

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

MAR - 2 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
JAMES A KAY, JR.) WT Docket No. 94-147
)
Licensee of One Hundred Fifty-)
two Part 90 Licenses in the Los)
Angeles, California Area.)

To: Honorable Richard L. Sippel
Administrative Law Judge

PETITION FOR LEAVE TO FILE APPEAL

James A. Kay, Jr. ("Kay"), by his attorneys and pursuant to Section 1.301(b) of the Commission's Rules, hereby petitions for leave to appeal the Presiding Judge's Order, FCC 98M-22, released February 26, 1998 (the "Order"). In support thereof, Kay states as follows:

1. Section 1.301(b) provides a basis on which to take an interlocutory appeal, with the Presiding Judge's concurrence, where there is a "new or novel" question of law or policy and the ruling is such that remand would be likely to occur if the appeal is deferred and raised as an exception. Based on the Order, Kay submits that the action of the Presiding Judge, in ruling (at n. 4) that the trial testimony of non-party witnesses, Marc and Craig Sobel (if they are called to testify), be conducted in Washington, D.C., exceeds the bounds of the authority delegated to the Presiding Judge and will constitute reversible error resulting in a future remand of the proceeding. Hence, there is a substantial basis for consideration of an interlocutory appeal in this matter.

2. Requiring non-party witnesses to travel to Washington, D.C., at their expense, represents a significant burden upon these witnesses. In order to appear at trial in which their

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testimony collectively may last just a few hours, non-party witnesses are required to travel to Los Angeles International Airport, fly from Los Angeles to Washington (a five-hour direct flight from Los Angeles International to Dulles International Airport and substantially longer with stops or connections), commute into Washington, D.C., spend at least one evening in a hotel in Washington, and return home. Thus, the non-party witness would lose three days from his business, work or other affairs.

3. As for costs, the non-party witnesses will be required to expend considerable sums to comply with the Presiding Judge's ruling. Attached hereto as Exhibit A is a listing from the Microsoft Expedia travel service showing that the round-trip airfare charged by a major airline for non-stop Los Angeles-Washington travel is \$1,912.00. To this the party would have to add ground transportation, hotel stay and meals. In contrast, their attendance at trial in the Los Angeles area would involve ground transportation and parking. This is quite a difference.

4. Commission precedent on this issue suggests that non-party witnesses should testify in Los Angeles in this proceeding. In Rocket Radio, Inc., 36 RR2d 79 (1976), the Commission, considering an application for review of the presiding judge's decision in a comparative case, transferred venue from Washington, D.C. to Georgia. In doing so, the Commission noted:

The general practice is to hold comparative hearings in Washington, D.C., where extensive hearing facilities are available and where communications counsel are principally based. However, hearings in renewal and revocation cases are held at the situs of the broadcast facility for a number of reasons, including the necessity of calling local witnesses and the likelihood of availability there of evidence.

Id. at 81, n 7 (emphasis added).

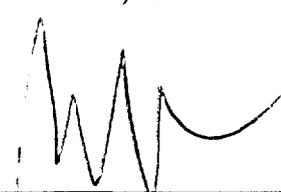
5. In this proceeding, virtually all of the witnesses reside in California and the Presiding Judge has previously indicated that a significant portion of the hearing will be held in the Los Angeles area. Under these circumstances, it makes far more sense for non-party witnesses to testify in their community of residence than in Washington, D.C. Kay submits that this is a decision that the Commission will reach if it were presented with an interlocutory appeal on the subject.

WHEREFORE, it is respectfully requested that the Presiding Judge permit an appeal to the Commission dealing with the discretion of a Presiding Judge to order non-party witnesses to travel to Washington, D.C. for trial when a significant portion of the trial will be held in their community of residence.

Respectfully submitted,

JAMES A. KAY, JR.

By: _____



Barry A. Friedman
Scott A. Fenske
Thompson Hine & Flory LLP
Suite 800
1920 N Street, NW
Washington, D.C. 20036

Dated: March 2, 1998

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EXHIBIT A

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CERTIFICATE OF SERVICE

I, Scott A. Fenske, do hereby certify that I have, on this 2nd day of March, 1998, served a copy of the foregoing "Motion for Leave to File Appeal," upon the following parties by first-class mail, postage prepaid:

Hon. Richard L. Sippel *
Administrative Law Judge
Federal Communications Commission
2000 L Street, NW
Washington, D.C. 20554

John J. Schauble, Esq. *
Federal Communications Commission
Wireless Telecommunications Bureau
Room 8308
2025 M Street, NW
Washington, DC 20554

William H. Knowles-Kellett, Esq
Federal Communications Commission
Wireless Telecommunications Bureau
1270 Fairfield Road
Gettysburg, PA 17325-7245

Scott A. Fenske