

WT Docket No. 94-147 WTB Exhibit No. 15.

ORIGINAL

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GETTYSBURG, PENNSYLVANIA 17325

June 30, 1994

W. Riley Hollingsworth
Deputy Chief, Licensing Division
Federal Communications Commission
Gettysburg, Pennsylvania 17325



Re: Compliance File No. 94G001

Application Nos. 415060, 415243, 415255,
415274, 415303, 415304, 415317, 415322,
415333, 628816, 632210

Dear Mr. Hollingsworth:

We represent the radio system interests of James A. Kay, Jr. before the Federal Communications Commission. On behalf of Mr. Kay, we hereby respond to various letters from your office concerning the above referenced matters.

1) With respect to Item one of your letter dated January 31, 1994, we respectfully direct your attention to letters which we had written to you on behalf of Mr. Kay earlier in the above referenced matters.

2) With respect to Item two of the Commission's January 31, 1994, letter, we respectfully direct your attention to letters which we had written to you on behalf of Mr. Kay earlier in the above referenced matters.

3) With respect to Item three of the Commission's January 31, 1994, letter, we respectfully direct your attention to letters which we had written to you on behalf of Mr. Kay earlier in the above referenced matters.

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Date 11-30-94

4) With respect to Item four of the Commission's January 31, 1994, letter, we respectfully direct your attention to letters which we had written to you on behalf of Mr. Kay earlier in the above referenced matters.

5 and 6) With respect to Items five and six of the Commission's January 31, 1994, letter, we respectfully direct your attention to letters which we had written to you on behalf of Mr. Kay earlier in the above referenced matters.

In your letter dated June 10, 1994, you stated that "information submitted will be kept confidential by the Commission." Mr. Kay appreciates the Commission's expression and trusts that the following will not be misinterpreted as any questioning of the Commission's integrity: Although the Commission's letter dated June 10 attempts to provide an assurance of confidentiality to Mr. Kay, it is not free from doubt whether the Commission's Freedom of Information Rules, 47 C.F.R. §0.401, *et seq.*, authorize the Commission to determine that it will keep information confidential in advance of its receiving and analyzing the specific information at issue.

Section 4(l) of the Communications Act of 1934, as amended, 47 U.S.C. §154, requires that "all reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier, or licensee that may have been complained of." Your letter dated January 31, 1994, stated that the Commission had received complaints against Mr. Kay and that, therefore, the Commission was conducting an investigation. It would appear that for the Commission to prepare a competent and comprehensive report, it would be necessary for such a report to state the allegation of the complainant and to state the facts as determined by the Commission, which would necessarily disclose some of the proprietary information which the Commission requested that Mr. Kay supply. Because it is not at all certain that the Commission can comply with its own rules and with the requirements of the Communications Act and keep confidential any proprietary information which Mr. Kay might submit, Mr. Kay's declining to supply the information requested by Items five and six of the Commission's request is entirely reasonable.

In Mr. Kay's initial response to the Commission's request, Mr. Kay had explained the practical difficulties which meeting all of the Commission's demands for information would impose on him. In your letter dated June 10, 1994, the Commission revised its request to request "a list of users as of January 1, 1994, but [the Commission] will accept a list, as detailed in [its] January 31, 1994 letter, as of any date subsequent to January 1, 1994 convenient to Mr. Kay." (emphasis in original) Mr. Kay appreciates the Commission's apparent recognition of the practical problems which the Commission's initial massive request for information would impose on him and appreciates the Commission's resulting modification of its request. However, Mr. Kay

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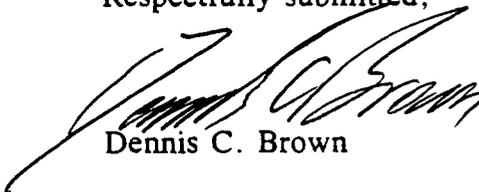
resulting modification of its request. However, Mr. Kay respectfully reports that there is no date subsequent to January 1, 1994 for which the submission of the requested information would be convenient. Therefore, we trust that that report terminates the Commission's request at Items five and six of its January 31, 1994 letter.

In your letter dated June 22, 1994 you noted that Mr. Kay had filed a Petition for Review and Inspection of Employee Conduct, requesting the Chairman's review and inspection of one of the Commission's engineers. We trust that you and the person about whose actions that petition was filed will understand that Mr. Kay's filing of that petition was not motivated by the Commission's actions in the instant matter.

Your June 22 letter expressed a view of the Commission's reasonableness in the instant matter. Although the letter referred to the information which the Commission did release in response to requests filed under the Freedom of Information Act, it did not deal in any reasoned way with the merits of Mr. Kay's motion for an extension of time, which was based on the fact that he is currently before the United States District Court seeking information that the Commission has not released and which, allegedly, formed the factual basis for the Commission's request dated January 31. The Commission's June 22 letter also did not mention that the Commission failed to deal in a timely manner with Mr. Kay's appeal of its initial FOIA action, which left him with no reasonable option but to request the assistance of the courts.

The June 22 letter expressed surprise that Mr. Kay had requested extensions of time and had requested that the Commission assure him of both confidentiality and immunity from criminal prosecution based upon the information which it demanded. However, the letter did not mention that the Commission denied all of Mr. Kay's requests for extension of time or that the Commission declined to grant him immunity and initially declined to provide him with any degree of confidentiality, although it threatened him with sanctions if he did not supply the information which it demanded. The Commission's letter also did not acknowledge that Mr. Kay has twice filed timely responses to the Commission's inquiries in the instant matter. In sum, although the Commission's June 22 letter attempted to stage the lighting of this matter in a particular mood, there is much that the letter left in the dark.

Respectfully submitted,



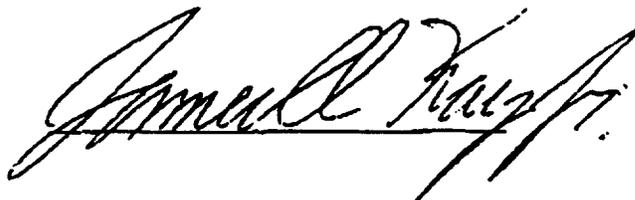
Dennis C. Brown

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DECLARATION

I declare under penalty of perjury under the laws of the United States that the foregoing response to the Commission's request for information is true and correct.

Executed on June 30, 1994.



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WT Docket No. 94-147 WT B Exhibit No. 16.

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 sixty)
four Part 90 licenses in the)
Los Angeles, California area)
)

To: Administrative Law Judge Richard L. Sippel

**OPPOSITION TO WIRELESS TELECOMMUNICATIONS BUREAU'S
FURTHER MOTION TO COMPEL ANSWERS TO INTERROGATORIES**

James A. Kay, Jr. (Kay) hereby opposes the Further Motion to Compel Answers to Interrogatories (Further Motion) filed in the above captioned matter by the Wireless Telecommunications Bureau (Bureau). In support of his position, Kay shows the following:

The Bureau has requested that the Presiding Judge order Kay to answer fully the Bureau's Interrogatory No. 4, which requested that

With respect to each of the call signs listed in Appendix A of the Order to Show Cause, Hearing Designation Order, and Notice for Opportunity for Hearing for Forfeiture, FCC 94-315 (released December 13, 1994), identify each and every "end-user" (i.e., customer) and the number of mobile units of each such "end-user" (i.e., customer) since January 1, 1991.

Kay has provided the Bureau with copies of his customer records for the period of time covered by the request. However, as the Bureau could and should have ascertained from its review of the nature of Kay's records, Kay does not keep records of the number of customers

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Date 11-30-98 } Received
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or the number of mobile units with respect to any certain call sign. Kay's customer records are limited to a record of the frequency band and location(s) used by a customer; they do not identify customers with respect to any certain call sign. While Kay has, for example, made, and supplied to the Bureau, records showing that a certain customer is provided service in the 800 MHz band from Mount Lukens, Kay has maintained no information concerning the call sign with which an end user of a specific mobile units is associated. The documentary information which Kay has provided to the Bureau in response to its requests is all of the information which Kay has which is, in any way, responsive to the Bureau's Interrogatory No. 4.

Since 1992, Kay and other commercial operators have not been required to maintain records of customer loading of specific stations, *see*, Report and Order in Amendment of Part 90 of the Commission's Rules Pertaining to End User and Mobile Licensing Information (PR Docket No. 92-78), 7 FCC Rcd. 6344 (1992)¹. Accordingly, Kay has not maintained such records. Neither Kay nor any of his agents knows the information which is requested by the Bureau's Interrogatory 4. Because Kay is not able to identify customers or numbers of mobiles of each customer with respect to any certain call sign, compelling Kay to do so would be futile and the Bureau's Further Motion should be denied.

¹ At paragraph 8 of its Report and Order, the Commission stated that it would not "impose any requirement on the licensee to provide such information to the coordinator or to the Commission", 7 FCC Rcd. at 6345.

It is possible that, by inquiring of his hundreds of customers, Kay could ascertain the requested information. However, given his present resources, Kay estimates that such an effort would require a his full time efforts for at least 90 days, and Kay simply lacks the resources to conduct such a inquiry. Kay could conduct such an effort only by totally neglecting the continued operation of his business and focussing his entire attention on gathering the requested information. While the Bureau appears to be dedicated to destroying Kay's business, it should not be permitted to succeed by abuse of the hearing process. The Bureau's right to discovery should be balanced against the burden to be imposed on Kay, and the Bureau should not be permitted to consume Kay's resources totally in a search for information which the Commission told licensees three years ago that it no longer required them to keep and no longer required them to provide to the Commission.²

² The Bureau was incorrect in stating at paragraph 2 of its Further Motion that "the Commission noted that the list information would be required in compliance cases". Footnote 21, referred to by the Bureau states that "these issues, however, generally arise in the context of a compliance action and, in such instances, we obtain information directly from the licensee, pursuant to Section 307(b) of the Communications Act," 7 FCC Rcd. at 6345 (1992). Section 307(b) of the Communications Act provides that

in considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same,

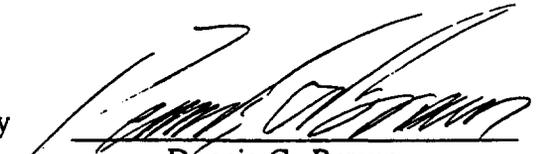
47 U.S.C. §307(b). Section 307(b) of the Act has nothing, whatsoever, to do with the Commission's requiring information from licensees concerning mobile loading. Further, the services provided by Kay are not broadcast services and the Commission has determined that Section 307(b) of the Act is not applicable to a non-broadcast service, *see, AnswerRite Professional Telephone Service*, 41 RR 2d 552 (1977). Accordingly, footnote 21 provided licensees no notice that the Commission might require the information requested by the Bureau's Interrogatory No. 4.

Conclusion

For all the foregoing reasons, Kay respectfully requests that the Presiding Judge deny the Bureau's Further Motion.

Respectfully submitted,
JAMES A. KAY, JR.

By



Dennis C. Brown

Brown and Schwaninger
1835 K Street, N.W.
Suite 650
Washington, D.C. 20006
202/223-8837

Dated: June 12, 1995

AFFIDAVIT

I declare under penalty of perjury under the laws of the United States that the foregoing
Opposition to Wireless Telecommunications Bureau's Further Motion to Compel Answers to
Interrogatories is true and correct. Executed on June 12, 1995.


James A. Kay, Jr.

CERTIFICATE OF SERVICE

I, hereby certify that on this twelfth day of June, 1995, I served a copy of the foregoing Opposition to Wireless Telecommunications Bureau's Further Motion to Compel Answers to Interrogatories on each of the following persons by hand delivery.

Gary P. Schonman, Esquire
Federal Communications Commission
Hearing Branch
Mass Media Bureau
Suite 7212
2025 M Street, N.W.
Washington, D.C. 20554

W. Riley Hollingsworth, Esquire*
Deputy Associate Bureau Chief
Office of Operations
Federal Communications Commission
1270 Fairfield Road
Gettysburg, PA 17325

* By mail.



Dennis C. Brown

WTB EX. 17

WT Docket No. 94-147 WTB Exhibit No. 17.

DECLARATION

I, James A. Kay, Jr., declare under penalty of perjury that the following is true and correct:

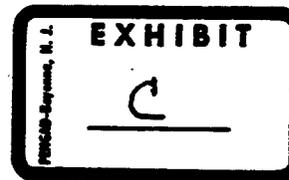
1. I am over 18 years of age, am fully competent to make this Declaration and the facts stated herein are true and correct and within my personal knowledge.

2. I am the party involved in the above-captioned administrative hearing wherein the Wireless Telecommunications Bureau seeks to revoke certain licenses that I hold. As such, I am competent to testify to the matters stated therein.

3. I make this Declaration in Support of the Opposition of James A. Kay, Jr. to Wireless Telecommunications Bureau's Motion for Summary Decision and Order Revoking Licenses ("Opposition").

4. I do not maintain historical loading information. As set forth in my response to the Wireless Telecommunications Bureau's (the "Bureau") Interrogatory No. 4, I only have current information. I keep my records in two ways. I keep individual paper files, arranged alphabetically by customer name. Each of these files contains copies of bills, a repeater contract (if it exists), and miscellaneous notes. Every one of these files was photocopied and provided to the Bureau. I have already supplied the Bureau with approximately 36,000 documents; this hardly constitutes non-compliance with a request for information. Second, there is a computerized database. This database is indexed by customer name, in alphabetical order. The computer fields for each customer include customer name, customer address, customer phone numbers, contact name, billing period, number of

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Reporter _____
Date *11-30-01* _____

control stations, number of mobile stations, frequency/site or system (as appropriate), monthly billing amount, last amount billed, last amount received, year-to-date billed, year-to-date received and current balance. The entirety of my customer database has already been printed out on paper and was previously supplied to the Bureau in response to the Bureau's earlier discovery requests. In other words, the Bureau now has a copy of every single record of my customers which is known to exist.

5. Historical loading records do not exist in any form, and cannot be accurately constructed because of the way my records were kept. First, this historical information was never required to be kept by the Commission's Rules. If a customer made changes to its system, the old information was purged from the file in order to prevent radios from being mistakenly programmed to an incorrect frequency or system. Not only was historical customer information not required to be kept, it was potentially harmful, and was therefore purged when out of date. Also, the computer data fields, when changed, do not maintain historical records. Whenever a particular customer's information is updated or changed, the old information is deleted from the computer system. No archive of old or previous information was ever created. Name changes, addition, deletions or changes of frequencies, changing systems, increasing or decreasing mobiles, and, therefore, call signs used or number of units on a particular call sign or group of call signs would be overwritten, with no archive being created of previous information.

6. I have regularly purged records to preserve storage space. All information regarding cancelled accounts was deleted approximately every six months. The last such regular deletion of information occurred in approximately the last quarter of 1993.

7. As the Bureau is fully aware, the Northridge Earthquake, which occurred on January 17, 1994, had a devastating impact on my business. The epicenter of this seismic event was approximately 3.5 miles from my office location. My office sustained significant damage, including damage to its computer system. My computerized billing system hard disk was destroyed and I was forced to replace the old XENIX operating system with a new DOS based system. Due to a significant loss of data which resulted from the damage to the old system, only accounts which had not discontinued repeater service prior to approximately September 1993 were reentered on the system. The newer DOS system has additional storage space, and no information on canceled accounts has been deleted from the data base since installation of the new computer system in early 1994.

8. The customer information on my computerized billing system has now been supplied twice to the Bureau in two different formats in response to the Bureau's demands.

9. The Bureau's allegation that no "loading information" from 1991, 1992 and 1993 was provided is absolutely false, and it is apparently the result of the Bureau's failure to understand the information which I supplied.

10. If one of my customers was receiving repeater service after January 1, 1991, the customer's file was photocopied, and sent to the Bureau. If a customer was receiving repeater service after January 1, 1991 and was still receiving repeater service in approximately September 1993, then the customer's information, in its last configuration, is still, to this date, on my computer system, and was supplied to the Bureau in two different ways -- first, as a printout of the customer's computer file, and second, on the previously supplied "loading reports."

11. No attempt has been made to withhold information from the Bureau. I simply do not possess a "time machine" which would allow me to go back in time to create records to satisfy the Bureau's inquiry in whatever format the Bureau desires.

12. With respect to the charge by the Bureau that I did not provide "loading records" for each call sign, I have pointed out on numerous occasions that I never maintained records "by call sign," and the closest I could come to providing this information was to hire, at considerable expense, a computer programming expert to write a custom computer program to have my computerized billing program produce a "loading report" indexed from the frequency/site or system fields. Instead, the "loading reports" that I created listed the frequency/site or system and the users, by name, together with the number of control and mobile stations for the particular customer. I then had to manually reference each frequency/site or system "loading report" to the particular FCC call sign or group of call signs represented by the "loading

report." I thereupon wrote the appropriate call sign(s) on each report. A sample page of the response to Interrogatory No. 4 is attached as Exhibit "A" to the Opposition, showing the call signs which were provided. However, I incorporate my full response to the Bureau's Interrogatory No. 4 in the Opposition.

13. Where multiple call signs are listed, all customers have access to both or all of the call signs. This is the only way I could possibly list this information, unless, of course, the Bureau wants me to make multiple copies of the same list and handwrite one call sign on each list. I have gone to considerable trouble and expense to provide the most accurate information possible, in response to Bureau's prior requests.

14. Until October 1992, there was no reason to keep loading reports of any kind, as at that point the FCC database was determinative. In fact, the FCC would not consider the applicant's own records regarding loading. In other words, if I could show that on a channel there were only eight mobiles on a frequency, and the FCC database showed fifty mobiles, the FCC would refuse to consider such evidence, and would hold its database to be sacrosanct, notwithstanding the reality on the ground. After October 1992, "loading information" would only be necessary for verifying that my stations were fully loaded for making application for additional frequencies.

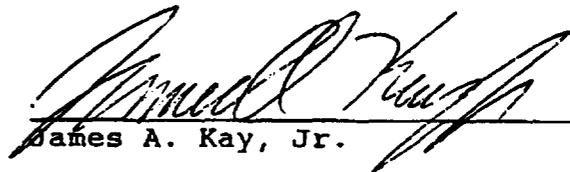
15. Repeater service on my stations has been provided on a "no billing" basis for in-house use, rental units, "loaner" units, demonstration units, and charitable contributions from my

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own shop and other radio dealers with whom I have business relations. Because no billing was made for these repeater services, no "customer file" was ever created on the computer billing system or kept on paper. There was simply no reason to create such records.

16. The Bureau's claims that end users were not identified is false. In fact, the Bureau has a "print screen" of the customer information on every one of my customers. Attached as Exhibit "B" to the Opposition is a sample of this data that I previously supplied. The Bureau was supplied with all the names, addresses, and telephone numbers of my customers months ago. In order to conserve space, the loading report gives the name of the customer, without the address information. If the Bureau wishes to verify any information, they can look up the information from the customer list. Putting the address information on the same sheet as the loading report would have required considerably more programming and would have, in addition, consumed literally several hundred additional sheets of paper.

Executed at Van Nuys, California on the 15th day of
December, 1995.


James A. Kay, Jr.

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