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**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
**JAMES A. KAY, JR.** ) WT DOCKET NO. 94-147  
 )  
 )  
 Licensee of 152 Part 90 Stations in the )  
 Los Angeles, California Area )

To: The Commission

**WIRELESS TELECOMMUNICATIONS BUREAU'S  
OPPOSITION TO MOTION TO STAY PROCEEDINGS**

1. The Chief, Wireless Telecommunications Bureau, by his attorneys, now opposes the "Motion to Stay Proceedings" filed by James A. Kay, Jr. (Kay) on October 31, 1997.

2. Kay seeks a stay of the proceeding pending a ruling on his petition for reconsideration of the Commission's Memorandum Opinion and Order, FCC 97-349 (released October 2, 1997) denying his motion to disqualify the Presiding Judge. Kay argues that "recently discovered evidence that may serve to establish the existence of an ex parte communication" (Kay Motion, p. 1) justifies a stay.

3. Using the test of Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958), the Commission looks at four factors in determining whether to stay an administrative orders: (1) "Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal?" (2) "Has the petitioner shown that without such relief, it

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will be irreparably injured?" (3) "Would the issuance of a stay substantially harm other parties interested in the proceedings?" and (4) "Where lies the public interest?" Contrary to Kay's argument, each of the elements of the Virginia Petroleum test supports denial of his stay request.

4. As the Bureau has shown in greater detail in its opposition to Kay's petition for reconsideration (being filed simultaneously with this opposition), Kay's petition has little, if any, chance of success on the merits. While Kay's petition submits a new version of the so-called "Pick Letter", he still has utterly failed to submit any competent evidence contradicting the Presiding Judge's representations that he never received the Pick Letter before Kay submitted the letter along with his motion for disqualification motion. Without such evidence, the Pick Letter (in whatever version) fails to support Kay's request for an investigation or for disqualification of the Presiding Judge.

5. Kay argues that unless the proceeding is stayed, "these proceedings may be subject to the taint of ex parte communications and any bias that may result therefrom." Kay Motion, p. 3. This brief statement falls far short of the particularized showing of irreparable injury needed to justify the issuance of a stay. First, Kay has failed to show that any ex parte communication reached the Presiding Judge, so there is no possible taint from any ex parte communication. Second, Kay has failed to show any type of injury that could not be remedied through Commission review of the Presiding Judge's initial decision. See Order, ¶14. Accordingly, Kay has utterly failed to show the existence of irreparable injury justifying

a stay.

6. The issuance of a stay would also harm the interests of the Commission and the public (and, indeed, of Kay) in resolving this proceeding in a timely fashion. This proceeding was designated almost three years ago, but has not yet reached the point where pre-trial depositions have been taken. The Bureau submits that the public interest would be best served by going forward uninterrupted with this much-delayed hearing in order to expeditiously resolve the very serious issues that have been designated against Kay. Kay has utterly failed to show the existence of any unfairness or appearance of impropriety on the part of the Presiding Judge, and the Commission's and the public's interest lies in denying Kay's motion for stay.

7. Kay's reliance on American Broadcasting Co., Inc., 23 FCC 2d 136 (Rev. Bd. 1970) and Midwest Television, Inc., 1 FCC 2d 1345 (Rev. Bd. 1965) (Kay Motion, p. 4) is inapposite for several reasons. ABC actually supports the denial of a stay because the petitioner's request for an ex parte issue was denied by the Review Board and no stay was issued. Here, where the Commission has already considered the matter and determined that no further action is required, there is even less of a reason for issuing a stay. In Midwest Television, the Review Board determined that a stay would be appropriate to allow the Commission to consider the alleged violations of the ex parte rules. In this case, the Commission has already considered and rejected Kay's arguments, and his reconsideration petition does not provide any basis for changing the Commission's ruling.

8. Accordingly, the Bureau asks the Commission to deny Kay's "Motion for Stay of Proceedings."

Respectfully submitted,  
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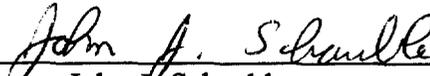
CERTIFICATE OF SERVICE

I, John J. Schauble, an attorney in the Enforcement and Consumer Information Division, Wireless Telecommunications Bureau, certify that I have, on this 10th day of November, 1997, sent by hand delivery, copies of the foregoing "Wireless Telecommunications Bureau's Opposition to Motion to Stay Proceedings" to:

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