

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

MAY 22 1996

In the matter of) WT Docket No. 94-147
JAMES A. KAY, JR.)
Licensee of one hundred fifty-)
two Part 90 licenses in the)
Los Angeles, California area.)

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To: The Commission

PETITION FOR PARTIAL RECONSIDERATION

James A. Kay, Jr. ("Kay"), by his attorneys and pursuant to Section 1.106 of the Commission's Rules, requests that the Commission reconsider that portion of its Order, FCC 96-200, released May 8, 1996, pertaining to the dismissal of Kay's Statement in Opposition to Wireless Telecommunications Bureau's ("Bureau") Request to Modify the Hearing Designation Order and Request for Commission Review of the Hearing Designation Order as an unauthorized petition for reconsideration. In support thereof, Kay states as follows:

INTRODUCTION

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

2. In the HDO, the Commission sought to, inter alia, revoke one hundred sixty-four (164) licenses allegedly held by Kay.

3. One year later, on December 4, 1995, the Bureau filed a Motion for Summary Decision seeking to revoke, without any

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opportunity for Kay to defend himself, 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 a Motion for Leave to File Supplement and Supplement to Motion for Summary Decision and Order Revoking Licenses (the "Motion").

5. In the Motion, the Bureau sought to "clarify" its position in this case and only 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."

6. On March 6, 1996, the Bureau filed a request for the Presiding Judge to certify the issue of whether the license of Multiple M and the eleven (11) licenses of Sobel be removed from the above-captioned proceeding due to the lack of evidence to establish the Kay owns or controls the twelve (12) licenses.

7. By Order, FCC 96M-35, released March 15, 1996, the Presiding Judge certified to the Commission, pursuant to Section 0.341(c) of the Commission's Rules, "the question of whether the one license held by Multiple M and the eleven licenses held by Marc Sobel that are specified in Appendix A to the Show Cause

Order should be the subject of revocation in this case and/or whether the licenses should be removed from the Show Cause Order."

8. On March 29, 1996, Kay filed a "Statement in Opposition to the Wireless Telecommunications Bureau's Request to Modify the Hearing Designation Order and Request for Commission Review of the Hearing Designation Order" (the "Statement"). In the Statement, Kay demonstrated that the relief requested by the Bureau was yet another example of the deficiencies in the Bureau's case against Kay and requested that the Commission, sua sponte, undertake a review of the propriety and bases for the issuance of the HDO and dismiss the HDO.

9. On April 8, 1996, the Bureau filed a Motion to Dismiss the Statement on the basis that the Statement was an unauthorized petition for reconsideration of the HDO.

10. In an Order, FCC 96-200, released May 8, 1996, the Commission deleted 12 Part 90 licenses from the HDO and dismissed the Statement as an unauthorized petition for reconsideration.

ARGUMENTS

A. THE STATEMENT IS NOT PROHIBITED BY SECTION 1.106(A) OF THE COMMISSION'S RULES BECAUSE THE BUREAU, NOT KAY, INITIALLY SOUGHT REVIEW OF SELECTED PORTIONS OF THE HDO

11. Section 1.106(a) of the Commission's Rules states that the Commission may only reconsider designation orders insofar as they relate to an adverse ruling with respect to a petitioner's participation in the proceeding. Kay did not file a petition for reconsideration seeking a review of the HDO. If he had, at any

point after January 1995, then such petition would have been summarily dismissed pursuant to Section 1.106(a) of the Commission's Rules.

12. The context in which Kay filed the Statement, however, was completely different from the scenario addressed in Section 1.106(a) of the Commission's Rules since the Bureau, not Kay, sought a review of the HDO. The Bureau filed the Motion, and eventually requested that the Commission reconsider a portion of the HDO¹, to correct an admitted error in the HDO. The Statement was in response to, and consistent with, the Bureau's, not Kay's, request to review the HDO. If the Bureau can request that the Commission review a portion of the HDO based on facts that the Bureau knew or should have known before the HDO was issued, then Kay is entitled an opportunity to demonstrate--through facts and testimony that became available to him months after the HDO was issued--that there is a reasonable basis for the Commission to review the entire HDO, not just the portions of the HDO selected by the Bureau.

13. The Statement was supported by evidence, unchallenged by the Bureau, presented by Kay. But for the Bureau's initial request to the Commission to modify the HDO, Kay would not have had the opportunity to request that the Commission, sua sponte, review the propriety and bases for issuing the HDO. Therefore, the Commission's dismissal of the Statement is both an

¹ The Commission's May 8, 1996 Order correctly notes that the Bureau believed "that the ALJ lacked the authority to modify the hearing designation order . . ."

unjustified expansion of Section 1.106 of the Commission's Rules and fundamentally unfair to Kay considering the unique procedural posture created by the Bureau's unilateral effort to obtain review of select portions of the HDO.

B. SECTION 1.106(C)(1) OF THE COMMISSION'S RULES AUTHORIZES PETITIONS FOR RECONSIDERATION BASED ON FACTS PREVIOUSLY UNKNOWN TO THE PETITIONER

14. As discussed above, Section 1.106 of the Commission's Rules does not apply in this case because the Bureau, not Kay, initiated a review of the HDO. Assuming, arguendo, that Section 1.106 of the Commission's Rules applies, however, Section 1.106(c)(i) of the Commission's Rules states that petitions for reconsideration may be granted if such a petition relies on facts (a) not previously presented to the Commission; and (b) that relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters. Although the Statement neither is, nor was it intended to be, a petition for reconsideration, to the extent that the Commission considers the Statement a petition for reconsideration, the Statement clearly fits within the exception set forth in Section 1.106(c)(i) of the Commission's Rules and should be considered by the Commission.

15. In short, the Statement addresses four (4) related topics dealing with the deficiencies in the case against Kay: (a) the Bureau's request to delete twelve (12) licenses from the HDO owing to the fact that the licenses were authorized to an unrelated party; (b) William Drareg, whom the Bureau relies upon

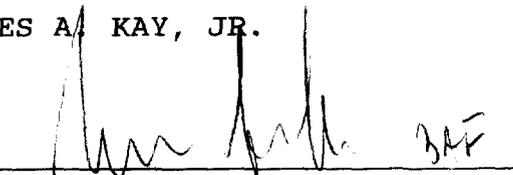
for evidence but, in all likelihood, has never existed; (c) the Bureau's continued unwillingness to produce evidence to support the allegations made in the HDO; and (d) Kay's personal account of other substantial defects in the Bureau's case against him. Each of these topics unquestionably relate to events which have occurred or circumstances which have changed since January, 1995, the last opportunity for Kay to file a petition for reconsideration pursuant to Section 1.106 of the Commission's Rules. Consequently, provided the Commission continues to maintain the position that the Statement is a petition for reconsideration, the Statement satisfies the criteria set forth in Section 1.106(c)(1) and should have been considered by the Commission.

CONCLUSION

WHEREFORE, for the reasons set forth above, Kay requests requests that the Commission: (a) reconsider that portion of its Order, FCC 96-200, released May 8, 1996, pertaining to the dismissal of the Statement as an unauthorized petition for reconsideration; (b) alternatively, consider the Statement as a Petition for Reconsideration under Section 1.106(c)(1) of the Commission's Rules; (c) sua sponte, undertake a review of the propriety and bases for the Bureau's issuance of the HDO and dismiss the HDO; and (d) grant such other and further relief as is just and proper.

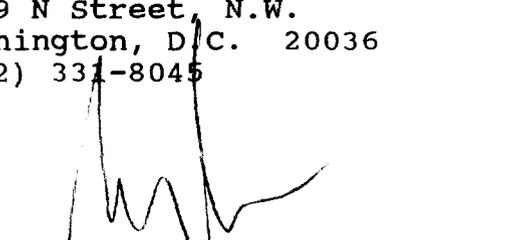
Respectfully submitted,

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Dated: May 24, 1996

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing James A. Kay Jr.'s Petition for Partial Reconsideration was hand-delivered on this 24th day of May, 1996 to the following:

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and sent via first-class mail, postage prepaid on this 24th day of May, 1996 to:

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