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FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

JAMES A. KAY, JR.)

Licensee of one hundred sixty
four Part 90 licenses in the
Los Angeles, California area)

PR DOCKET NO. 94-147

WT DOCKET NO. 94-147

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To: The Honorable Richard L. Sippel, Administrative Law Judge

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

REQUEST FOR PERMISSION TO FILE APPEAL

James A. Kay, Jr. (Kay), by his attorneys, respectfully requests permission to file an appeal of the presiding officer's Order released on January 30, 1995 (the Order), in the above captioned matter. In support of his position, Kay shows the following:

Two new or novel issues are presented. The first is an issue of whether the Chief, Wireless Telecommunications Bureau (Chief), was lawfully named as a party to the instant proceeding. The second issue is whether the Chief was required to file a notice of appearance.

In complying with Section 1.301(b) of the Commission's Rules, 47 C.F.R. §1.301(b), Kay respectfully shows that permission should be granted to file an appeal of the Order because new or novel questions of law are presented by the Order and the ruling is such that error would be likely to require remand should the appeal be deferred and raised as an exception.

To determine whether the Chief was properly named as a party to the instant proceeding it is necessary to determine whether the Wireless Telecommunications Bureau (WTB) has any

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lawful existence and whether the Chief of the WTB has been lawfully delegated authority to do anything. The News Release 50909 was, by its own terms, an unofficial news release,¹ and the letter from Congress was of no legal significance. Additionally, the news release announced an intention by the Commission to consolidate certain functions of two bureaus and even announced a new chief for the new Bureau. The former Chief, Private Radio Bureau (PRB), was reportedly assigned to a different post. The Commission Chairman does not agree with the Order's conclusion that the WTB was merely a continuation of the PRB. In remarks prepared for delivery on February 1, 1995, Chairman Reed E. Hundt stated that "the Commission had created a whole new bureau to deal with your issues," see, Exhibit I hereto at page 7 (emphasis added). Since the Commission intended that the WTB be a whole new bureau, no authority delegated to the Chief, PRB could be tacked to the Chief, WTB. Had the Chief been able to present any delegation of authority to her by published rule or order, she would have done so. However, the Chief failed to present any evidence that the Commission had complied with the requirements of 47 U.S.C. §155(c)(1) or 47 C.F.R. §0.201(d)(1)&(2) to delegate lawful authority to a Chief, WTB. Absent evidence of a published rule or order which is required by law to effectuate a delegation of authority, the Order was in error in finding a delegation of authority to the WTB.

¹See Header of News Release 50909. "This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action. See MCI v. FCC, 515 F. 2d 385 (D.C. Circ 1974)."

In regard to the denial of Kay's Motion to Dismiss, the Presiding Judge at paragraph 6, page 3, of the January 30 Order held that:

But there is no requirement for the Bureau to formally enter a notice of appearance since this is a revocation case in which the Commission has made the Bureau a party in the HDO and has assigned the Bureau its burden of proof. On the other hand, it is self evident that there is a need to know whether a licensee intends to litigate. Therefore, it is essential that a party licensee state that intention at the beginning of a proceeding.

The issue of whether the Chief was required to file a notice of appearance is crucial to Kay's ability to prepare a legal defense to the allegations in the HDO. The two rules that apply in the instant matter are 1.221(d)&(e), 47 C.F.R. 1.221(d)&(e) and 47 C.F.R. §1.91. Rule Section 1.91(c) applies only to Kay in the instant matter. However, Section 1.221(e) of the Commission's Rules requires that

in order to avail himself of the opportunity to be heard, any person named as a party pursuant to paragraph (d) of this section shall, within 20 days of the mailing of the notice of his designation as a party, file with the Commission, in person or by attorney, a written appearance in triplicate, stating that he will appear at the hearing. Any person so named who fails to file this written statement within the time specified, [sic] shall, unless good cause for such failure is shown, forfeit his hearing rights.

47 C.F.R. §1.221(e). This rule applies to any person named by the Commission. No exception is made for the Chief of a Commission bureau. The reasons behind the rule are clear. Only by having all parties involved in the proceeding enter the required notice of appearance can all parties be apprised of who has chosen to participate. In computing deadlines, the date that a party entered an appearance is used to calculate subsequent deadlines. Rule Section 1.246(a), 47 C.F.R. §1.246(a), provides that requests for admissions are to be served within 20 days after the time for filing a notice of appearance has expired. Were the chief of a bureau not required

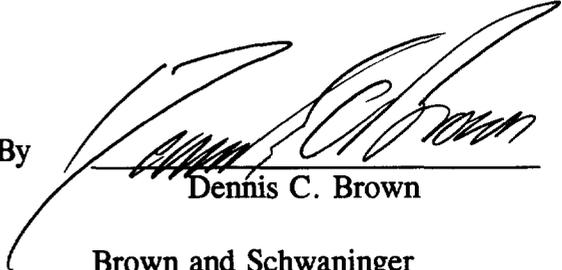
to file a notice of appearance, then either no opportunity would arise for the bureau to request admissions or the licensee would be vulnerable to service of a request for admissions up to the date of the hearing. Unless one result or the other is reasonable, the Order must have been in error.

This request for permission to appeal is filed pursuant to 47 C.F.R. §1.301(c)(6). Kay respectfully explains that he is not requesting that the presiding officer reconsider his action in the Order but rather, he is requesting permission pursuant to 47 C.F.R. §1.301(c)(6) to file an interlocutory appeal with the Review Board.

Conclusion

For all of the foregoing reasons, Kay respectfully requests permission to file an interlocutory appeal of the January 30 Order with the Review Board.

Respectfully submitted,
JAMES A. KAY, JR.

By 
Dennis C. Brown

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Dated: February 6, 1995

EXHIBIT I

REMARKS OF FCC CHAIRMAN REED E. HUNDT
CTIA CONVENTION

NEW ORLEANS, LA

FEB. 1, 1995

(as prepared for delivery)

ACKNOWLEDGEMENTS: Thank you Tom, for generous introduction. And thanks to all you for joining us this morning.

I. Glory of Wireless

I've heard about the prospects for an exciting new telecommunications sector called cellular. After careful consideration, we at the FCC are taking the advice of the experts. We are granting a single monopoly license for wireless communications to cover the entire country...

Okay, okay!

That would have been my speech--15 years ago. Then we were told that a single wireless license could collect as many as 900,000 customers by the year 2000 if we would only grant such a license. Indeed, that would have been a compound growth rate of 20% over the current customer base of 43,000 customers, and therefore an extraordinary growth rate in the world of telecommunications.

The predictions experts made then remind me of other predictions made at the birth of other industries.

finance, working hand-in-hand with Morgan to finance this country's heavy industry. Durant, looking for capital, told Perkins, "There will come a time when a half million automobiles are built and sold in this country." Perkins wrote later, "If this man has any sense at all, he will keep those observations to himself when he tries to borrow money."

Six years later, the U.S. auto industry achieved Durant's prediction. By 1920, only twelve years later, this country produced 2 million automobiles in a single year.

What lessons can we draw from these predictions? (1) All experts aren't expert?

(2) The future's not ours to see? Que sera, sera. (For those of you who don't remember much -- either last night or last year -- my era's singers of that song were Doris Day, the Four Aces, Little Wally, Henry Mancini, Sly and the Family Stone, and, last but not least, the Ray Conniff Singers.)

(3) The real lesson is that we should let markets not predictions or Commissions decide future growth.

Let's remember what markets can do: confounding all predictions, you now offer service to 97% of the country. The number of subscribers across the industry has

grown almost 50% in the last year. Wireless is quite simply the fastest growing sector of the U.S. economy in terms of new customers added. The cellular industry has attracted investment of over \$16 billion in private capital. And, most important for the working men and women, your industry has created 200,000 new, largely high-wage jobs.

The skills and economies of scale you are achieving in this market are making you world leaders in this industry. Your industry is the single largest positive component of this country's telecommunications balance of trade.

Indeed, the Global Information Infrastructure envisioned by Vice President Gore in his famous Buenos Aires speech last year will be in very significant part a wireless one. The GII will tie together the four corners of this earth with instantaneous untethered communication. Your industry is building that GII -- bringing education, sustainable development, and hope to the more than one-half of the world's population who have never even made a phone call.

By contrast, the intensely regulated Ma Bell monopoly took more than 30 years to get to 50% penetration in the USA.

In the very near future, we will all think of wireless communications devices the way we think about AM/FM radios. You don't even know how many you own;

you just want them around, ubiquitous, cheap, in every car, ready-to-wear, easy to carry, often turned on.

This isn't hard to imagine: isn't wireless the same as a radio, except it's two-way?

One result for the entire economy will be huge productivity gains. According to MIT, information technology has been responsible for up to one-half of the growth in total output in the U.S. in recent years. Thanks in large part to wireless technology, America will stay number 1 in productivity.

For us in public policy, this wireless revolution is a dream come true. I've been talking about competition most of my career--as an anti-trust lawyer, and as chairman of our hardworking little agency. Wireless truly is the dawn of a new age of competition. In this competition every kind of communication company should compete with every other. And what is the Sprint-cable company consortium in our PCS auctions but real, actual convergence of the different lanes of the information highway?

Everyone is excited about the auctions. Today or tomorrow we'll go over \$5 billion revenues from PCS. Let me digress briefly and give you a quick update on

these auctions: The latest figures are on \$2.5 million per FCC employee, and \$66 per household.

The public has focussed on the money raised. PCS is discussed as a competitor to cellular.

But what *really* drives the auction and the convergence is that PCS is not just about new entrants in the cellular market. It's about those entrants forming a profound re^{*}consideration of wireless. Competition in wireless is going to drive wireless companies to invade the local loop. You are going to find out the real limits of competition in the allegedly natural local telco monopoly -- in my view, are most unnatural monopolies government ever created.

But I'm no expert. I can't predict the future of your battle with the Bell monopolies. But I do know that competition among wireless companies and with the wireline companies will create hundreds of thousands of jobs and spur tens of billions of dollars of investment.

II. Mass Market

That competition will make wireless a mass market product. That means you need to do what Henry Ford did with the automobile; what George Eastman did with photographic film. You need to democratize consumption of wireless communications. You need to make your product affordable, accessible, and needed by everyone--not just business and high-end users. It also means your networks must have wireline quality and consistency. You will need to reduce dropped calls, and improve customer service. We all know you can attain these goals, as long as you attract investment and retain focus.

But it is competition that will provide the essential prerequisite of mass marketing: high value for the dollar, where value is a function of low price and high quality. Analysts tell us they see prices falling by over 40% from today's levels. And they've already come down some 20% in the last year.

But remember: the market you're invading is just so huge. The average talk time for a cellular customer is a tiny little number: 70 minutes per month. For a landline customer, it's 1,600 minutes a month. That's a very hospitable territory for you wireless invaders.

Today people pick up a wireline phone to make a call without giving it a second thought. When people treat wireless the same way, you will be a mass-market success--and you are going to be successful.

III. What Got You to this Point

Let's reflect on what happened to get you to this jumping off point for the bright future. We at the FCC have long plumped for the importance of your industry. Indeed one of our recent steps was to create a whole new bureau to deal with your issues--under the terrific leadership of Gina Keeney, who will be here today.

Our most important decision -- next to picking Gina -- was the plan for allocating spectrum. After we issued our first band plan for PCS, one executive told me "Don't make any changes." I said, "Why, you mean we finally did something perfectly right?" "No," he said, "because you'll only make it worse."

I did not accept that, for two reasons: one, I'm stubborn, and two, I knew you all could help us figure out a better plan.

So we worked hand-in-hand with industry, to create a workable allocation band plan. Then we worked with you to design the best way to sell the licenses.

Our auctions employ cutting edge game theory, a branch of economics more often found on the pages of abstract academic journals than on the pages of *BusinessWeek*. We use game theory to make sure bidders can't play games. What happens instead is that those users who value licenses most highly buy the licenses they want, putting together the regional plans they want.

The result is that our auctions have made the Guinness Book of Records as the biggest sale of public property in history. We had no history books to study how to do this. It was our privilege to work with you to write history.

But let me be clear: the auctions weren't intended to maximize revenue. They are supposed to reveal fair value. It's like the stock market, but better: no brokers and no commissions.

And licenses don't go to the people with the best lawyers and lobbyists. They go to the businesses with the best plans and the checkbooks to back them.

Furthermore, the auctions are a cash and carry business. The winners receive their licenses in record time. Our time to issue a license has gone down from years to months. The first narrowband winners received their licenses about 60 days after

the auction closed -- and you know nothing is supposed to happen in Washington in only 60 days.

What we didn't do is just as important; we did not develop hundreds of pages of rules to govern your industry. Because competition replaces regulation, the rules for PCS are shorter than the instruction booklet that came with my VCR -- and a lot easier to read.

Throughout, our overarching goal was to create as many viable competitors as we possibly could so that the market would do our job for us.

This is what we did.

Listening to me praise what we did is like listening to the guy who mixed paint for Michelangelo on the Sistine Chapel job. You deserve the credit for the success of the auction and the brilliance of the future of your industry.

More important is what you did. On behalf of the people of the U.S., let me say again we are very grateful to the bidders in these auctions, many of whom are sitting here in this room, because they are the people who are going to help lead this industry and this country into the next century.

IV. The Future

Now competition will do most of the jobs that regulators have to do in monopolized markets. But you are still going to need and want rules of fair competition.

The purpose of government is to do for everyone the right thing that no one person can accomplish on his or her own. That includes setting fair rules of competition. That should be our job at the FCCC--the Federal Commission for Competition in Communications.

Here are some specific issues we can address:

We'll need to face the issue of interconnection to the local loop. If wireless is to be a mass market, we will have to eliminate all bottlenecks between the source of information and the user, ensure consumer choice and promote competition..

Number portability will be critical as well. Here's an issue you can really help us on: we all know numbers will be scarce resources. A current FCC proceeding will address some of the issues surrounding this problem. But maybe we should be

thinking more creatively. For example, maybe we should consider auctioning valuable numbers. We know that's a good way to distribute valuable property in a non-discriminatory way, so that people who most need the numbers can get them. After all, we know that you're having trouble getting the numbers you need from the local phone companies.

Certainly, we need to recognize that the current system is broke. We need to think about how we can get the market to take over.

And we'll need to sort out universal service in this new world. If you're successful, you'll take minutes away from local exchange carriers who have an obligation to pay into the fund whose purpose it is to make phone service available to everyone.

As your success increases, your obligation to share this burden will increase. You should come up with a proposal over the next several months for a way in which you can contribute to legitimate universal service goals.

At the local level, we need to ensure that local zoning restrictions do not derail the build-out. The Commission has put CTIA's petition for rulemaking on public notice, and I'm looking forward to reading the comments over the next several weeks. What I can say, however, is that if a truly ubiquitous competitive wireless market is to develop, the industry cannot be held up by occasionally irresponsible local zoning boards; consumers don't want coverage to look like Swiss cheese.

At the state level, Congress gave us the authority to make certain that no state impose rate regulation on commercial mobile radio service (CMRS) providers unless that state can demonstrate unreasonable rates.

When I was at the NARUC convention in November, I told the state regulators that I was concerned about recent developments in the emerging wireless market. A handful of states have petitioned the FCC for the right to regulate the rates of CMRS, such as cellular and soon-to-be PCS licensees. Certainly we will analyze these petitions carefully and expeditiously -- we are committed to completing our review by August. But, as I told the states, continued rate regulation in markets that are demonstrably competitive disserves the interests of consumers. And we will not sanction it at the FCC.

As you may know a long, long time ago when cellular telephones where no more real than Dick Tracy's wrist phone, I was a school teacher. I learned then, what I know now. While the rest of the country is moving into the 21st century, we condemn our children to learn in the 19th century--and that's if they're lucky. Wireless technology can bring the information highway to every classroom in the country. You can empower teachers. You can make sure that they are just as productive as the rest of the work force that is striding into the information age.

You're association has already shown great leadership in developing the power of wireless communications to revolutionize communications. John Stupka has personally made a commitment by creating in Dallas the first interlinked wireless classrooms. I know each and every one of you would be privileged and honored to save our public schools and brighten our children's futures by bringing the information highway into every classroom and to the desk of every teacher and student in this country. And if you want to build these networks over the air instead of down the wires, that'll be just fine with all of us. But we need you to figure out what you need government to do to help you make this dream come true.

Just as when we worked together to develop the PCS spectrum plan, we want you to tell us what you need. We're happy to be the paint mixers for all of you Michaelangelos.

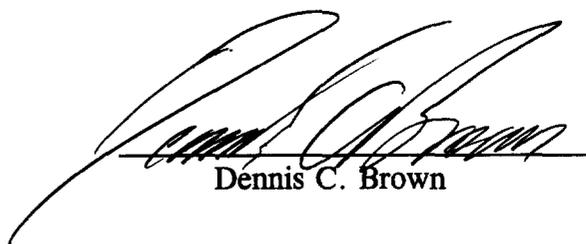
Thank you and have a great time here in New Orleans.

CERTIFICATE OF SERVICE

I, hereby certify that on this 6th day of February, 1995, I served a copy of the foregoing Request for Permission to File Appeal on each of the following persons by placing a copy in the United States Mail, first-class postage prepaid:

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Dennis C. Brown

* By Hand Delivery