

MAR 5 - 1998

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

Federal Communications Commission
Office of 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

**MOTION TO SHIFT BURDEN OF PROOF
OR, IN THE ALTERNATIVE, PETITION FOR LEAVE TO FILE APPEAL**

James A. Kay, Jr. ("Kay"), by his attorneys and moves that the Presiding Judge shift the burden of proof on the newly designated issues to the Wireless Telecommunications Bureau ("Bureau") pursuant to Section 312(d) of the Communications Act of 1934, as amended, or, alternatively, petitions for leave to appeal the Presiding Judge's Memorandum Opinion and Order, FCC 98M-26, released March 5, 1998 (the "Order") pursuant to Section 1.301(b) of the Commission's Rules. In support thereof, Kay states as follows:

1. Section 312(d) of the Communications Act of 1934, as amended (47 USC § 312) provides that "[i]n any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission." (emphasis added). See Also D and E Broadcasting Co., 5 RR2d 475, 478, n.1 (1965) ("In revocation case, of course, the Commission always bears the burden of proceeding and the burden of proof. Section 312(d) of the Communications Act.")

2. In the Order, the Presiding Judge assigned the burden of proof to Kay to "show by a preponderance of the evidence that he is qualified to be a licensee notwithstanding the Sobel

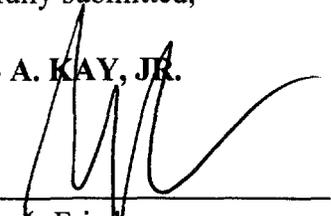
ID.” (Order at ¶ 5). Since the Commission seeks to revoke Kay’s licensees, this portion of the Order contradicts the express language in Section 312(d) of the Communications Act, an action that an administrative law judge has no authority to undertake.

3. 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 assigning the burden of proof to Kay, will constitute reversible error resulting in a future remand of the proceeding. Hence, there is a substantial basis for the Presiding Judge to properly shift the burden of proof back to the Bureau or, alternatively, request that the Commission rule on whether the Presiding Judge has the authority to take actions that violate express provisions of the Communications Act of 1934, as amended.

WHEREFORE, it is respectfully requested that the Presiding Judge shift the burden of proof back to the Bureau or, alternatively, permit an appeal to the Commission concerning the Presiding Judge’s assignment of the burden of proof on the newly designated issues to Kay.

Respectfully submitted,

JAMES A. KAY, JR.

By: 
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Dated: March 5, 1998

CERTIFICATE OF SERVICE

I, Scott A. Fenske, do hereby certify that I have, on this 5th day of March, 1998, served a copy of the foregoing "Motion to Shift Burden of Proof or, in the Alternative, Petition for Leave to File Appeal," upon the following parties via hand-delivery:

Hon. Richard L. Sippel
Administrative Law Judge
Federal Communications Commission
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