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FEDERAL COMMUNICATIONS COMMISSION  
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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of ) WT DOCKET NO. 94-147  
)  
**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

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**WIRELESS TELECOMMUNICATIONS BUREAU'S REPLY TO  
OPPOSITION TO MOTION FOR SUMMARY DECISION  
AND ORDER REVOKING LICENSES**

1. On December 4, 1995, the Wireless Telecommunications Bureau filed a motion for summary decision, adverse to James A. Kay, Jr. ("Kay"), of the § 308(b) issue in this proceeding. See Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, FCC 94-315 (released December 13, 1994) ("Show Cause Order"), at ¶ 10(a). The Bureau also requested the Presiding Judge to issue a further order revoking Kay's licenses because Kay is unqualified to remain a Commission licensee. On January 11, 1996, Kay opposed the Bureau's motion. Pursuant to authority granted by the Presiding Judge in Order, FCC 96M-1 (released January 18, 1996), the Bureau hereby submits this reply.

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2. Initially, Kay erroneously asserts that the Bureau's motion is procedurally

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defective because it does not contain a supporting affidavit. Section 1.251 of the Commission's Rules states:

The party filing the motion may not rest upon mere allegations or denials but must show, by affidavit *or by other materials subject to consideration by the presiding officer*, that there is no genuine issue of material fact for determination at the hearing. (emphasis added)

The Bureau explicitly recognized these requirements for seeking summary decision when it stated, at footnote 13 of its motion, that it is relying on "other materials subject to consideration by the presiding officer." This evidence includes correspondence from the Commission to Kay that Kay has admitted receiving, reply correspondence that Kay has admitted directing to the Commission, admissible discovery materials, and orders of the Presiding Judge in this proceeding. Since § 1.251 requires that the moving party rely on *either* an affidavit *or* other materials subject to consideration by the Presiding Judge, and the Bureau provided such other materials, the Bureau has clearly satisfied its threshold burdens under the rule section. Accordingly, Kay's procedural challenge to the Bureau's motion must be rejected.

3. Kay also suggests, at footnote 3, that the Bureau erred by filing a motion for summary decision instead of a motion to compel. This argument is flawed. The Bureau *already* filed a motion to compel, and the Presiding Judge agreed that Kay's response was deficient. As a result, the Presiding Judge *ordered* Kay in no uncertain terms to answer Interrogatory No. 4 "fully and completely." Order, FCC 95M-203 (released October 31, 1995). Kay's failure to heed the Presiding Judge's Order is substantially more serious than his initial failure to fully answer the Bureau's interrogatory. The Presiding Judge issued his

Order compelling Kay to answer Interrogatory No. 4 after a thorough and reasoned analysis of all the arguments advanced by the Bureau in its motion to compel and by Kay in his opposition thereto. Kay's continued failure to answer the interrogatory fully and completely, in the face of a valid discovery order, constitutes a flagrant and contemptuous disregard for the Commission's processes and a *further violation* of § 308(b).<sup>1</sup> The filing of a further motion to compel at this juncture would thus be an unnecessary and futile gesture given the gravity of Kay's actions. Indeed, while the Bureau continues to believe that the information sought in Interrogatory No. 4 is absolutely critical for the purpose of resolving the loading-related issues in this proceeding (Show Cause Order, at ¶¶ 10(c) and 10(d)), it is Kay's repeated failure to produce the requested information, as sought by the Commission prior to designation and as ordered by the Presiding Judge during discovery, that is key to resolving the § 308(b) issue in this case. (Show Cause Order, at ¶ 10(a)). Accord, WOKO, Inc., 329 U.S. 223, 227 (1946) (The fact of concealment may be more significant than the facts concealed.). Given the compelling evidence presented by the Bureau, there is nothing left for discussion at the hearing insofar as the § 308(b) issue is concerned. Even if Kay, at this late date, were to suddenly produce the requested loading information, he has secured by his pattern of conduct (prior to and after designation) that the § 308(b) issue should be resolved against him. Accordingly, the Bureau appropriately filed a motion for summary decision,

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<sup>1</sup> In his opposition, Kay does not contest that § 308(b) of the Act establishes an additional ground for requiring a complete answer to an interrogatory. See, Order, FCC 95M-203 (released October 31, 1995), at n. 1. Thus, Kay's failure to comply with the Presiding Judge's discovery Order constitutes an additional basis, separate and distinct from Kay's predesignation refusal to turn over his loading information, for resolving the § 308(b) issue against Kay.

not merely a request for a redundant order to compel.

4. Kay's opposition mischaracterizes the nature of the Bureau's motion. Kay suggests, at ¶ 3, that the Bureau is seeking summary decision based on the allegation that Kay has failed generally to provide the Bureau with "discovery materials." This is incorrect. The Bureau's motion is predicated on the fact -- supported by reliable evidence -- that Kay willfully and/or repeatedly violated § 308(b) of the Act before this case was designated for hearing and again by his post-designation failure to comply fully and completely with the Presiding Judge's Order, FCC 95M-203 (released October 31, 1995), compelling Kay to produce information requested in Interrogatory No. 4. The Bureau has posited no allegation of a general failure by Kay to comply with discovery requests. However, Kay's defiance of the Presiding Judge's Order compelling him to respond to Interrogatory No. 4 plainly constitutes "the straw that broke the camel's back" insofar as the § 308(b) issue is concerned. Merely because Kay may have provided other information sought by the Bureau during discovery does not establish a justification for failing to provide the specific information requested in Interrogatory No. 4, particularly when the significance of the information in question has been the subject of robust discussion and the Presiding Judge has stepped in and

directed Kay to provide the information.<sup>2</sup> Stated otherwise, Kay cannot be permitted to rely on the fact that he has answered other interrogatories or document requests in an effort to avoid responding fully and completely to Interrogatory No. 4.

5. Interrogatory No. 4 -- and the Presiding Judge's discovery Order -- required Kay to compile information that is uniquely within his control to enable the Bureau and the Presiding Judge to determine whether Kay is and has been in compliance with the Commission's loading requirements. Among other things, Kay was required to report the number of mobile units operating on each of his stations and to attribute each mobile unit to a specific station. Kay has not done this. In both of his responses thus far to Interrogatory No. 4, Kay has merely provided aggregate loading; that is, the number of mobile units claimed to be operating from a particular site on any of *multiple* stations. He has never identified the number of mobile units claimed for *each specific station* of which he is the licensee. Furthermore, he has never reported how his mobile units are attributed to each specific station.

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<sup>2</sup> Kay's related suggestion, at footnote 2 of his opposition, that he has somehow been placed at a disadvantage because he alone must "resort" to the Freedom of Information Act in order to obtain documentary information, is disingenuous. Kay has availed himself of his FOIA rights on more than a score of occasions so far, prompting the Commission to turn over many pages of materials to Kay. Indeed, the Presiding Judge has all but cautioned Kay on the number of FOIA requests that he has submitted to the Commission. See Order, FCC 95M-209 (released November 24, 1995). Moreover, and contrary to Kay's further suggestion, the Bureau has never disclaimed any obligation to provide discovery materials to Kay. The Bureau's actions in this adjudicatory proceeding are strictly governed by the Commission's rules of procedure, and the Presiding Judge has found the Bureau to have acted in complete compliance with those rules. See e.g., Order, FCC 95M-102 (released April 7, 1995).

6. Kay claims, at ¶ 4 of his opposition, that facts concerning his predesignation § 308(b) violations "bear no relevance to the [Bureau's] Motion." This is patently incorrect. Kay's failure to provide information in response to multiple § 308(b) inquiry letters is one of the primary reasons why Kay's licenses were placed in hearing. Indeed, it is *the* reason why the issue at ¶ 10(a) of the Show Cause Order was designated against Kay. See Show Cause Order, at ¶¶ 6-9. Since evidence of Kay's repeated failure to respond to official letters of inquiry prior to designation is relevant to the disposition of the § 308(b) issue, the Bureau properly met its burdens under § 1.251, in part, by providing as exhibits to its motion, critical predesignation correspondence between Kay and the Commission. Kay has heretofore admitted to the genuineness of these documents. *On their face*, the documents evidence willful and repeated violations by Kay of § 308(b) of the Act, and, standing alone, provide an independent basis for resolving the issue against Kay. Indeed, the only reasonable inference that one can draw from these documents after examining them closely in context is that Kay acted in an utterly unconscionable manner unbecoming a licensee. In sum, evidence about Kay's conduct prior to designation is not simply relevant to the § 308(b) issue, it is inextricably linked to the issue.

7. The remainder of Kay's opposition is devoted to attempting to justify Kay's noncompliance with the Presiding Judge's Order compelling production of the information requested in Interrogatory No. 4. Kay concedes that he has not provided all of the information which the Presiding Judge required Kay to provide. However, he offers a

number of "excuses" for not providing the information. For instance, Kay claims at ¶ 6, that he has "provided all the information and records available to him." At ¶ 9, Kay argues that he "does not maintain historical loading information"; he only has "current information"; and "the Bureau now has a copy of every single record of Kay's customers which is known to exist." At ¶ 10, Kay asserts that "[h]istorical loading records do not exist in any form, and cannot be accurately constructed . . . ." At ¶ 11, Kay states he "has regularly purged [his] records" and that the last such "regular deletion" of information took place in "approximately the last quarter of 1993." At ¶ 12, Kay indicates that, as a result of the January 17, 1994, earthquake, his "computerized billing system hard disk was destroyed . . . ." At ¶ 13, among other things, Kay posits a baseless and insulting accusation that the Bureau does not understand the information which Kay has already provided.

8. These excuses collectively do not absolve Kay. After the Commission first asked for Kay's loading information in early 1994, and despite extensions of time to accommodate him, Kay insolently refused to submit the data because, in Kay's words, there was no date "for which the submission of the requested information would be convenient."<sup>3</sup> In his June 12, 1995, Opposition to the Bureau's Further Motion to Compel Answers to Interrogatories, Kay proffered similar reasons why he should not be required to provide the information requested in Interrogatory No. 4. Nevertheless, Kay conceded at page 3 of his June 12, 1995, filing:

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<sup>3</sup> See, Bureau's Motion for Summary Decision and Order Revoking Licenses, Attachment 5.

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 his full time efforts for at least 90 days, and Kay simply lacks the resources to conduct such an inquiry.

Thus, although he stated that it might be difficult, Kay acknowledged *more than six months ago* that he could indeed provide the requested information to the Bureau. The Presiding Judge rejected Kay's claim that providing the information would constitute an undue hardship, and, in his Order compelling Kay to answer Interrogatory No 4 fully and completely, the Presiding Judge concluded that "there has been *no showing* that the request is unreasonably burdensome." (emphasis added).<sup>4</sup> Rather than complying with the Order and making a good faith effort to, in Kay's words, "ascertain the requested information," Kay provided yet another inadequate response. Kay never contacted any of his customers to obtain the requested information, as he indicated he could. In this regard, the Commission has stated that "a party may not unreasonably ignore information available to it from outside sources or fail to make good faith attempts to obtain such information." Faith Center, Inc., 82 FCC 2d 1, 27 (1980) (footnote omitted). Kay essentially admits that all he did was reformat information that he had previously provided to the Bureau.<sup>5</sup> This is not even arguably close to complying with the Presiding Judge's Order.

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<sup>4</sup> In rejecting Kay's claim of hardship, the Presiding Judge relied, in part, on Report and Order, 7 FCC Rcd 6344, 6344-45 (1992), wherein the Commission stated that, despite the burden on licensees, loading reports would continue to be required in compliance cases. Kay has been on notice *for years* that the Commission retains the authority to receive critical loading information upon request for the purpose of ensuring compliance with its loading requirements. Id.

<sup>5</sup> See, Kay's Opposition, at ¶ 13(c).

9. The Bureau fully recognizes the seriousness of its request. Indeed, prior to filing its motion, the Bureau thoroughly analyzed all of the salient facts, the prevailing law, and the possible ramifications. In making its decision to move for summary decision, the Bureau observed, in part, that § 308(b) of the Act constitutes a fundamental regulatory tool upon which the Commission relies to ensure compliance by its licensees. The Bureau further relied on the fact that the loading data that it has repeatedly tried to obtain from Kay since 1994 is precisely the information which the Commission in 1992 said it would continue to require from licensees in enforcement proceedings. In the final analysis, Kay's callous disregard for the Commission's processes and his cavalier attitude toward his responsibilities as a licensee can no longer be tolerated or condoned. The Wireless Telecommunications Bureau has satisfied fully all of its burdens for summary decision, and the § 308(b) issue is ripe for disposition. Accordingly, the Presiding Judge should exercise his authority under § 1.251,<sup>6</sup> resolve the § 308(b) issue against Kay, find that Kay is basically unqualified to

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<sup>6</sup> See, Summary Decision Procedures, 34 FCC 2d 485, 487 (1972) (wherein the Commission endorsed the position that the function of § 1.251 is to avoid a useless hearing.).

remain a licensee, order the revocation of Kay's licenses, and terminate this proceeding.

Respectfully submitted,  
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January 22, 1996

CERTIFICATE OF SERVICE

I, Natalie Moses, a secretary in the Complaints and Investigations Branch, Mass Media Bureau, certify that I have, on this 22nd day of January 1996, sent by regular First Class United States mail, copies of the foregoing "Wireless Telecommunications Bureau's Reply to Opposition to Motion For Summary Decision and Order Revoking Licenses" to:

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