

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.

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MAR 15 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY  
WT Docket 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

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**SUPPLEMENTAL OPPOSITION TO WIRELESS TELECOMMUNICATIONS BUREAU'S  
MOTION FOR SUMMARY DECISION AS SUPPLEMENTED BY  
MOTION FOR LEAVE TO FILE SUPPLEMENT AND SUPPLEMENT TO  
MOTION FOR SUMMARY DECISION AND ORDER REVOKING LICENSES**

James A. Kay, Jr. ("Kay"), by his attorneys and pursuant to Section 1.294(b) of the Commission's Rules, files this Supplemental Opposition the Wireless Telecommunications Bureau's (the "Bureau") Motion for Summary Decision as Supplemented by Motion for Leave to File Supplement and Supplement to Motion For Summary Decision and Order Revoking Licenses (the "Motion"). In support thereof, Kay states as follows.<sup>1</sup>

**INTRODUCTION**

1. On December 13, 1994, the Bureau released its Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, FCC 94-147 (the "HDO").

2. In the HDO, the Bureau sought to, inter alia, revoke one hundred sixty-four (164) licenses allegedly held by Kay. (See page one of the HDO ("James A. Kay, Jr. (Kay), holder of one

<sup>1</sup> Pursuant to the Presiding Judge's Order, FCC 96M-33, released March 11, 1996, the Presiding Judge extended the time by which Kay could file the instant pleading to March 15, 1996.

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hundred sixty-four (164) land mobile licenses . . ."). A list of the one hundred sixty-four (164) licenses that the Bureau designated for hearing is attached as Appendix A to the HDO.

3. One year later, on December 4, 1995, the Bureau filed a Motion for Summary Decision seeking to revoke Kay's licenses and terminate the above-captioned proceeding based on Kay's alleged pre- and post-designation misconduct.

4. On February 23, 1996, fourteen (14) months after issuance of the HDO and three (3) months after it filed its Motion for Summary Decision, the Bureau filed the instant Motion.

5. In its Motion, the Bureau sought to "clarify" its position in this case and only to seek revocation of the licenses identified as Nos. 1-152, thereby omitting Nos. 153-164, in Appendix A of the HDO. According to the Bureau, License Nos. 153-164, "are held in the names of entities ('Multiple M Enterprises, Inc.: Kay, Jr., James A. LP' and 'Marc Sobel') in which the full nature and extent of Kay's involvement remains unclear." See, Motion, Pg. 2.

#### ARGUMENT

**I. THE MOTION SETS FORTH ANOTHER DEFICIENCY IN THE BUREAU'S CASE AGAINST KAY. THIS IS AN ADMISSION BY THE BUREAU THAT ITS CASE AGAINST KAY IS SUSPECT, THEREBY PRECLUDING SUMMARY DECISION IN FAVOR OF THE BUREAU**

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In the Motion, filed over fourteen (14) months after issuance of the HDO, the Bureau admits a blatant deficiency in its case against Kay and adds substantial doubt as to the factual basis underlying the HDO. It further evidences why the Bureau so tenaciously seeks to have this matter terminated by summary

decision, rather than having to meet the twin burdens of going forward and establishing its case, which it would have to do if this case proceeds to trial. In Paragraph three (§ 3) of the HDO, the Bureau alleged that "[i]nformation available to the Commission also indicates that James A. Kay, Jr. may have conducted business under a number of names. . . We believe these names include some or all of the following: . . . Multiple M Enterprises, Inc.; . . . Marc Sobel dba Airwave Communications . . ." After fourteen (14) months and Kay's production of over 36,000 documents to the Bureau, the Bureau now admits that at least a portion of Paragraph three (§ 3) of the HDO was incorrect.<sup>2</sup>

There is substantial evidence indicating that there are additional flaws in the Bureau's case. For example, Attachment 2 to the Bureau's Response to Kay's First Set of Interrogatories (filed on or about March 8, 1995) contained a letter, dated December 9, 1991, from William Drareg of William Drareg & Associates, with a business address of 1800 Century Park, Century City, Los Angeles. A copy of the December 9, 1991 letter from

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<sup>2</sup> The Bureau admits that, in discovery responses dated March 10, 1995, Kay disclosed the identities of Marc Sobel and Multiple M Enterprises, Inc. and their "relationship" to Kay. See, Motion for Leave, n.2. Nonetheless, the Bureau did not take any steps to "clarify" the nature of the ownership of the licenses controlled by Mr. Sobel and Multiple M Enterprises, Inc. until it filed the Motion on February 23, 1996, almost one year after receiving Kay's discovery responses. This delay has never been explained. However, it is interesting to note that it came on the heels of a FOIA request by Kay seeking information related to a recent Section 308(b) letter propounded by the Bureau to Sobel, a letter which Kay was not informed of, but which came to Kay's attention anyway.

William Drareg is attached hereto as Exhibit "A". Mr. Drareg's letter alleges that Kay violated certain Commission Rules and the Communications Act of 1934.

As part of Kay's informal discovery, Kay and his attorneys have made monumental efforts to locate Mr. Drareg, including searching various directories, databases, California state records and contacting the management of the building located at 1800 Century Park, Century City. Furthermore, a February 5, 1996 letter from Kay's attorneys to the Bureau asking for information as to the whereabouts of this individual. See Exhibit "B". Based on this exhaustive search, it appears that neither Mr. Drareg nor William Drareg & Associates have ever existed, yet is relied upon anyway by the Bureau.

The name "Drareg" is additional evidence that the author of the December 9, 1991 letter is likely to be a fictitious person. "Drareg" spelled backward is "Gerard". As evidenced in the few relevant documents that the Bureau has produced to date, Gerard Pick (prior to his death in 1995) was one of the chief complainants about Kay to the Bureau. As noted in Kay's Declaration, attached hereto as Exhibit "C", Gerard Pick and his son, Harold, are fierce competitors of Kay, and are defendants in ongoing litigation initiated by Kay in Los Angeles County Superior Court, and, most significantly, are parties that have submitted multiple complaints to the Bureau that appear to have instigated the instant proceeding.

Kay submits that this is merely the tip of the iceberg. If and when Kay undertakes discovery of the Bureau's evidence and witnesses, Kay has full reason, based on what he has learned to date, that the Bureau's case will dissolve, as it has with the Sobel, Multiple M. Enterprises, and Drareg matters. This Emperor has no clothes.

Not only does the Bureau lack reliable witnesses, its case lacks any concrete evidence and can only be saved by not being made. For example, as noted in Attachment "A" to the Bureau's Motion for Summary Decision, on January 31, 1994, the Bureau, pursuant to Section 308(b) of the Communication's Act, sent Kay a letter requesting certain information. In a letter dated April 7, 1994 (Attachment 2 to the Bureau's Motion for Summary Decision), Kay's former attorneys responded thereto and raised certain concerns about the January 31, 1994 letter. One concern was that "Kay may not know the number of mobile units operated on each of his stations." In response to this and other concerns, the Bureau, in a letter dated May 20, 1994 (Attachment 3 to the Bureau's Motion for Summary Decision), only requested "a listing of the total number of units operated on each station for all facilities owned or operated by Kay, or by any companies under which he does business, as of January 31, 1994 . . ." (emphasis added). Despite this request in its May 2, 1994 letter, the heart of the Bureau's Motion for Summary Decision is that Kay failed to properly answer Interrogatory No. 4. Interrogatory No. 4 requests the same information from Kay since January 1, 1991.

(See Bureau's Motion for Summary Decision, page 5). At a minimum, the Bureau's inconsistent positions raise substantial unresolved issues concerning what information the Bureau truly needs and the purpose behind its request.

These are only some of the discrepancies that Kay has identified.<sup>3</sup> The Motion addresses only one of the numerous deficiencies that the Bureau is trying to avoid. It is virtually impossible for Kay to identify additional deficiencies in the Bureau's case without opportunity for full discovery, which Kay has not yet had. Recognizing that its own case will not survive full and complete discovery and hearing, the Bureau seeks to terminate these proceedings on summary decision so as to avoid these and other inadequacies. Considering the numerous unresolved legal and factual issues in this proceeding, the Presiding Judge now has even more reason for conducting a hearing on the matters raised in the HDO, after the opportunity for full and fair discovery.<sup>4</sup>

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<sup>3</sup> Kay challenges, inter alia, the motives and biases of the Bureau's "witnesses" in his Declaration, attached as Exhibit "C" hereto.

<sup>4</sup> The Commission has consistently held that it will not resolve material and relevant factual issue on the basis of pleadings. See, e.g., Gateway Broadcasting Enterprises, Inc., 24 RR 2d 958, 961 (1972). Likewise, summary decision is not appropriate where there are genuine issues of material fact for determination at hearing. See Section 1.251 of the Commission's Rules.

**II. THERE IS NO LEGAL BASIS TO REVOKE ALL OF KAY'S LICENSES ON SUMMARY DECISION. THE REVIEW BOARD'S DECISION IN CAPITOL RADIOTELEPHONE INC. CONFIRMS THE COMMISSION'S RELUCTANCE TO REVOKE LICENSES**

In Capitol Radiotelephone, Inc., FCC 96R-1, released February 23, 1996, only recently decided by the Board, the Bureau designated, inter alia, issues concerning misrepresentation, lack of candor, and interference with a competitor's station for hearing. Similar to the HDO in the instant case, the Bureau sought to terminate the licenses held by Capitol Paging and related entities. After conducting a full hearing on the issues in the HDO, the Presiding Judge ruled that there was no justification for the revocation of any licenses held by Capitol Paging and related entities. Kay submits that a hearing in this matter will lead to the same result.

The Bureau filed exceptions to the Presiding Judge's decision. The Review Board recently affirmed the Presiding Judge's conclusion that there was insufficient evidence to support the revocation of Capitol's licenses. Even after finding "willful and repeated violations of Sections 90.403(e), 90.405(a)(3), and 90.425(b)(2) of the Commission's Rules" (emphasis added), the Review Board merely imposed a six thousand dollar (\$6,000.00) fine.

The Capitol decision evidences the Commission's position that in order to revoke a license, there must be a finding not just of a violation of Commission Rules, but an intent to do so. No such record exists, and cannot exist, in this case. Kay has identified herein several reasons why the Bureau does not want a

full hearing in this case. Such a hearing will expose the numerous weaknesses in the Bureau's case to the point, Kay submits, that he will be entirely vindicated. Instead, in its Motion for Summary Decision, the Bureau seeks to terminate Kay's licenses, without hearing, based solely on alleged pre- and post-designation conduct. Kay has already set forth his position on the Bureau's Motion for Summary Decision in pleadings already before the Commission and will not repeat these positions here. However, the recent decision in Capitol emphasis that the relief requested by the Bureau in the HDO is extraordinary in and of itself. The Bureau's request to terminate this proceeding without a hearing (on its Motion for Summary Decision) is even more extraordinary and entirely inappropriate. If Capitol teaches anything, it is that a full record, not only of a party's actions, but its intent, must be made before a revocation can result. No such record is contained in the Bureau's pleadings in favor of summary decision.

**III. CONSISTENT WITH THE BOARD'S DECISION IN CAPITOL,  
KAY'S ALLEGED MISCONDUCT, IF PROVEN BY THE BUREAU,  
CARRIES ONLY A RELATIVELY SMALL FINE**

In determining the appropriate sanction in the Capitol case, the Board took note of Notice of Proposed Rulemaking on Forfeiture Guidelines, 10 FCC Rcd 2945, (1995) (the "Proposed Guidelines"), since the Commission's Policy Statement, Standards for Assessing Forfeitures, 6 FCC Rcd 4695 (1991) (subsequent history omitted) was set aside in United States Telephone Ass'n v. FCC, 28 F.3d 1232 (D.C. Cir. 1994). Under the Proposed

Guidelines, the base forfeiture warranted as a result of Kay's alleged misconduct specified in the Motion for Summary Decision (i.e., failure to respond to Commission communications), is \$4,000.00. This amount may be adjusted upward or downward based on criteria set forth in the Proposed Guidelines.

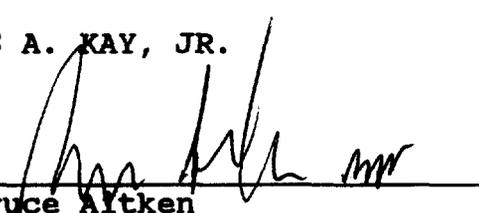
The Proposed Guidelines, examined in conjunction with the Board's recent decision in Capitol, demonstrate further that the relief requested by the Bureau--revocation of Kay's licenses--is extraordinary and unwarranted, particularly in the absence of a full evidentiary hearing. Accordingly, based on the precedent set forth in Capitol, Kay requests that the Presiding Judge conduct a hearing on the matters raised in the HDO.

CONCLUSION

WHEREFORE, for the reasons set forth herein, James A. Kay, Jr., requests that the Motion be denied and that the Presiding Judge deny the Bureau's Motion for Summary Decision, schedule a full hearing on the HDO, and grant such other and further relief as is just and proper.

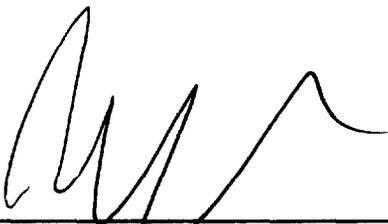
Respectfully submitted,

JAMES A. KAY, JR.

By: 

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Dated: March 15, 1996

~~WILLIAM DEARBORN & ASSOCIATES~~ 1800 Century Park, Century City - Los Angeles

Mr. Terry Fishel,  
Chief, Land Mobile Branch  
Federal Communications Commission  
1270 Fairfield Road  
Gettysburg, PA. 17326

9 December 1991

Dear Mr. Fishel:

This is an informal PETITION TO DISMISS OR DENY, or SET-ASIDE any license resulting from application number 557897-101 on 10/02/91 for the frequency of 854.4875MHz. Objections are based upon the following:

WNX5753  
gr. 11-15-91

(1) Mr. James A. Kay has not shown true loading on any of his granted licenses to prove a need for this frequency nor does he have a right to gather licenses to prevent others from obtaining them. According to FCC rules an applicant must have other SMR systems loaded before additional frequencies may be granted. As you go through your records you will find that Mr. Kay does not have his SMR systems loaded to their capacities; therefore an issuance of an additional SMR License would be in violation of FCC Part 90 Rules.

(2) Mr. Kay could be in violation of the Communications Act of 1934, Section Number 313A, if he is using additional channels.

(3) Mr. Kay can in no way justify requests for these frequencies because such would put him in violation of part 90 rules, numbers 90.623 (a) and (b). All his licenses and applications seem to be in need of thorough review.

(4) The following are examples of some let's say strange practices involving possible SMR paper loading by Mr. Kay:

The frequency of 854.3875 MHz/WNSK552 granted 4/1/91 to James A. Kay has bogus loading - the listed user, Coast Electric Co. Inc.-WNVY322 is NOT using nine mobiles; G.T. Equipment, Inc./WNVY323 is not using eight mobiles; Universal Protection Services Inc., DBA Home Security Sentinel Patrol/WNWB482 with twenty-two mobiles listed is not using this frequency. This is an especially good example of bogus loading by Home Security; they are not using any conventional systems; all their radios are trunked. When you research Home Security you will find that they have more than five frequencies which clearly

they do not even have these frequencies in the radios they use.



Mr. Terry Fishel, Chief, Land Mobile Branch/FCC - 12/09/91 - p.2

Our research shows that Coastal Concrete Care WNWA 930 with sixteen mobiles listed is NOT constructed.

The frequency of 852.1875 is a further example of bogus loading because the system is not constructed and the four sites are not used.

Medi Express Medical Transportation is another example of bogus loading. The company-WNWB269 with twenty-two mobiles listed is not using the system because they use Mr. Kays trunked system on Mt. Lukens; they are also bogus-loaded on more than five systems which violates 90.623 (b).

Master Gate Corp.-WNWN332 with five mobiles listed is NOT constructed.

The frequency of 851.7125-WNWA837/Eveready Tire Co.Inc. is NOT constructed.

The system of WQZ838, one of Mr. Kay's with nineteen mobiles licensed, has not been constructed.

The system of James Kay, WNVL794/853.5825 with Daves Trans Services, Inc. [WNVL772] with twenty-two mobiles is not constructed.

The system WNVJ775/851.7625, Kane Communications, has not been constructed.

The system WNVJ774/852.8625, Appliance Masters, has not been constructed.

The SMR WNSC920/853.6875, American Home Security Inc., WNSC921 is not constructed.

The SMR on 854.1875 and 854.3875-WNSK552 is bogus and so is Consolidated Financial Holdings (another name for James A. Kay) with 37 mobiles which in no way could have that many mobiles in operation because it is doubtful that Mr. Kay has 37 people available to use them.

The other listings - WNUH921 with 34 mobiles, WNVY322 with 9 and WNVY323 with 8 - are NOT constructed.

I should very much appreciate it if you would take the steps necessary to right the wrongs done by Mr. Kay.

12/10/91

Sincerely -

THOMPSON  
HINE & FLORY P.L.L.

*Attorneys at Law*

February 5, 1996

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

Re: James A. Kay, Jr., WT Docket No. 94-147

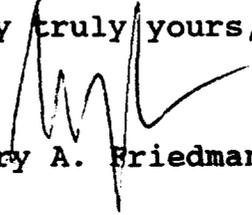
Dear Gary:

As you know, the Presiding Judge has not prohibited either party from conducting discussions with any potential witness in the above-referenced matter. In the course of our preparation for the hearing, we have assembled a list of possible witnesses. With one exception, we successfully located each potential witness.

Attachment 2 to the Bureau's Response to Kay's First Set of Interrogatories (filed on or about March 8, 1995) contained a letter, dated December 9, 1991, from William Drareg of William Drareg & Associates, with business address of 1800 Century Park, Century City, Los Angeles. A copy of Mr. Drareg's December 9, 1991 letter is attached hereto for your convenience. Despite great efforts, we have been unable to locate Mr. Drareg or his business organization. In a spirit of cooperation, we ask that if the Bureau has it, that the Bureau provide us with Mr. Drareg's current business and home addresses and telephone numbers.

Your anticipated cooperation is greatly appreciated.

Very truly yours,

  
Barry A. Friedman

cc: James A. Kay, Jr.

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THE ATTACHED DECLARATION OF JAMES A. KAY, JR. HAS BEEN RECEIVED  
IN FACSIMILE FORM. AN ORIGINAL VERSION WILL BE SUBMITTED BY  
SUPPLEMENT UPON RECEIPT.

## DECLARATION OF JAMES A. KAY, JR.

I, James A. Kay, Jr. declare that I am the Respondent in the above-entitled action. If called as a witness, I could competently testify to the facts contained herein. I make this declaration in response to the Bureau's latest Supplement to Motion for Summary Decision and Order Revoking Licenses, wherein it requested that all of my licenses except those supposedly in the name of Marc Sobel and in the name of Multiple M Enterprises, Inc. be revoked. This most recent pleading by the Bureau has muddied the waters to the point where a full, comprehensive explanation of the all the facts and circumstances leading up to the filing of the HDO is appropriate so that the Administrative Law Judge should have a full and complete record on which to rule.

In 1991, Harold Pick, a would-be competitor of mine, began an unceasing campaign of letters and complaints to the FCC Wireless Telecommunications Bureau, formerly Private Radio Bureau (Bureau), for the purpose of damaging my reputation. In addition, Mr. Pick engaged in a campaign of defamation against me with my customers, vendors, landlords, friends, other competitors, government agencies, Police Departments, and mutual acquaintances. I met with Pick in 1991 and told him to cease and desist his unlawful actions. He said he would do so, but in fact he did not. Throughout 1992, a running controversy continued with Pick. I would file applications for frequencies and Pick would file strike applications and strike protests. He was largely unsuccessful in his actions.

This history which follows is important, because it explains the genesis of the entire HDO. Also, informal pretrial discovery has revealed to me that all of the substantive complaints of wrongdoing alleged against me stem directly from complaints by Pick and his cohorts.

On July 24, 1992, at the Holiday Inn Crowne Plaza Hotel in Los Angeles, Pick arranged for a meeting with several of my competitors, the purpose of which was we believe, to enter into a civil conspiracy to attack my business interests in

every possible manner. See attached letter from Lewis Goldman, which documents the existence of this meeting. In August 1992, one of these individuals, Philip Gigliotti, sought to interfere with my agreement with Brown Ferris Industries (BFI) which had been made through a BFI employee named John Knight. This caused me severe difficulties at the Commission and the Commission ruled against me and later set aside one of my licenses. At the end of 1992, I instructed my attorneys to send a letter to Pick warning him not to defame me. Pick ignored the letter and continued his tortious conduct.

In April 1993, I completed a contract with Duke Pacific, Inc. through an employee named Greg Severson. To the best of my knowledge, Pick used the FCC database to identify Duke Pacific, Inc. as one of my customers. Pick subsequently called Severson and told him that I was a "thief, liar and murderer", all of which are untrue. As a result of Pick's allegations, Severson decided not to do business with either me or Pick, and decided to use cellular telephones instead. This loss of business, due directly to the breach of contract by Duke Pacific, cost me over \$15,000. After the Duke incident, in August 1993, I sued Pick for slander and a variety of other torts. We understand that Gerard Pick, Harold Pick's father, went so far as to scream at a process server that I was a "murderer"! Harold Pick then enlisted the aid of a close friend of his (Frank DeMarzo) to assist him in his campaign against me. In particular, we believe they used the technique of instructing and encouraging customers to file untrue and defamatory accusations with the Commission. Customers were instructed not to serve copies of these complaints on me. Pick and DeMarzo assisted in the preparation of numerous letters and complaints to the Commission.

We understand that in September 1993, less than one month after Pick was served with the lawsuit, Frank DeMarzo, using FCC database records supplied by Pick, called upon a company called Cal Western Termite who had a contract with me. On DeMarzo's advice, Cal Western got counsel, who then filed accusations

against me before the Commission and sought reinstatement of a canceled license. Despite having made allegations of fraud and unlawful business practices against me before the FCC, Cal Western never filed any action in state court or brought any complaints before local authorities - the proper venue for such allegations stemming from contractual matters. As a result of his actions on behalf of Pick at Cal Western, DeMarzo was added as a defendant to the lawsuit which I had already commenced against Pick.

In December 1993, we understand that DeMarzo and Pick also successfully solicited complaints to be made against me from Cornelia and Charles Dray dba Chino Hills Patrol, Eddie Cooper of the Fullerton School District, Gary VanDeist, President of VanDeist Brothers, Inc. To the best of my knowledge, Pick repeatedly bragged to these people that they "had the goods on me" and that the FCC would put me out of business with their help and cooperation.

Pick even called John Poat, who was my Sales Manager, to gloat in a telephone call laced with obscenities, saying that "James Kay is going to get his, and so are you", and said that we were both "going on trial for our lives". I thus believed that complaints had once again been filed against me by Pick, but I did not know any of the specifics. I frankly wondered what false charges Pick was fabricating this time. On January 16, 1994, I filed Freedom of Information Act Requests (FOIAs) to discover what complaints had been filed against me, so that I might properly respond to them. I then received a letter from the Commission, dated January 31, 1994, commonly called a "308(b) letter". This is the letter which has been attached to the Bureau's moving papers. I sent this letter to my lawyers, BROWN & SCHWANINGER, for a response. I subsequently received from the Bureau a denial of my FOIA request. I became alarmed in February of 1994 when competitors told me that copies of the Bureau's January 31, 1994 letter were being distributed amongst the radio community and to my customers. This led me to conclude that I was the victim of "selective leaking" by the Bureau.

While the Bureau steadfastly refused to inform me of any of the specifics of any of the accusations against me, and denied my FOIA requests, I believe that they were inappropriately distributing to my competitors their investigative documents.

Moreover, the January 31, 1994 letter did not strike me as a true investigative tool. These concerns were expressed in my attorney's response to the Commission. I believed that the January 31, 1994 letter did not represent a true investigation, but was an attempt by the Bureau to secure my business list for distribution to my competitors. I instructed my attorney to request confidentiality for any records which I would provide. This is a request which I believed should have been routinely granted.

I was already very suspicious of the Bureau's intentions because the stated purpose of the letter was allegedly to determine the construction and loading of my stations. The letter requested only that I provide a current customer list for some date in 1994. The information requested in the letter would neither have proven nor disproven whether or not my stations were constructed or loaded in years past. In other words, the information requested could never have satisfied the stated purpose of the letter. This point was also argued by my attorneys in their Reply to the Commission. Therefore, I had to consider the real purpose of this letter. This was particularly true when my attorney's request for confidentiality was twice denied by the Bureau.

In an attempt to protect my customer list, my attorneys suggested that I copyright my answer. The Bureau's response to our statement that the customer list would be copyrighted was to demand 50 copies of this highly confidential material. When I received the demand for 50 copies of my customer list, I had no doubts whatsoever and believed, that the real purpose of the January 31, 1994 letter was to obtain my customer list which, under advice of counsel, I believe was in serious risk of release to my competitors.

In the same time frame, specifically in April 1994, I had a Finder's Preference on file against a company called *Ralph Thompson dba Thompson Tree Services* (Thompson). Thompson's reply to the Finder's Preference filing revealed that Thompson was a customer who had been ill served by his previous equipment supplier and had simply discontinued use of his license. I was sympathetic towards his predicament that he would lose the ability to operate his radios. I contacted Thompson and offered my repeater services to him. He accepted and signed a contract. Several days later, Mrs. Thompson called me and informed me that she had received a telephone call from Anne Marie Wypijewski, who stated she was an attorney with the Federal Communications Commission. To the best of knowledge and belief, Ms. Wypijewski told Thompson that the Commission was going to delete Thompson's license from the database, and that Thompson could immediately refile for a new license, and that a week after the license had been deleted from the database, that my Finder's Preference would be dismissed.

I believed that Anne Marie Wypijewski was unfairly favoring one party in a license dispute, and under advice of counsel, came to believe that my rights were being deprived. This situation would be analogous to a Judge calling a litigant in secret and telling that person how judgment was going to be rendered against them and how to circumvent the consequences of the judgment. I believe that this action was deliberately directed against me due to the dispute involving the FOIA and the January 31, 1994 308 (b) letter. Upon advice of counsel, the decision was made to seek ironclad assurance of confidentiality. The Bureau steadfastly refused to deliver any such assurance.

Justice required that I have a neutral, detached party, such as a magistrate, review the Bureau's requests. At this point, I had repeatedly filed FOIAs to request copies of the accusations against me so I could know why I was being

treated this way by the Bureau. I simply had no idea what I could possibly have done or been accused of doing that would warrant such horrendous abuse as was being inflicted by the Bureau.

Also, at this time the Bureau had begun to hold up my license applications and to dismiss them, in my opinion, improperly, and the Bureau further refused to provide me any hearing on any of my applications as required by law. With the continued refusal of the Bureau to inform me of the charges against me, which was a matter of elemental fairness, or to provide me with any documents under FOIA, even after my filing suit in federal court, upon advice of counsel, I came to believe that my civil rights and rights of due process were being trampled upon.

Upon advice of counsel, I came to believe that administrative remedies before the Commission were pointless because the complaints were being handled by the same persons who were investigating me.

In response to a FOIA request, the Bureau provided the cover pages to six blind copies of the January 31, 1994 letter. These letters were sent to Pick, Christopher Killian (Carrier Communication), VanDeist, Cornelia Dray, Eddie Cooper (Fullerton School District) and Dr. Michael Steppe of Chino Hills Equine Clinic. I found this extremely alarming because of Pick's animosity to me. Killian is a competitor and cohort of Pick, who attended the July 1992 meeting. I was surprised at the Commission letters having been sent to VanDeist, Cornelia Dray and the Fullerton School District because all my dealings with them were legal, well documented and perfectly legitimate contractual relationships. I never succeeded in doing business with Dr. Steppe, never met with Dr. Steppe, nor had any personal contact with him. I had no idea why these people would have filed any complaint before the Bureau against me. These four parties and others had been solicited by Pick, DeMarzo and others who were all present at that meeting in July 1992.

That the charges against me are baseless and false will be clear upon the examination of the record by anyone with an open mind. This is where the questions raised by the Bureau involving Marc Sobel's licenses and Multiple M licenses are important. For the first time, we have an admission by the Bureau that they do not even have the names of the licensees correct. They have alleged that these licenses are held in my name as a "shill", or as a nominee. In truth and in fact, these licenses are held by Marc Sobel, who is an individual residing in California, and with whom I am personally acquainted. This is contrary to the Bureau's claim that Marc Sobel does not exist, or is my alter ego. Multiple M Enterprises, Inc. is solely owned by Vida Knapp. I have no interest in the corporation known as Multiple M Enterprises, Inc. or Vida Knapp. Vida Knapp is a resident of California. She is not, nor has ever been, my alter ego.

The purpose of my declaration here is to show that not only is the complaint false as to the Marc Sobel licenses and the Multiple M license, but to state unequivocally on the record that it is false as to the other respects as well. The upshot of this entire dispute with the Commission was that the Bureau issued a "Hearing Designation Order" based solely upon false accusations provided by or solicited by my business competitors.

At all times, I have sought to comply with lawful court process. When, at the request of the ALJ, a Joint Protective Order was entered into, I provided all documents and information which I was legally required to give. Also, I have fully participated and have fully litigated all of the issues in the HDO. Specifically, I remain ready, willing and able to provide all information in my custody and control in response to a lawfully drafted interrogatory or request for production of documents.

What I find to be truly extraordinary is that the Bureau's staff has now alleged in oral argument that without historical data regarding the construction and loading of my stations, that it is unable to determine whether my stations were duly

constructed or loaded. This is an extraordinary admission on their part because that information was never even requested in the original January 31, 1994 letter by the Bureau. In other words, the staff now has, in effect conceded, at least indirectly, with the position put forward by my attorneys, Brown & Schwaninger, that the January 31, 1994 letter could never have achieved its stated purpose of shedding light on the question of whether my stations were constructed or fully loaded. See Brown & Schwaninger's letter of April 7, 1994. It also shows that they have absolutely no evidence of any kind regarding this issue.

I believe that the conclusion can then be reached that the Bureau's very broad request for information was nothing more than a "fishing expedition" against me. The conclusion is inescapable that the Bureau's staff had formed an opinion a long time ago, based strictly upon accusations which were fomented and directed by competitors, that I was a "bad person" and should be driven from the radio business. Based on innuendos and accusations alone, I was condemned to the administrative equivalent of death row. I was offered essentially a choice of method of execution. I could turn over my customer list to the Bureau, where my competitors could obtain it, thus granting me a quick economic death, or I could resist the Bureau and the Bureau would then file an action to take away all of my licenses by means of an HDO, thus choosing a lingering economic death. It would base the HDO not on any substantive wrongdoing, but simply upon my refusal to grant the Bureau my confidential customer information. This was a classic Hobson's choice.

The above facts now explain why my customer list required ironclad protection. In my opinion, Pick, DeMarzo, Gigliotti or their associates exhibited a pattern of behavior under which once they discovered the identity of one of my customers, they would contact this customer and defame me with outrageous and untrue accusations, up to and including murder. Even if these competitors could not provide service (which was often), they could still, and would still have attempted to injure my business interests by convincing the customer to

discontinue my service or better still - file false allegations with the Bureau against me. This helped them because it weakened me financially so that they could better compete against me in other areas.

Such practices are wrongful in any civilized society, yet this was the standard operating procedure of the Picks, DeMarzo and Killian, who I believe filed these complaints with the Commission and induced others to file similar complaints against me.

Based on the above and all of the facts which I have stated herein, and upon advice of counsel, I came to believe that I was justified to postpone release of customer information until issuance of the Joint Protective Order.

Now that the Bureau has admitted that neither Marc Sobel nor Multiple M are my "alter ego", these facts show that this was not merely a minor procedural mistake on their part, instead, it is a devastating admission that their substantive case against me is without evidentiary support. It is also evidence that the HDO was very sloppily drafted and, I believe, improperly investigated (or perhaps not even investigated at all) and the case against me is clearly not thought out or even properly prepared. If the Bureau cannot be sure of even the ownership of a substantial number of licenses, it is reasonable to infer that other serious oversights have occurred. The Bureau's admission that these licenses should be removed from the HDO also supports my position that the entire case against me is false and meritless from beginning to end.

There is also attached to these moving papers a declaration by Mrs. Thompson, who heard Ms. Wypijewski make the offending statements regarding the Finder's Preference. Also, there is attached a declaration of Mr. Mullins who was Pick's former employee, who heard Pick and DeMarzo bragging about how they were going to destroy me. Furthermore, this latter declaration gives evidence of how Gerard Pick gave gifts to FCC staff members. and engaged in numerous communications with the staff. Additional discovery of the staff is necessary to

determine the full extent of these gifts. Also, Chuck Smith, a former Pick and DeMarzo employee, was present at Cal Western Termite and heard DeMarzo tell Cal West that I stole their license, cheated them, and that Cal Western should hire lawyers to get their license back. These two ex-employees have shed light on the true facts. Cal Western admits that DeMarzo talked with them, and said that they were told by their radio man to complain. Smith and Mullins show how DeMarzo induced Cal Western Termite to file this complaint (Smith's transcript attached).

A question arises as to where the Bureau received the erroneous information set forth in the HDO that I own the licenses that in fact belong to Marc Sobel. Also, this is true for the corporation Multiple M Enterprises, Inc. Where did the Bureau get the information that Marc Sobel was a non-existent person? Where did the Bureau get the information regarding Multiple M?

I believe that the Commission had an elementary and basic duty to investigate its case before it filed it. Didn't anyone at the Bureau have the foresight to call Marc Sobel to find out if he even existed?

At this date, I find it truly incredible that the Bureau has never even contacted me or my counsel regarding any of the allegations filed against me by Cornelia Dray, Eddie Cooper of the Fullerton School District, VanDeist, Cal Western Termite, BFI, or Dr. Steppe. Likewise, they have not discussed with me any other complaints, and indeed, there may be other complaints which are unknown to me. At no time have they ever asked for my side of the story before issuing the January 31, 1994 308(b) letter. Now the Bureau has made a motion to take all of my licenses without so much as a hearing on the false claim that I failed to answer one interrogatory (that I have, in fact, answered twice!).

The Bureau has made vague innuendos that I have somehow concealed information, yet they have produced no evidence of any kind to that effect. All they have shown is that my lawyers have responded to their January 31, 1994 letter in the form of a vigorous assertion of my constitutional rights, my rights

to due process and administrative fairness. All that happened, under advice of counsel, was an objection to an overbearing and questionable demand for information. I submit that I had good grounds to make my objections to the January 31, 1994 letter and that my lawyers' assertion of my rights is not evidence of bad character or unfitness to be a licensee, but is rather evidence that my lawyers decided to challenge an overreaching governmental inquiry into my affairs.

The purpose of the following is to respond to the Bureau's statements made in oral argument regarding how my records are kept. In the first place, I point out that the staff members of the Bureau are unqualified to testify or to introduce any evidence as to how private business people, such as myself, should keep or maintain business records. In particular, they are incompetent to testify as to "industry practices" due to lack of training and experience in private business. Also, more to the point, "industry practices" are irrelevant as a standard for my particular record keeping practices. The Commission provides no rules or regulations as to what records need to be kept, nor in what form records should be kept. Also, there is a question of what is the "industry" in determining the standard. Against whom would you compare my operations? Nextel (a multibillion dollar company) or perhaps Motorola (the largest and most aggressive communications company in the world)? Merely thinking of these issues must give one cause to realize that the staff is totally unqualified to speak on the subject of industry practices or the keeping of records.

One final point. The Bureau staff stated repeatedly that they did not understand how I could stay in business and keep my records as I do. However, in making these arguments, they sound like the proverbial engineers who have determined, through calculations, that a bumblebee cannot fly. The bumblebee, not having studied aerodynamics still flies in blissful ignorance of the expert's judgment.