

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

FCC 97M-52
71080

In 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.)

MEMORANDUM OPINION AND ORDER

Issued: April 10, 1997 ; Released: April 14, 1997

Background

1. On March 26, 1997, a Motion To Disqualify Presiding Officer¹ ("Motion") was filed by the licensee, James A. Kay, Jr. ("Kay"). It was found necessary that a Declaration be resubmitted that complied with the Commission's Rules. Order FCC 97M-46, released April 1, 1997. On April 2, 1997, Kay's counsel refiled a Declaration signed by James A. Kay, Jr. The Declaration as resubmitted under Praecepte dated April 2, 1997, is found to accord substantially with the Commission's requirements. See 47 C.F.R. §1.16 (unsworn declarations under penalty of perjury in lieu of affidavits). The Presiding Judge now responds to the Motion. 47 C.F.R. §1.245(b)(2).

Motion To Disqualify

2. There are five categories of conduct alleged by Kay to evidence a bias on the part of the Presiding Judge: (1) adverse rulings that were made in the course of adjudication and issuance of a Summary Decision FCC 96D-02 ("SD") on May 28, 1996; (2) references to a "Bivens" civil action for damages brought by Kay against Bureau staff prior to the designation of this case for a hearing; (3) sua sponte imposition of a penalty in the amount of \$75,000; (4) a document authored by a third-party that was addressed to an indecipherable name at the Bureau's office in Gettysburg, PA which is alleged to be an

¹ The hearing was commenced under the Commission's Order To Show Cause, Hearing Designation Order And Notice Of Opportunity For Hearing For Forfeiture FCC 94-315, released December 13, 1994 (the "HDO"). Commission Rules provide that a hearing may be conducted by a "presiding officer who may be one or more commissioners or a law judge designated pursuant to Section 11 of the Administrative Procedure Act." 47 C.F.R. §1.241(a). The Chief Judge designated the undersigned Administrative Law Judge as the Presiding Judge of this hearing. Order FCC 94M-147, released December 21, 1994.

improper ex parte communication; and (5) certain discovery and procedural rulings. These matters are considered and responded to under the Commission's standards for disqualification for bias or prejudice.²

Adjudication Rulings In Summary Decision

3. The "primary basis" for disqualification is alleged to be the conduct of the Presiding Judge in failing to consider any testimony presented by Kay and by failing to give Kay an opportunity to cross-examine a Bureau witness. The Presiding Judge concluded after briefing and oral argument that the Bureau had met the Commission's standards for a summary decision on the first of eight issues. On appeal, summary decision was held to be an erroneous remedy on the record that was relied upon by the Presiding Judge. Memorandum Opinion And Order ("MO&O") FCC 97I-06, released February 20, 1997. For that reason, the case was remanded to the Presiding Judge for a full hearing on all issues at which Kay will be permitted to testify and cross-examine the Bureau's witnesses.³ In remanding the case, it was held that reversible error does not establish a personal bias or prejudice and, adverse rulings against a party, even where erroneous, do not alone establish a lack of neutrality. MO&O, supra at Para. 23, citing WWOR-TV, Inc., 5 F.C.C. Rcd 2845. Para. 6 (1990) and Liteky v. U.S., 114 S.Ct. 1147, 1157 (1994).

4. Kay points out various rulings in the SD as evidence of bias.⁴ Kay contends that bias was shown in the conclusion reached that Kay was "arrogant" when his former counsel, Kay's agent, stated that there was no date that would be convenient for compliance with the Bureau's Section 308 request. Such an absolute statement of refusal to cooperate with the Bureau appeared to be convincing evidence in support of a finding of "arrogance". That finding is now moot on remand. Kay also cites as evidence of bias an alleged failure to take into account the mitigating circumstance of an earthquake. However, the circumstance of an earthquake was considered. See SD at Paras. 25, 33. Kay also objects to an inference drawn that his records were deliberately designed to avoid retrieval of the loading data which the Bureau sought. That conclusion was based on Kay's Declaration dated December 15, 1995: "Historical loading records do not exist in any form and cannot be accurately reconstructed because of the way my records were kept." SD at Para. 17. The findings were not totally unfounded, were based on the record, and while held to be erroneous, do not show a bias or prejudice. See SD at Para. 31.

² 47 C.F.R. §1.245 (disqualification of presiding officer). Section 1.245 was amended by Order of the Managing Director Mimeo No. 62692, released April 30, 1996 (Commission review in lieu of Review Board).

³ Summary decision was granted as to the first issue alleging that Kay had wrongfully withheld information despite Section 308 requests and an interrogatory question seeking data on loading. That issue would be revisited on remand with evidence that had not been considered in the SD. For example, there will be an opportunity for Kay and the Bureau to present new evidence from experts on industry standards for record-keeping. See MO&O at Paras. 16, 20.

⁴ Virtually all of the rulings were addressed in the MO&O.

Presiding Judge: [T]he Bureau has not even suggested this and I'm not -- we're into a bit of an argumentative phase here, and there is no inference to be drawn from this that anybody is saying that Mr. Kay is not operating his business in a way that a businessman should or in an inefficient way. That's not an issue here.

See Prehearing Conference, January 31, 1996, at Tr. 161-162. The Presiding Judge has not criticized Mr. Kay's business practices and there were no personal attacks made against Kay's business or his business practices.

Sua Sponte Forfeiture

8. The Motion characterizes as "most egregious" the decision to impose a forfeiture of \$75,000, allegedly without a finding that Kay committed any willful or repeated violations of the Commission's Rules. The HDO had ordered that irrespective of whether Kay is determined to be qualified to remain a licensee, it must be determined whether an order for forfeiture shall be issued against Kay. HDO at Para. 16. There was a \$75,000 ceiling set for any single act or failure to act. Id. And the violation must be found to be willful or repeated in order to warrant a forfeiture. Id. The Presiding Judge concluded that evidence based on language of letters from former counsel to the Bureau showed an "arrogant disregard" of the Section 308 requests. He also found an "intransigence" on Kay's part where there had been "multiple refusals to comply" which were found to establish a "knowing culpability." Such conclusions equate with findings of willful and repeated violations of the Commission's Rules which Kay was alleged to have violated, i.e., Section 308(b) of the Communications Act, as amended, and Section 1.17 of the Commission's Rules. The findings of refusals to comply with the Bureau's requests and the subsequent failure to produce information on loading in response to an interrogatory also were found to constitute delay by design and a "grave abuse of the Commission's process." SD at Para. 32 and fn.18. Those findings and conclusions of willfulness and repeated knowing violations were based solely on evidence and pleadings in the case. SD at Para. 5-9 and 14-17. While the Bureau did not request a forfeiture, it did not oppose one. The Bureau remained mute on the question. See Conference of January 31, 1996, Tr. 151-152. In view of the instruction of the HDO to consider forfeiture, the fact that the Bureau did not advocate a forfeiture is not conclusive evidence of a bias. Therefore, Kay's allegations of bias and prejudice relating to forfeiture fail to provide a basis for disqualification because the forfeiture order was based on evidence in the case and the ruling was made in furtherance of the HDO.

The Bivens Action

9. During the Prehearing Conference of October 24, 1995, the Presiding Judge acknowledged having read the United States District Court's Memorandum decision dated March 31, 1995, in James A. Kay, Jr. d/b/a Lucky's Two Way Radio v. W. Riley Hollingsworth, Terry L. Fishel, and Anne Marie

Wypijewski (United States District Court for the Middle District of Pennsylvania Civil Action No. 1:CV-94-1787) (the "Bivens Action").⁵ The Presiding Judge became sensitive to Kay's requests at the beginning of the hearing to depose Bureau staff members who were parties to the civil litigation. See Prehearing Conference at Tr. 98-99; 102-104. Kay argues that by informing himself of the Bivens Action, the Presiding Judge permitted his decisions to be shaped by events unrelated to the issues in this case. That suggestion of bias is unsupported by the relevant facts and circumstances.

10. Bivens Action defendants Hollingsworth and Wypijewski are Bureau staff members who also were counsel of record in the hearing. Kay's counsel indicated that he intended to seek their depositions for use in the hearing.⁶ In reacting to a concern of the Presiding Judge, Kay's counsel represented that the depositions were not for any use outside the hearing: "that's not our intention". Tr. 104. Counsel for Kay seemed to acknowledge the validity of concern by reassuring the Presiding Judge that the Bivens Action had been put to rest. Kay's counsel stated in open court: "The last thing we want to do is resurrect the Pennsylvania [Bivens] case. That's not what we came here for today, but I think you've focused properly on our objective." (Emphasis added.) See Tr. 104. That was stated by Kay's counsel in open court on March 24, 1995. It was the last reference made by Kay to the Presiding Judge's knowledge of the Bivens Action until the instant disqualification Motion. The subject of the Bivens Action remained dormant until it was raised in the disqualification Motion. The matter of the Bivens Action that arose independently of the Presiding Judge and which was put to rest as soon as possible does not evidence a bias or prejudice. The knowledge of the Bivens Action does not equate with the adjudication of facts in this case by the Presiding Judge and the situation as explained here fails to show any bias.

The Alleged Ex Parte Pick Letter

11. Kay makes reference to pending California litigation in which he obtained a copy of a letter from Annedore Pick (the "Pick Letter"). The Pick Letter is attached to the disqualification Motion that now is under consideration. Kay asserts in the Motion that the Pick Letter appears to have been sent and received in violation of the Commission's ex parte Rules. 47 C.F.R. §1.1200 et seq. Kay also asserts that he has been unable to determine whether the Presiding Judge has actually received or seen the Pick Letter. On January 6, 1997, in response to Kay's FOIA request, the Presiding Judge responded by letter to Kay's counsel that he has not received the Pick

⁵ See Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (under certain conditions federal officers may be sued for monetary damages for committing constitutional torts).

⁶ The Commission and not the Presiding Judge would be the decision-maker on permitting depositions of Bureau staff members. 47 C.F.R. §1.311(b)(2). But the course of discovery relates directly to the Presiding Judge's responsibility to manage the litigation and the Commission expects an active role by Presiding Judges in matters relating to discovery. Hillebrand Broadcasting, Inc., 1 F.C.C. Rcd 419 (1987).

Letter. The Pick Letter was not found in the Presiding Judge's log.⁷ The name of the addressee is not decipherable although it appears to be addressed to an Administrative Law Judge at the Bureau's Gettysburg, PA office. The salutation states "Your Honor-". The Pick Letter was not seen by the Presiding Judge until its submission by Kay as an attachment to the disqualification Motion. Therefore, there is no basis for alleging that the Pick Letter may have caused any bias or prejudice.

12. Kay further argues that actual receipt of the Pick Letter is not a determining factor because the mere fact that it was addressed to the Presiding Judge raises an inference that it was received by the Presiding Judge and that alone raises an appearance of an impropriety. The Presiding Judge completely disagrees with that argument. The letter was addressed to Gettysburg, PA and the Presiding Judge is in Washington, D.C. The letter cannot even be identified as having been addressed to the Presiding Judge by name. Certainly, it cannot be presumed to have been delivered to the Presiding Judge. Furthermore, the Presiding Judge has a case log system that was checked twice and revealed no Pick Letter. Also, the Presiding Judge's file of pleadings and correspondence were checked and double checked and the Pick Letter was not found. Therefore, the Pick Letter is a nullity for purposes of the Motion and presents no basis for recusal or disqualification.

Discovery And Procedural Rulings

13. Kay refers to certain situations in which the Presiding Judge is alleged to have shown a bias in his rulings on discovery. Kay complains that he was limited to an initial ten interrogatories with respect to each of the ten substantive paragraphs of the HDO. Order FCC 95M-28, released February 1, 1995. That amounts to allowing Kay one hundred substantive interrogatory questions which is certainly a fair amount of interrogatory discovery. Also, in that same order, and despite the Bureau's objection (Tr. 33), the Presiding Judge provided for a staggered exchange of hearing evidence that provides Kay a significant advantage in that Kay would see the Bureau's entire case before exchanging its own case. Order FCC 95M-28 at fn.3.

14. In ruling on a subsequent Motion To Compel that was filed by Kay, the Presiding Judge determined that Kay was seeking matter that would be redundant, burdensome and/or protected as "work product." Order FCC 95M-102, released April 7, 1995. Kay argues bias in that ruling because the Bureau had not asserted any privilege, and or work product, as a basis for withholding documents that were "otherwise responsive to Kay's interrogatories." Kay had asked the Bureau in an interrogatory to "state with particularity" each fact which Kay has failed to supply that he was required to provide pursuant to Section 308 of the Act. The Bureau had provided copies of complaint letters to Kay that were the basis for the Section 308 requests. The Bureau argued that narrative responses of the same information that was contained in the

⁷ Kay has asked for the log under FOIA, but that request was denied. The Presiding Judge's log, which records and describes each incoming pleading and any case-related correspondence, was withheld under the "work paper" exemption of FOIA. 47 C.F.R. §0.457(e).

letters of complaint would be redundant. The Presiding Judge agreed with that assessment. The Bureau would not be permitted to expand its evidence on that question, except upon a showing of newly discovered evidence. See 47 C.F.R. §1.323(d) (where interrogatory has not been answered fully and truthfully adverse findings may be made). As to privileged information, the Commission Rules limit discovery of any matter "not privileged." 47 C.F.R. §1.311(b). Kay had asked for "each fact ascertained by investigation or contained in any complaint and which supports the belief that Kay violated the Act or that Kay does not possess the character qualifications to be a licensee." The Presiding Judge found that the breadth of Kay's request could include matters which would be privileged and therefore not discoverable. It was merely an explanation or clarification given for the ruling. Cf. Tri-State Community Development and Communications Corporation, 5 F.C.C. Rcd 942, 943 (1990). The Bureau had made available relevant documents in addition to narrative responses and that information was found in its totality to be responsive.⁸ Order FCC 95M-102, supra at 2. This was a routine ruling on discovery which shows no bias or prejudice.

15. Kay alleges bias because of an instruction from the Presiding Judge that Kay make a thorough search of his billing records and describe steps taken to search and represent whether a particular document was found. Order FCC 95M-131, released May 26, 1995 at 6. The Bureau had asked for the identity of contact persons at Walnut Leasing, Inc., as well as a relevant address and dates of billings or invoices. Kay answered "unknown". The Presiding Judge exercised discretion in requiring a more complete answer for the identity of a contact. Even if deceased, the identity of the contact may have led to further evidence. It was also well within the Presiding Judge's discretion to require an assurance that a complete search of billing records was made in order to support Kay's answer. The ruling does not support an allegation of bias or prejudice.

16. Kay further argues that in the Presiding Judge's Prehearing Conference Order FCC 97M-32, released March 3, 1977, which was issued after the remand, the Presiding Judge exhibited a bias against Kay by "surprisingly" presuming that the Bureau will take Kay's deposition and that Kay will be called to testify in open court. The Presiding Judge was told at the outset that the Bureau "for sure" would seek Kay's deposition. See Prehearing Conference, January 27, 1995, at Tr. 7, 32. Kay later argued in a Bench Memorandum dated January 31, 1996, that it was necessary to "hear evidence on Kay's handling of the Section 308(b) issue." Kay's counsel also argued that the issues should be addressed in depositions. See Prehearing Conference, January 31, 1996, at Tr. 178. Kay's counsel even suggested that the Bureau depose Kay in person on his record-keeping format. Id. at Tr. 169. There was no bias on the part of the Presiding Judge in reminding the parties and their counsel after the case was remanded that they should begin to think again of scheduling a deposition of Kay, the licensee party. Nor is there any bias

⁸ Responsive information provided by the Bureau included information on loading; trunked mode; inspection of Station WNWK 982; copies of complaints; identify of stations charged with inflated loading; willful interference; abuses of Commission processes; and evidence leading up to Section 308(b) requests. It was found that under the circumstances Kay had received responsive information from the Bureau. Id. at 3.

shown or inferred by the Presiding Judge alerting counsel in advance of a scheduling conference that Kay's hearing testimony is expected to be heard in the Bureau's case in chief since the Bureau has the burden of proceeding and the burden of proof.⁹

17. Kay even goes beyond arguments of bias to define limits on the Presiding Judge's "job" that would, in Kay's view, exclude acting as a "coach" in directing the litigation strategy of the Bureau's trial team.¹⁰ Kay infers nonjudicious conduct where the Presiding Judge has been attempting to manage and direct the movement of the case through discovery to a hearing. See 47 C.F.R. §1.243(f) (authority of presiding officer to regulate the course of the hearing) and WWOR TV, Inc. *supra* at Para. 13 (no bias shown by a Presiding Judge's narrowing the scope of a party's discovery). The Commission expects Presiding Judges to regulate the course of a hearing. Hillebrand Broadcasting, Inc., *supra* at Para. 5. It has been held that a Presiding Judge's efforts to "focus" a conference will not support a charge of bias for being unduly harsh. Center For Study And Application Of Black Economic Development, 7 F.C.C. Rcd 3101, 3104 (Review Bd 1992), 10 F.C.C. Rcd 2836, 2841 (Review Bd 1995), *aff'd* 11 F.C.C. Rcd 1144 (1996). In its ultimate ruling, the Review Board followed the Liteky case holding that even a "stern and short-tempered judge's ordinary efforts at courtroom administration remain immune." 10 F.C.C. Rcd at 2841 and 114 S.Ct. at 1157. There is only adjudicative case management, focus and direction shown in the procedural and discovery rulings of the Presiding Judge which are being relied on by Kay as a basis for assertions of bias. See Catalina Radio, A California Limited Partnership, 5 F.C.C. Rcd 3710, 3711 (1990) (a showing of a pattern of unfavorable rulings that are subject to review is not sufficient to overcome the strong presumption that a Presiding Judge has acted in a fair and impartial manner).

Standards For Disqualification

18. The relevant Commission Rule provides:

Any party may request the presiding officer to withdraw on the grounds of personal bias or other disqualification.

The person seeking disqualification shall file with the presiding officer an affidavit setting forth in detail the facts alleged to constitute grounds for disqualification.

⁹ It would be to Kay's advantage and convenience for Bureau counsel to disclose as soon as possible at what point Kay would be called to testify.

¹⁰ In support of this alleged bias, Kay notes the Presiding Judge's Order FCC 95M-131, released May 26, 1995, at page 3, wherein the Bureau was instructed to seek further discovery with respect to an answer of Kay's to an interrogatory which failed to give specific information about dates on which stations began operating. Actually, the burden was placed on the Bureau to seek more discovery rather than imposing a burden on Kay to try to provide a more precise answer. Therefore, the ruling was favorable to Kay in its application.

The presiding officer may file a response to the affidavit; and if he believes himself not disqualified, shall so rule and proceed with the hearing.

47 C.F.R. §1.245(b) (1) (2).

19. To establish a basis for a Presiding Judge's disqualification, a party's affidavit must show personal bias or prejudice that will impair the ability to act in an impartial manner. Barnes Enterprises, Inc., 66 F.C.C. 2d 499, 501 (1977), citing Berger v. United States, 255 U.S. 22, 33-35 (1921). Any party requesting disqualification has a heavy burden of proof. Barnes Enterprises, Inc., supra at 502-03. The Commission has held that the alleged bias and prejudice "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." Black Television Workshop of Los Angeles, Inc., 6 F.C.C. Rcd 6525 (1991), citing United States v. Grinnell Corp., 384 U.S. 563, 583 (1966). See also Catalina Radio, A California Partnership, 5 F.C.C. Rcd 3710 at Para. 5 (1990) (any error of fact or law may be corrected on review); and WWOR-TV, Inc., supra at Para. 6. The rulings that are cited by Kay in support of allegations of bias are based on matters that are solely case-related.

20. The Commission has sustained a Presiding Judge's ability to remain in a case where the alleged bias and prejudice was based primarily on rulings with which the party disagreed. Black Television Workshop of Los Angeles, Inc., supra. That is true even when a Judge has commented on potential evidence. For example, a reference to "mysterious" bylaws as an expression that the bylaws appeared flawed did not evidence any bias. Id. Here, the two matters alleged to be disqualifying by Kay which were outside the record are the Bivens Action and the Pick Letter, both of which are considered above and both of which are found to not support recusal or disqualification. They add no support to the rulings which are alleged to provide a basis for disqualification. The concern of the Presiding Judge about deposition discovery possibly being used for advancing the Bivens Action was justified to insure that this case remained properly focused. It was not a disqualifying expression of concern at the time that it was made in 1995 or now. And the Pick Letter could not be viewed as an outside source that caused or appeared to cause a bias because as a matter of fact it never reached the Presiding Judge. Therefore, the Pick Letter is a nullity for purposes of the disqualification Motion.

21. Nor should the rulings of the Presiding Judge in the SD that were adverse to Kay disqualify the Presiding Judge from hearing the case on remand. As a matter of law, the issue was found not be appropriate for summary decision based on the record considered by the Presiding Judge. It has been held that a decision-maker's preconceptions as to the law, standing alone, do not require disqualification. FTC v. Cement Institute, 333 U.S. 683, 702-03 (1948); City of Charlottesville v. FERC, 774 F.2d 1205, 1212 (D.C. Cir. 1985). Even when a motion is directed to a sentencing judge who conducted the trial, there need not arise any question concerning impartiality. Liteky, supra at 1161. And it has been held that judges are

not always precluded from deciding cases involving questions on which they have expressed previous views. Assoc. of Nat'l Advertisers v. FTC, 627 F.2d 1151, 1171 n.51 (D.C. Cir. 1979).

22. Nor is there a basis for disqualification based on affirmative steps taken by the Presiding Judge to see that discovery is completed in a timely and efficient manner. Under the Commission's established policy, a Presiding Judge has "full control" over the use of discovery procedures. See In the Matter of Discovery Procedures, 11 F.C.C. 2d 185, 187 (1968). See also Chronicle Broadcasting Co., 20 F.C.C. 2d 728 (Review Bd 1969) (Presiding Judges are delegated broad responsibility "to carefully manage" discovery procedures); Van Buren Community Services, 87 F.C.C. 2d 1018 (Review Bd 1981) (Presiding Judges have great latitude and discretion in regulating the course of hearing procedures); and Marlin Broadcasting of Central Florida, Inc., 2 F.C.C. Rcd 2025 (Review Bd 1987) (Presiding Judges have wide latitude to deal with exigencies of hearing).

Conclusion

23. The Presiding Judge was reversed on a summary decision on one of eight issues. There is new evidence to be received and considered on remand on all the issues, including the issue which was held to have been erroneously decided as a matter of law. The Presiding Judge stated at the first conference held after the remand, before the disqualification Motion was filed, that he would look at the case in a "fresh new way." See Prehearing Conference of March 19, 1997 at Tr. 191. The Presiding Judge has responded to the points and matters raised in the disqualification Motion. Based on the Commission's standards, there has not been a basis shown for recusal or disqualification. The rulings cited for bias are not attributable to any outside source. And even though held on appeal to be erroneous, the SD does not reveal "such a high degree of favoritism or antagonism as to make fair judgment impossible." Liteky, 114 S.Ct at 1157. The testimony of Kay has not yet been heard. His testimonial demeanor has not yet been observed. The Presiding Judge has not shown a predisposition against Kay's credibility.¹¹ Therefore, the undersigned Administrative Law Judge is qualified to remain in the case as its Presiding Judge.¹²

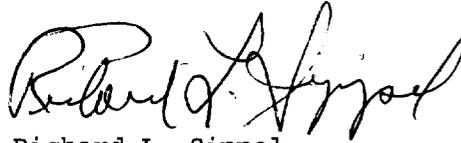
¹¹ Cf. Nicodemus v. Chrysler Corp., 596 F.2d 152, 155-157 (6th Cir. 1979) (trial judge found disqualified who had referred to party in open court during an injunction hearing as a "bunch of villains" who could not be believed).

¹² It is standard procedure for a case to be returned to the same Presiding Judge who has already ruled in favor of one party by summary decision. See, e.g., Weyburn Broadcasting Ltd. Partnership v. FCC, 984 F.2d 1220 (D.C. Cir. 1993) and Memorandum Opinion And Order FCC 93M-544, released December 20, 1993 (case remanded by the Commission to the same Presiding Judge).

Order

Accordingly, IT IS ORDERED that the Motion To Disqualify filed by James A. Kay, Jr. IS DENIED.¹³

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in cursive script, appearing to read "Richard L. Sippel".

Richard L. Sippel
Administrative Law Judge

¹³ The release date of this Memorandum Opinion And Order FCC 97M-52 determines the time that this ruling denying disqualification is made. 47 C.F.R. §1.4(b)(2). An advance copy of this ruling is being made available to Kay's counsel in order to allow time to consider an appeal. 47 C.F.R. §1.245(b)(3).