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FEDERAL COMMUNICATIONS COMMISSION
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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

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 TO STAY PROCEEDINGS**

James A. Kay Jr. ("Kay"), by his attorneys, hereby files this Reply to the Wireless Telecommunications Bureau's (the "Bureau") Opposition to Kay's Motion to Stay Proceedings ("Opposition") filed by the Bureau on November 10, 1997.

On October 31, 1997, Kay filed a Petition for Reconsideration ("Petition") with the Commission, requesting reconsideration of the Bureau's Order, FCC 97-349, released October 2, 1997 ("Commission Order"), denying Kay's Appeal of the Presiding Officer's Order Denying Kay's Motion to Disqualify. Simultaneously with the Petition, Kay filed a Motion to Stay Proceeding ("Motion to Stay"), asserting that if the Petition for Reconsideration is granted, a stay of the above-captioned proceeding is proper under the Commission's Rules.

In the Opposition, the Bureau contends that the Motion to Stay failed to satisfy the four factors set forth in Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977) ("WMATA"), which decision governs motions to stay

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administrative orders.¹ Contrary to the Bureau's contention, the Motion for Stay satisfies all four factors of WMATA, rendering a stay of these proceedings proper.

In the Opposition, the Bureau contends that the Petition fails to satisfy the first factor of the WMATA test because it has little possibility of success. As shown more fully in the Petition and Kay's Reply to the Bureau's Opposition thereto, the Petition is based on three grounds, each of which, independently, justifies reconsideration of the Commission Order. The Bureau either fails to recognize or chooses to ignore the fact that Letter No. 2 constitutes a new and independent basis for the Commission to either grant the Motion to Disqualify or, at a minimum, conduct an investigation into either the Commission's or the Presiding Officer's receipt of any illegal ex parte communication. The Bureau's assertion that Kay's failure to prove that the Commission received Letter No. 1 (attached to Petition as Exhibit B) precludes any stay in these proceedings is inapposite: neither the Commission's Rules nor Commission precedent contain such a requirement, particularly since the Commission, itself, has the sole power to review its files as part of an investigation into its receipt of any illegal ex parte communications.

The Bureau next contends that Kay has not established any irreparable injury, thus failing to satisfy the second factor set forth in WMATA. As asserted in the Motion to Stay, Kay's economic livelihood is at stake in these proceedings. By definition, Kay will be irreparably injured if his revocation proceeding is tainted by the Commission's receipt of any ex parte communication.

¹ Pursuant to WMATA, a petitioner must demonstrate that (1) he is likely to prevail on the merits of his Petition; (2) he will suffer irreparable injury if the Petition is denied; (3) other parties to this proceeding will not be harmed; and (4) a stay of the proceedings is in the public interest.

The Bureau contends in its Opposition that the public interest is best served by a speedy resolution of this matter. Although an expeditious resolution of this matter is important, the public interest in the maintenance of a fair and impartial judiciary is of far greater importance. See e.g., United States v. Hollister, 746 F.2d 420, 425 (8th Cir. 1984) (“[a]voiding even the appearance of impropriety is as important to developing public confidence in the judiciary as avoiding impropriety itself”). The public interest would be best served in this matter by a stay pending the Commission’s consideration of the Petition and any resulting investigation of ex parte communications to the Commission. This is particularly true in this case since the Commission initiated this proceeding almost three years ago and formal pre-trial discovery is only now beginning.

Finally, the Bureau contends in its Opposition that Kay’s reliance on In re Application of American Broadcasting Co., Inc. (ABC), 23 FCC 2d 136 (1970), and Midwest Television, Inc., 1 FCC 2d 1345 (1970), is inappropriate. A fair reading of both cases, however, clearly indicates that a stay of proceedings is correct while the Commission considers potential ex parte violations. If the Commission determines to reconsider the Commission Order or conduct an investigation into its receipt of ex parte communications, then a stay of Kay’s revocation pending such reconsideration/investigation is the only proper course of action.

WHEREFORE, for the reasons set forth above and in the Motion to Stay, James A. Kay Jr. requests that the Commission grant his Motion to Stay Proceedings.

Respectfully submitted,

JAMES A KAY, JR.

By: Scott A. Fenske

Barry A. Friedman

Scott A. Fenske

Thompson Hine & Flory LLP

1920 N St., N.W., Suite 800

Washington, D.C. 20036

(202) 973-2700

Dated: November 17, 1997

CERTIFICATE OF SERVICE

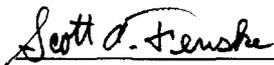
I hereby certify that a true and correct copy of the foregoing James A. Kay Jr.'s Reply to Wireless Telecommunications Bureau's Opposition to Motion to Stay Proceedings was hand-delivered on this 17th day of November, 1997, to the following:

John I. Riffer, Esq.
Administrative Law Division
Office of the General Counsel
Federal Communications Commission
Room 610
1919 M Street, N.W.
Second Floor
Washington, D.C. 20554

Gary P. Schonman, Esq.
Federal Communications Commission
Wireless Telecommunications Bureau
Enforcement Division
Suite 8308
2025 M Street, N.W.
Washington, D.C. 20554

and sent via first-class mail, postage pre-paid on this 17th day of November, 1997, to:

William H. Knowles-Kellett, Esq.
Wireless Telecommunications Bureau
1270 Fairfield Rd.
Gettysburg, Pennsylvania 17325-7245



Scott A. Fenske