

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

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WT Docket No. 94-147

In the matter of)
)
JAMES A. KAY, JR.)
)
Licensee of one hundred sixty-)
four Part 90 licenses in the)
Los Angeles, California area.)

To: Administrative Law Judge
Richard L. Sippel

RECEIVED
JAN 11 1996
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

OPPOSITION OF JAMES A. KAY, JR. TO WIRELESS TELECOMMUNICATIONS
BUREAU'S MOTION FOR SUMMARY DECISION AND ORDER REVOKING LICENSES

James A. Kay, Jr. ("Kay"), by his attorneys and pursuant to Section 1.251(b) of the Commission's Rules, hereby opposes the Motion for Summary Decision and Order Revoking Licenses (the "Motion") filed by the Wireless Telecommunications Bureau ("Bureau") on December 4, 1995. In support thereof, Kay states as follows.

1. The Motion is procedurally defective and should be dismissed forthwith based on the Bureau's failure to file the supporting affidavit required by Section § 1.251(a)(1) of the Commission's Rules.

2. Even assuming that the Motion is not dismissed as procedurally defective, it must still be denied. In order to secure a grant of summary decision, a movant must meet the stringent standards that serve to "insure due process." Midwest St. Louis, Inc., 48 RR 2d 95, 104 (1980). This requires a showing that no genuine issue of material fact exists for determination at hearing. Summary Decision Procedure, 24 RR 2d 1715 (1972). The burden is on the movant to establish that there

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is no doubt as to facts and only that legal conclusions remain. The Presiding Judge is to proceed with a hearing even if evidentiary standards are met, when it is otherwise appropriate "in view of the nature of the proceeding or the surrounding circumstances." Midwest St. Louis, Inc., supra

3. In this instance, the Bureau has not even made an evidentiary showing.¹ Rather, it is seeking summary decision based on its allegation that Kay has failed to supply it with discovery materials.² This is not what is required by the rules in order to secure a summary decision.³ Further, as will be shown herein, Kay has responded to the Bureau's requests with the documents he possesses and is not subject to any penalty, let alone a summary decision.

4. In the event the Court considers the Motion, Kay respectfully submits this Opposition and states that the Bureau has not met its heavy burden that summary decision is appropriate. In this Opposition, Kay responds only to the

¹ The Presiding Judge should consider a summary denial of the Bureau's Motion under Section 1.251(f) of the Commission's Rules.

² Interestingly, the Bureau has disclaimed any obligation to provide discovery materials to Kay. Kay has had to resort to the Freedom of Information Act process, in order to obtain discovery, with the attendant delays in the provision of information to Kay and the requirement that he pay substantial fees to secure any discovery from the Commission. Kay's responses were provided, in contrast, on a timely basis and for free.

³ If the Bureau finds Kay has not responded to it, the Bureau has the right to compel responses, under Section 1.325(a)(2), or such other relief that the Presiding Judge can authorize, short of a summary decision.

Bureau's central allegation; namely, that Kay has failed to properly answer Interrogatory No. 4. Kay is not responding to the Bureau's allegations concerning Kay's previous objections to the Bureau's request for information prior to the issuance of the Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, FCC 94-147, released December 13, 1994, as they bear no relevance to the Motion.

5. Kay has fully complied with all requests for information in formal discovery, and has also complied with the Presiding Judge's Order, FCC 95M-203, released October 31, 1995, regarding Interrogatory No. 4. The Bureau has made no allegation that any of its discovery (other than Interrogatory No. 4) remains unanswered. Since Kay's supplemental answers to the Bureau's Interrogatory No. 4, dated November 13, 1995, the Bureau never made any request to Kay for additional information or clarification.

6. Contrary to the Bureau's allegations repeated throughout the Motion, Kay has not refused to provide information regarding his loading. In fact, Kay has provided all information and records available to him. As proven herein, Kay has unequivocally answered Interrogatory No. 4 to the best of his ability. In addition, in prior discovery, Kay has turned over all of his customer records to the Bureau. The Bureau now has

all records which Kay possesses, including a hard copy of his customer database.⁴

7. On page 6 of the Motion, the Bureau describes Kay's responses to Interrogatory No. 4 as "woefully inadequate" because Kay's responses allegedly do not:

- a. provide loading information dating back to January 1, 1991;
- b. produce customer lists and number of mobile transmitters for each specific call sign;
- c. include all classes of end users such as demo, loaners, non-paying customers, etc; and
- d. adequately identify end users, even though it refers to a customer list, which was provided to the Bureau several months earlier.

8. In order to understand Kay's answer to Interrogatory No. 4, and the limitations provided therein, it is necessary to first understand how Kay's records are maintained. What follows is a detailed account of these practices, the rationale for them, and a brief accounting of the records that were previously provided to the Bureau.

9. Kay does not maintain historical loading information. As set forth in his response to Interrogatory No. 4, Kay only has

⁴ It should be noted that the Bureau has modified its initial request for loading information to make it far more onerous. In its January 1994 letter, the Bureau did not request historical loading data going back to 1991, but instead requested only the then current data. Interrogatory No. 4 actually requests much more than was originally requested, and represents a "moving of the goal posts" by the Bureau. Nevertheless, Kay has done his best to comply with the Presiding Judge's Order, FCC 95M-203, released October 31, 1995, requiring a further response. Kay has not attempted to avoid answering Interrogatory No. 4 and has responded to the best of his knowledge and ability.

current information. Kay keeps his records in two ways. Kay keeps 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. Kay has 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 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 Kay's 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 Kay's customers which is known to exist.

10. Historical loading records do not exist in any form, and cannot be accurately constructed because of the way Kay's 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.

11. Kay has 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.

12. Furthermore, as the Bureau is fully aware, the Northridge Earthquake, which occurred on January 17, 1994, had a devastating impact on Kay's business. The epicenter of this seismic event was approximately 3.5 miles from Kay's office location. Kay's office sustained significant damage, including damage to its computer system. His computerized billing system hard disk was destroyed and Kay 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.

13. This detailed background has been provided so that the following points will be made crystal clear:

- a. The customer information on Kay's computerized billing system has now been supplied twice to the Bureau in two different formats in response to the Bureau's demands. This can hardly be described as uncooperative.
- b. 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 was supplied. If Kay's customer 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 Kay's 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." No attempt has been made to withhold information from the Bureau. Kay simply does not possess a "time machine" which would allow him to go back in time to create records to satisfy the Bureau's inquiry in whatever format the Bureau desires.
- c. With respect to the charge by the Bureau that Kay did not provide "loading records" for each call sign, Kay has pointed out on numerous occasions that he never maintained records "by call sign," and the closest he could come to providing this information was to hire, at considerable expense, a computer programming expert to write a custom

computer program to have his computerized billing program produce a "loading report" indexed from the frequency/site or system fields. Instead, the "loading reports" that Kay 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. It was then necessary for Kay 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." Kay then personally wrote the appropriate call sign(s) on each report. A sample page of the response to Interrogatory No. 4 is attached as Exhibit "A", showing the call signs which were provided. However, Kay incorporates his full response to the Bureau's Interrogatory No. 4 in this Opposition.

- d. Moreover, where multiple call signs are listed, all customers have access to both or all of the call signs. This is the only way Kay could possibly list this information, unless, of course, the Bureau wants him to make multiple copies of the same list and handwrite one call sign on each list. Kay has gone to considerable trouble and expense to provide the most accurate information possible, in response to Bureau's prior requests.
- e. 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 Kay 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 Kay's stations were fully loaded for making application for additional frequencies.
- f. Repeater service on Kay's stations has been provided on a "no billing" basis for in-house use, rental units, "loaner" units, demonstration units, and charitable contributions from Kay's own shop and other radio dealers with whom Kay has 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.

- g. Finally, 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 Kay's customers. Attached hereto as Exhibit "B" is a sample of this data that Kay previously supplied. The Bureau was supplied with all the names, addresses, and telephone numbers of Kay's 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.

14. In the Motion, the Bureau requests the ultimate sanction of a judgment against Kay based on Kay's alleged failure to answer Interrogatory No. 4. The Bureau's request is improper since Section 1.251(a)(1) of the Commission's Rules provides that summary decision should be granted only "when there is no genuine issue of material fact for determination at hearing." As demonstrated above, Kay has fully responded to Interrogatory No. 4. Even assuming, arguendo, that Kay has not fully responded to Interrogatory No. 4, however, material issues of fact remain in dispute. In fact, the Bureau has not proved that any material issues of fact have been resolved in its favor. The Bureau merely makes the unsupported and self-serving conclusion that "[t]he Bureau has satisfied its burden of establishing that the truth is clear, the basic facts are beyond dispute, and there can be no reasonable disagreement on the inferences to be drawn from the facts." (See Motion, Pg. 12). As the moving party, the

Bureau has the burden of establishing that summary decision is warranted not serving as the arbiter of fact, which resides with the Presiding Judge. See, e.g., Coyle Communications, Ltd., 3 FCC Rcd 2302 (ALJ 1988), citing, Summary Decision Procedures, supra. The Bureau has not even begun to carry this heavy burden of proof and is not entitled to the relief it seeks.

15. Attached hereto as Exhibit C and incorporated herein by reference is Kay's Declaration in support of his Opposition.

CONCLUSION

WHEREFORE, for all the foregoing reasons, Kay respectfully requests that the Bureau's Motion be dismissed or, in the alternative, denied.

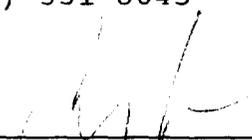
Respectfully submitted,

JAMES A. KAY, JR.

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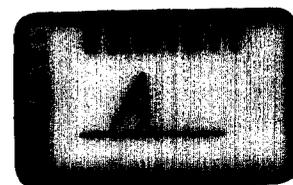
Dated: December 18, 1995

KRV 576

Page 1

LOADING REPORT
800.0000 21 H-HILLS

| Name | Bases | Mobiles |
|---------------------------------|-------|---------|
| A V C AUTO PARTS, INC. | 1 | 4 |
| A. J. LIMOUSINE, INC. | 1 | 3 |
| A/C COMPANY | 1 | 2 |
| AARON'S WINDOW COVERINGS | 1 | 5 |
| ALL STAR TOWING | 1 | 4 |
| ANGEL CITY MESSENGER | 1 | 4 |
| AQUATIC POOLS, INC | 1 | 3 |
| ARGUBRIGHT CONSTRUCTION | 1 | 4 |
| AUTO STIEGLER, INC. | 1 | 2 |
| AUTOMATIC SPRINKLER CONTROL | 1 | 5 |
| BLACK TIE LIMOUSINE | 1 | 7 |
| BRUCE WATSON PAINTING | 1 | 2 |
| BULLMASTER CONSTRUCTION | 0 | 2 |
| CARDINAL EXPRESS | 1 | 17 |
| COMMERCIAL ELECTRIC MOTORS, INC | 1 | 3 |
| COMMUNICATION CENTER - DEMO | 0 | 0 |
| D & D CONSTRUCTION | 1 | 10 |
| DATA EXPRESS DEMOS | 0 | 0 |
| DELTA TOWING | 0 | 3 |
| DENNIS NYBACK CONSTRUCTION | 1 | 4 |
| DIAMANTE POOL PLASTERING CO. | 1 | 3 |
| DIGITAL COMMUNICATIONS | 6 | 9 |
| DJS FILM COURIER | 0 | 4 |
| EARTH & ART LANDSCAPE | 1 | 6 |
| EVENT TECHNICAL SERVICES | 0 | 6 |
| F L I POOL & SPA SERVICES | 1 | 5 |
| FOLGER ROOFING | 0 | 5 |
| FOOTHILL TRANSPORTATION | 0 | 6 |
| FOUR MEDIA COMPANY | 2 | 4 |
| G. B. COOKE, INC. | 1 | 9 |
| GIL'S ELECTRICAL SERVICE | 1 | 2 |
| GLOBAL PROJECTS LTD | 0 | 3 |
| HBE MANAGEMENT & INVESTMENT | 1 | 6 |
| HOLCHEM, INC | 1 | 10 |
| HOME RUN PIZZA | 1 | 1 |
| J. V. MC BURNEY CONCRETE CONST | 1 | 5 |
| JAN MAR COURIER, INC. | 1 | 17 |
| JIM MARSHALL CONSTRUCTION, INC | 1 | 2 |
| JMS AIR COND. & APPLIANCE SVC. | 1 | 3 |
| JOHNSON-FRANK & ASSOC., INC | 1 | 15 |
| KENCO CONSTRUCTION, INC | 1 | 24 |
| L. A. SOUND CO. | 1 | 2 |
| LA CIENEGA STUDIO CLEANERS | 0 | 5 |
| LIVINGSTON PONTIAC | 1 | 2 |
| M & M KEY SERVICE | 2 | 9 |
| MAGNUM FORCE PATROL | 1 | 6 |
| MARTY'S PLUMBING COMPANY | 0 | 3 |
| MATLEE GENERAL CONTRACTING | 0 | 2 |
| MDX MEDICAL DIAGNOSIS X-RAY | 1 | 12 |
| METRO MOBILE COMMUNICATIONS | 44 | 19 |
| MONTOYA TERMITE CONTROL | 1 | 3 |



LOADING REPORT
800.0000 21 H-HILLS

KR0576
Page 2

| Name | Bases | Mobiles |
|--------------------------------|-------|---------|
| MUSTANG INVESTIGATION SERVICES | 0 | 3 |
| NATIONWIDE EAGLE SECURITY | 1 | 12 |
| PACIFIC WEST LANDSCAPE & MTNCE | 0 | 3 |
| PORTABLE CLINIC | 1 | 0 |
| PROTECTION ONE | 4 | 65 |
| R & S EXTERMINATORS | 1 | 26 |
| RADAR SHOPPING CART RETRIEVAL | 0 | 17 |
| RANDY THE HANDYMAN | 1 | 4 |
| SCENERY WEST | 1 | 3 |
| SEGALA TREE SERVICE | 1 | 4 |
| SEQUOIA WOOD PRODUCTS | 1 | 2 |
| SOUTHLAND DEMO CODES | 1 | 1 |
| STRAIGHTLINE TRANSPORT SERVICE | 1 | 12 |
| STUART CONSTRUCTION CO. | 1 | 4 |
| THE DORLAND COMPANY | 1 | 8 |
| THE GATEKEEPER | 1 | 2 |
| TRITECH ASSETS SERVICES GROUP | 0 | 21 |
| UNIVERSAL PRIVATE SECURITY | 1 | 8 |
| V & K TRUCKING | 0 | 3 |
| VAN NUYS PLYWOOD & LUMBER | 1 | 3 |
| VISUAL CONCEPTS | 0 | 2 |
| WAVELINK - DEMO CODES | 0 | 0 |
| WILLIAM FRANKEL PLUMBING | 1 | 9 |
| WOODCRAFT | 1 | 2 |

KRV576

Page 3

LOADING REPORT
852.5125 10 LUKENS

| Name | Bases | Mobiles |
|-----------------------------|-------|---------|
| DIGITAL COMMUNICATIONS | 1 | 14 |
| ROGERS & MC DONALD GRAPHICS | 1 | 7 |
| ROGERS & MC DONALD GRAPHICS | 1 | 0 |

KR0576

Page 9

LOADING REPORT
800.0000 21 H-HILLS

| Name | Bases Mobiles | |
|---------------|---------------|-------|
| ----- | ----- | ----- |
| A. J. ROOFING | 1 | 9 |

DECLARATION

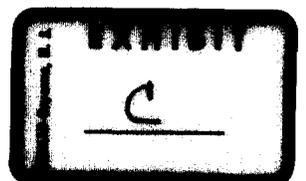
I, James A. Kay, Jr., declare under penalty of perjury that the following is true and correct:

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



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.

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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."

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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.

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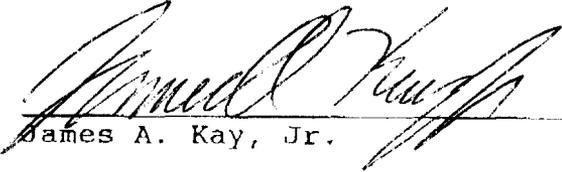
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Executed at Van Nuys, California on the 15th day of
December, 1995.


James A. Kay, Jr.

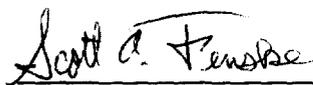
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Opposition of James A. Kay, Jr. To Wireless Telecommunications Motion for Summary Decision and Order Revoking Licenses was sent via first-class mail, postage prepaid on this 10th day of December, 1995 to the following:

Gary P. Schonman, Esquire
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