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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

|                                |   |                      |
|--------------------------------|---|----------------------|
| 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.  | ) |                      |

To: The Commission

**REPLY TO WIRELESS TELECOMMUNICATIONS BUREAU'S  
OPPOSITION TO MOTION FOR LEAVE TO FILE SUPPLEMENT**

James A. Kay, Jr. ("Kay"), by his attorneys, files this reply to the Wireless Telecommunications Bureau's Opposition to Motion for Leave to File Supplement. In support thereof, Kay submits the following:

1. On January 17, 1997, Kay filed a Motion for Leave to File Supplement to Consolidated Brief and Exceptions of James A. Kay, Jr., along with a Supplement to Consolidated Brief and Exceptions of James A. Kay, Jr. ("Supplement")

2. On January 27, 1997, the Wireless Telecommunications Bureau (the "Bureau") filed an Opposition to the Supplement (the "Opposition").

3. In the Opposition, the Bureau argues that the Supplement is an unauthorized petition for reconsideration of the Order to Show Cause, Hearing Designation Order, and Notice of Apparent Liability for Forfeiture, 10 FCC Rcd 2062 (1994) (the "HDO").

4. The Bureau's argument is wide of the mark. In the Opposition, the Bureau focuses solely on the Presiding Judge's finding that Kay failed to cooperate in discovery and states that

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the Supplement did not "address, challenge, or dispute" this issue. The Bureau, however, fails to recognize that as a result of the Summary Decision, Kay stands to lose his entire livelihood without the chance to even present a witness in his favor. By the Supplement, Kay addresses the question of whether the Bureau sought and secured a summary decision on discovery grounds in order to avoid having to go to hearing with a case that it lacked the evidence to support.

5. Thus, one of Kay's exceptions to the Presiding Judge's ruling on summary decision was that the Presiding Judge wrongfully failed to allow Kay the opportunity to present any evidence in defense of the allegations contained in the HDO or those that the Presiding Judge relied on to support his summary decision. See Exceptions to the Summary Decision of Administrative Law Judge Richard L. Sippel, filed by Kay on July 1, 1996 at page 5 (the "Exceptions"). The Bureau has not, and cannot, allege that Kay did not raise this issue in the Exceptions.

6. The Supplement addresses and expands upon the fact that the Commission lacks the evidence necessary to meet its own evidentiary burden under the HDO. In the Supplement, Kay submitted undisputed evidence, primarily in the form of declarations, affidavits and deposition testimony, that the Commission's case against Kay was, at best, incomplete, or, at worst, unsubstantiated. For example, one of the witnesses that the Commission has stated would testify against Kay, Richard

Rose, now says under oath that he has "no knowledge, direct or indirect, that Kay or any business owned or operated by Kay has conducted business in an unlawful or illegal manner or that Kay has violated the Communications Act of 1934, as amended, or any other Commission rule or regulation." (See Exhibit "E" to the Supplement). Another Commission witness, Terry Peterson of A.C. Peterson Co., Inc., submitted a witness statement to the Commission. However, he now states under oath that this statement was based solely on information he obtained from one of Kay's business competitors and he lacks personal knowledge of the claims contained in the witness statement. (See Exhibit "G" to the Supplement). The consequences of the Presiding Judge's failure to allow this case to go to hearing is that Kay's licenses and business are at risk based on charges the Commission lacks witnesses and evidence to prove.

7. The Commission cannot, as the Bureau insists, look at the Presiding Judge's summary decision ruling in a vacuum. It must recognize that summary decision represents extraordinary relief that should be allowed in the rarest of instances, especially when the result would be the revocation of a license. See, e.g., GAF Broadcasting Co., 55 RR 2d 827, 832 (Rev. Bd. 1984). The Supplement, like the Exceptions, raises material questions as to the validity of the case that the Bureau is prosecuting. These questions cannot be ignored. It is clear that the Supplement is not, as the Bureau suggests, a petition for reconsideration. Rather, the Supplement is even more support

for the proposition that this matter cannot be decided until a full evidentiary record is had.

8. This is bitterly contested litigation since it involves the rare instance where the Commission seeks to strip a party of his licenses.<sup>1</sup> As demonstrated in the Supplement, the contents of which have not been challenged by the Bureau, there are numerous and substantial deficiencies in the HDO and, in addition, the Bureau's so-called "witnesses" do not possess evidence in support of the allegations contained in the HDO. This is certainly not the type of evidence that should be ignored by either the Presiding Judge or the Commission. Rather, it calls out for the Commission to require a hearing where the Bureau would be obligated to prove its case, if that is possible.

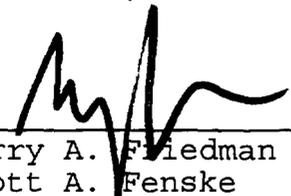
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<sup>1</sup> The Commission has recently declared its reluctance to take action against other applicants or licensees who the Commission has found to have committed egregious acts such as misrepresentation, destroying evidence, and lacking candor in presentations to the Commission. PCS 2000, L.P., FCC 97-16, released January 22, 1997; Public Notice, DA 97-12, released January 3, 1997; Mario Loreda, FCC 97D-1, released January 6, 1997. Kay is subject to revocation without any finding of the Commission, however, of such acts.

WHEREFORE, Kay respectfully requests that the Commission grant the Motion for Leave to File Supplement to Consolidated Brief and Exceptions of James A. Kay, Jr.

Respectfully submitted,

JAMES A. KAY, JR.

By: 

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Dated: February 2, 1997

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply to the Wireless Telecommunications Bureau's Opposition to Motion for Leave to File Supplement was hand-delivered on this 2nd day of February, 1997 to the following:

Gary P. Schonman, Esquire  
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John I. Riffer, Esquire  
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and sent via first-class mail, postage prepaid on this 2nd day of February 1997 to:

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Scott A. Fenske