiction over a Bivens action filed collateral to an administrative proceeding. The instant case does not present such a scenario. Plaintiff's constitutional claims are intimately connected to matters presently before an Administrative Law Judge at the FCC. Moreover, Plaintiff's opposing brief belies the true nature of his claim. While attempting to demonstrate that adequate administrative remedies are not available to him, Plaintiff argues as follows:

7. The court reaches this discussion by assuming arguendo that one of the exceptions to the exhaustion rule has been met.

Nowhere does the Order [and notice of opportunity for hearing for forfeiture] place before the tribunal the issues arising out of illegal dismissal of applications without hearing, improper revocation of licenses without hearing, etc.

(Pl. Brief in Op. at 8 (emphasis added).) Thus, while masquerading as the victim of a constitutional tort, Plaintiff is really only the victim of an adverse preliminary administrative ruling. Moreover, Plaintiff's primary complaint is that he has been deprived of constitutionally protected rights without a hearing. The record before the court clearly demonstrates that a hearing has been scheduled.

This court has grave questions about whether the instant action is any more than a thinly veiled and frivolous attempt to improperly influence or subvert the pending administrative proceedings. Even if the court were convinced that Plaintiff's constitutional claims were well founded, the claims are not so separate from the administrative proceedings that the court could reach the merits of those claims prior to a final order being issued by the FCC. The proper forum for Plaintiff's action lies within the FCC. Should Plaintiff disagree with the FCC's final order, he may seek redress from the District of Columbia Circuit. This court does not have subject matter jurisdiction over the captioned action.

III. Conclusion

The court finds that the exhaustion requirement should be applied to the captioned action because of the collateral proceeding pending before the FCC. Further, the court finds that Plaintiff has not exhausted his administrative remedies. Although the court converted the motion to dismiss to a motion for summary judgment, it will not enter summary judgment against Plaintiff for failure to meet the exhaustion requirement. See Kobieur v. Group Hospitalization & Medical Service, 787 F. Supp. 1444, 1453 (S.D. Ga. 1991) (converting motion to dismiss to motion for summary judgment to "enable . . . [the court] to consider evidence submitted with the parties briefs without conclusively making findings of fact on issues inextricably intertwined with the merits of the . . . action," and then dismissing the action without prejudice). "The proper remedy for failure to exhaust administrative remedies is to dismiss without prejudice." Id. (citing Donnelly v. Yellow Freight Sys., Inc., 874 F.2d 402, 410 n.11 (7th Cir. 1989), aff'd on other grounds, 494 U.S. 820 (1990)).

The court finds that the most appropriate resolution is to dismiss the action without prejudice. Accordingly, the court will deny Defendants' motion for summary judgment and grant Defendants' motion to dismiss. An appropriate order will issue.

Dated: March 31, 1995


SILVIA H. RAMBO, Chief Judge
Middle District of Pennsylvania

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JAMES A. KAY, JR.
d/b/a LUCKY'S TWO WAY-RADIOS,

Plaintiff,

v.

W. RILEY HOLLINGSWORTH,
TERRY L. FISHEL, and
ANNE MARIE WYPIJEWSKI,

Defendants

CIVIL NO. 1:CV-94-1787

FILED
HARRISBURG, PA

MAR 31 1995

MARY E. D'ANDREA, CLERK
Per [Signature]

ORDER

In accordance with the accompanying memorandum, the court finds that the captioned action is collateral to a proceeding pending before an Administrative Law Judge at the Federal Communications Commission. Plaintiff has not exhausted his administrative remedies. Thus, IT IS HEREBY ORDERED THAT:

- 1) Plaintiff's motion to strike Defendants' statement of material facts is DENIED;
- 2) Defendants' motion for summary judgment is DENIED;
- 3) Defendants' motion to dismiss is GRANTED;
- 4) The action is DISMISSED without prejudice; and
- 5) The Clerk of Court shall close the file.

[Signature]
SYLVIA H. RAMBO, Chief Judge
Middle District of Pennsylvania

Dated: March 31, 1995.

ATTACHMENT 2

enemies be kept apprised of each step of the investigation against Kay than it was for the Bureau to seek corroboration of the claims of biased accusers before rushing to judgment against Kay.

(2) The Thompson Tree Incident

62. Wypijewski's efforts to harm Kay did not stop with merely sending blind copies of the 308(b) letter to Kay's enemies. She went so far as to engage in *ex parte* communications with a party to a contested proceeding involving Kay, providing the other party with valuable strategic inside information. Kay learned about this immediately after it happened, confirming once and for all his suspicion of bad faith on the part of the Bureau, and vindicating his determination that it would have been competitive suicide to turn over his business information to the Bureau.

63. Ralph Thompson d/b/a Thompson Tree Service once held an authorization for Business Radio Service Station WIH275, authorizing operations on the frequency pair 508/511.1875 MHz at Sierra Peak in Corona (Riverside County) California. On or about January 31, 1994, Kay submitted a finder's preference request pursuant to Section 90.173(k) of the Commission's Rules, demonstrating that Thompson had discontinued operation of the station for more than one year, thereby resulting in the automatic cancellation of the license pursuant to Section 90.157(a) of the Rules. The matter was assigned Compliance File No. 93L778.

64. On December 23, 1993, Hollingsworth sent a letter to Thompson, serving him with the finder's preference request and directing him to respond within 20 days. Exhibit TT-1 is a copy of that letter. Thompson did not respond, and on March 29, 1994, Wypijewski wrote a second letter to Thompson, again requesting a response within 20 days. A copy of that letter is attached hereto as Exhibit TT-2. Wypijewski did not serve a copy of the letter on Kay. This is significant in that Kay's finder's preference request should have been granted at that point. Kay

had presented compelling evidence of abandonment by Thompson, and after nearly three months, Thompson had failed to respond to the Commission's request. Instead, Wypijewski, on an *ex parte* basis, wrote to Thompson giving him a second chance to respond. Allowing Thompson additional time to respond was within the scope of the Bureau's discretion, but initiating *ex parte* communications with a party to a contested matter is not. In fact, it is unlawful conduct, proscribed by Commission regulation.

65. On April 5, 1994, Thompson responded to the Wypijewski letter and served a copy of his response on Kay. On April 8, 1994, Kay initiated discussions with Thompson leading to an agreement whereby Kay would provide repeater service to Thompson and Thompson would voluntarily surrender his license for cancellation. On April 15, 1994, Thompson executed a formal repeater agreement with Kay and signed an FCC Form 405-A, surrendering his license call sign WIH275 for cancellation.

66. On or about April 18, 1994,¹⁰ Wypijewski telephoned Gail Thompson, Ralph Thompson's wife. Exhibit TT-3 is the sworn affidavit of Mrs. Thompson recounting that conversation. Wypijewski provided Mrs. Thompson with strategic inside information regarding the anticipated FCC disposition of matter. She effectively "coached" Thompson on how her husband could regain the authorization, knowing full well that the disposition of the authorization was a pending contested matter. Wypijewski advised Mrs. Thompson that the authorization was going to be canceled regardless of the finder's preference request, but she explained that the channel would then be "up for grabs" and that anyone, including Mr. Thompson, could file an application for it.

¹⁰ Although Mrs. Thompson's affidavit does not specify the date of this telephone call, Kay has placed it at April 18, 1994, because Mrs. Thompson called Kay immediately afterwards and advised him of her conversation with Wypijewski.

67. On April 22, 1994, call sign WIH275 was deleted from the Commission's database. On April 25, 1994, Wypijewski mailed a letter to Kay dismissing his finder's preference request on the grounds that the Commission was already investigating the matter prior to receipt of Kay's finder's preference request.¹¹ Kay received his service copy of this letter on April 28, 1994. On April 29, 1994, Wypijewski again telephoned Mrs. Thompson, but did not reach her and only left a message. Mrs. Thompson did not return the call, but it is obvious from the context that the purpose of Wypijewski's April 29 call was to alert Mrs. Thompson that both the cancellation and the finder's preference request had been dismissed, and that the time was ripe for Mr. Thompson to re-file an application. With this kind of inside information, Thompson might well have been able to file an application and obtain an authorization before the general public even became aware of the opportunity. Thus, by means of illegal *ex parte* communications, Wypijewski attempted to give Thompson what, as a practical matter, was the finder's preference she had just denied Kay.

68. By engaging in communications with and providing inside information to Mrs. Thompson, Wypijewski not only violated the spirit and the letter of the Commission's *ex parte* rules, she also attempted, perhaps intentionally, to interfere with Kay's contractual relationship with Thompson. Wypijewski's conduct is unbecoming of an ostensible public servant, and is inexcusable.

¹¹ Ironically, this was because of a prior letter from Kay, sent on September 20, 1993, requesting removal of the Thompson license from the database because of discontinuance.

ATTACHMENT 3

The Bureau states that "[u]nless Kay expected the Bureau staff to break the law in order to accommodate his wishes, he had no right to expect further assurances." *Bureau's Sobel Opposition* at ¶ 29. But this is an overstatement. The "law" simply requires that the Commission release information that is not privileged or subject to an exception upon receipt of a valid FOIA request. Keep in mind that the Bureau was seeking a vast amount of information, including Kay's complete customer list. There is no law that would have prevented the Commission from narrowing the scope of its document request to Kay, to arrange for in camera inspection of the requested information, or to make other arrangements designed to alleviate Kay's justified and understandable confidentiality concerns. Moreover, when he received Hollingsworth's May 20, 1994, letter, Kay knew that the Bureau had already released the 308(b) request to his competitors who were using it against him, and he knew that Anne Marie Wypijewski ("Wypijewski"), a Bureau staff attorney, had already attempted to sabotage him by communicating behind his back with a party to a finder's preference proceeding in which Kay was involved. See Section II.D.2, below. The Bureau certainly did nothing to reassure Kay, and the actions that it did take make it clear that certain members of the Bureau staff had absolutely no intention of keeping the most important trade secrets of Kay's business from Kay's enemies.¹⁸

2. The Thompson Tree Incident

Wypijewski's efforts to harm Kay did not stop with merely sending blind copies of the 308(b) letter to Kay's enemies. She went so far as to engage in *ex parte* communications with a party to a contested proceeding involving Kay, providing the other party with valuable strategic inside information. Kay learned about this immediately after it happened, confirming once and

¹⁸ Kay was well aware of the serious danger his enemies could do to his business when they identified his customers. Kay was already involved in a law suit, commenced in August of 1993, against Harold Pick for illegal acts committed by Pick to Kay's customers. Moreover, Kay was aware that Pick and other were already using the fact of the Section 308(b) request (which Wypijewski informed them of by sending blind copies) to defame Kay in the Los Angeles land mobile radio business community.

for all his suspicion of bad faith on the part of the Bureau, and vindicating his determination that it would have been competitive suicide to turn over his business information to the Bureau.

Ralph Thompson d/b/a Thompson Tree Service once held an authorization for Business Radio Service Station WIH275, authorizing operations on the frequency pair 508/511.1875 MHz at Sierra Peak in Corona (Riverside County) California. On September 20, 1993, Kay submitted a letter to the Commission requesting removal of the Thompson license from the database because of discontinuance. On December 23, 1993, Hollingsworth sent a letter to Thompson, advising him that "[t]he Commission has been informed that that [his] radio system may no longer be in operation," and directing him to respond within 20 days. Attachment 21 is a copy of that letter. On or about January 31, 1994, Kay submitted a finder's preference request pursuant to Section 90.173(k) of the Commission's Rules, demonstrating that Thompson had discontinued operation of the station for more than one year, thereby resulting in the automatic cancellation of the license pursuant to Section 90.157(a) of the Rules. The matter was assigned Compliance File No. 93L778.

Thompson did not respond to Hollingsworth's December 23, 1993, letter, and on March 29, 1994, Wypijewski wrote a second letter to Thompson, again requesting a response within 20 days. A copy of that letter is attached hereto as Attachment 22. Wypijewski did not serve a copy of the letter on Kay. This is significant in that Kay's finder's preference request should have been granted at that point. Kay had presented compelling evidence of abandonment by Thompson, and after nearly three months, Thompson had failed to respond to the Commission's request. Instead, Wypijewski, on an *ex parte* basis, wrote to Thompson giving him a second chance to respond. Allowing Thompson additional time to respond was within the scope of the Bureau's discretion, but initiating *ex parte* communications with a party to a contested matter is not. In fact, it is unlawful conduct, proscribed by Commission regulation.

On April 5, 1994, Thompson responded to the Wypijewski letter and served a copy of his response on Kay. On April 8, 1994, Kay initiated discussions with Thompson leading to an agreement whereby Kay would provide repeater service to Thompson and Thompson would voluntarily surrender his license for cancellation. On April 15, 1994, Thompson executed a formal repeater agreement with Kay and signed an FCC Form 405-A, surrendering his license call sign WIH275 for cancellation.

On or about April 18, 1994,¹⁹ Wypijewski telephoned Gail Thompson, Ralph Thompson's wife. Attachment 23 is the sworn affidavit of Mrs. Thompson recounting that conversation. Wypijewski provided Mrs. Thompson with strategic inside information regarding the anticipated FCC disposition of matter. She effectively "coached" Thompson on how her husband could regain the authorization, knowing full well that the disposition of the authorization was a pending contested matter. Wypijewski advised Mrs. Thompson that the authorization was going to be canceled regardless of the finder's preference request, but she explained that the channel would then be "up for grabs" and that anyone, including Mr. Thompson, could file an application for it.

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The Bureau argues that it was independently investigating Thompson Tree's possible nonconstruction, that the Hollingsworth letter and the Wypijewski follow-up had nothing to do with the finder's preference request, but was a follow-up on the Bureau's "independent" investigation of Thompson Tree. *Bureau's Sobel Opposition* at ¶ 32. But the investigation was not "independent." It was prompted by a letter from Kay dated September 18, 1993, and directed specifically to the attention of Wypijewski. Thus, as the one who filed the "complaint," Kay was very much a party-in-interest with respect to the investigation. Hollingsworth of course did not serve Kay with a copy of his December 23, 1993, letter. Compare this to the Bureau's dissemination of six blind copies of the 308(b) letter to Kay. Thus, the Bureau's claim that it "routinely provides complainants with information concerning the status of investigations," *Bureau's Sobel Opposition* at ¶ 30, is apparently another one of those things that is true only for parties other than Kay--or it is yet another Bureau statement that is *not* true.

In any event, assuming *arguendo* that Wypijewski was calling about the so-called "independent" investigation, her communications with Thompson Tree had a very direct bearing (and intentionally so) on Kay's pending finder's preference request. Indeed, Wypijewski

²⁰ The Bureau's denial of Kay's finder's preference request on the grounds of an independent investigation is another example of its negative animus toward Kay. The so-called "independent" investigation was actually the result of Kay's September 20, 1993, letter that had been sent as a prelude to his finder's preference request.

specifically discussed the finder's preference request in the conversation, confirming her own understanding that there was a connection between the two. Whether or not this fits precisely within the four corners of the applicable *ex parte* regulations, it can not be denied that it is highly improper for a Bureau staff member to take sides in a licensing matter, specifically providing unsolicited advice to one party how to strategically outmaneuver the other. Yet, that is precisely what Wypijewski did.²¹

By engaging in communications with and providing inside information to Mrs. Thompson, Wypijewski not only violated the spirit and the letter of the Commission's *ex parte* rules, she also attempted, perhaps intentionally, to interfere with Kay's contractual relationship with Thompson. Wypijewski's conduct is unbecoming of an ostensible public servant, and is inexcusable.

3. The Pro Roofing Incident

Hollingsworth, or persons acting under his direction, apparently interfered with a legitimate attempt by Kay to press criminal charges against the perpetrator of a theft of service against Kay's repeater company.

On December 14, 1995, Kay discovered that a company called Pro Roofing was operating mobile units that had been programmed, without Kay's knowledge or consent, to operate on Kay's conventional SMRS Station WNYR747. When Kay investigated further he learned that Harold Pick d/b/a Century Communications had programmed approximately seven or eight units for Pro Roofing to operate on Kay's repeater. Attachment 24 is a copy of

²¹ The Bureau makes the fantastic argument that Kay has no basis to complain about Wypijewski's April 29 attempt at a further *ex parte* contact with Thompson Tree because his finder's preference request had been denied on April 25, 1998. *Bureau's Sobel Opposition* at 32. This argument fails on two counts. First, it utterly ignores the successful *ex parte* contact on April 18, 1994, while Kay's finder's preference request was still pending. Second, the prohibition on *ex parte* communications did not end with the dismissal of Kay's finder's preference request. Kay had until at least June 25, 1994 to seek reconsideration or review of the Bureau's action, and the *ex parte* restrictions continued during that period.

ATTACHMENT 4

Federal Communications Commission

1270 Fairfield Road
Gettysburg, PA 17325-7245

DEC 27 1993

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Ralph Thompson dba
Thompson Tree Service
8661 Beechwood Drive
Alta Loma, CA 91701

Re: Call Sign W1H275
Compliance File No. 93L778

Dear Licensee:

The Commission has been informed that the above-captioned radio system may no longer be in operation. Our Rules require the licensee of a station which has permanently discontinued operation to forward the license to the Commission for cancellation. 47 CFR Sec. 90.157. Any station which has not operated for more than one year is considered to have been permanently discontinued.

Please inform us within twenty (20) days of the date of this letter as to whether you have permanently discontinued operation. If your system has ceased operation, please forward the station license to our office. Alternatively, you may notify the Commission by checking the appropriate box on FCC Form 405-A (enclosed), which states that your station has discontinued operation and that you request license cancellation. If you are using these facilities, please provide the dates that your facilities were constructed and operational. Licensees whose licenses are due for renewal and who have received an FCC Form 574-R in the mail may use the appropriate box on that form to notify the Commission that station operation has discontinued and that the license should be cancelled.

We are authorized to request this information pursuant to the Communications Act of 1934, as amended, 47 U.S.C. Sec. 308(b).

When responding to this office, please verify that the above-listed mailing address for your system is correct. If we do not hear from you within 20 days, your license for the above-captioned station will be cancelled without any other correspondence generated by this office. Please send your reply to: Federal Communications Commission, 1270 Fairfield Road, Gettysburg, PA 17325-7245, Attention: Compliance - Room 41. If you have any questions, you may telephone our legal staff at (717) 337-1311, extension 133.

Your attention should be directed to Title 18, U.S.C. Section 1001, in which Congress has determined that a wilful false reply to a letter of this type may result in fine or imprisonment.

Sincerely,



W. Riley Hollingsworth
Deputy Chief, Licensing Division

amw/thompson/rah

ATTACHMENT 5

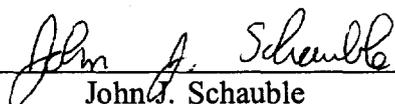
CERTIFICATE OF SERVICE

I, John J. Schauble, an attorney in the Enforcement and Consumer Information Division, Wireless Telecommunications Bureau, certify that I have, on this 8th day of January, 1999, sent by hand delivery (unless otherwise indicated), copies of the foregoing "Wireless Telecommunications Bureau's Motion to Strike Witnesses and Notification of Witnesses for Cross-Examination" to:

Robert J. Keller, Esq.
Robert J. Keller, P.C.
4200 Wisconsin Avenue, N.W.
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(Counsel for James A. Kay, Jr.)
(Via First Class Mail)

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(Co-Counsel for James A. Kay, Jr.)

Chief Administrative Law Judge Joseph Chachkin
Federal Communications Commission
1250 Maryland Avenue, S.W., Room C-1749
Washington, D.C. 20554



John J. Schauble