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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

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	)	

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To: Honorable Richard L. Sippel
Administrative Law Judge

WIRELESS TELECOMMUNICATIONS BUREAU'S COMMENTS ON MOTION TO SHIFT BURDEN OF PROOF OR, IN THE ALTERNATIVE, PETITION FOR LEAVE TO FILE APPEAL

1. The Chief, Wireless Telecommunications Bureau, by his attorneys, now comments upon the "Motion to Shift Burden of Proof Or, In the Alternative, Petition for Leave to File Appeal" filed by James A. Kay, Jr. (Kay) on March 5, 1998.

2. In his Memorandum Opinion and Order, FCC 98M-15 (released February 2, 1998), the Presiding Judge specified the following issues against Kay:

> To determine, based upon the findings and conclusions of Initial Decision FCC 97D-13 reached in WT Docket No. 97-56 concerning James A. Kay, Jr.'s (Kay) participation in an unauthorized transfer of control, whether Kay is basically qualified to be a Commission licensee.
>
> To determine whether James A. Kay, Jr. misrepresented facts or lacked candor in presenting a Motion to Enlarge, Change, or Delete Issues filed by Kay on January 12, 1995 and January 25, 1995.

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> To determine whether in light of the evidence adduced under the aforementioned added issues whether James A. Kay, Jr. is qualified to hold a Commission license.

The Presiding Judge assigned the burden of going forward under the added issues to the Bureau, but he placed the burden of proof on Kay.[1] Kay argues, based upon Section 312(d) of the Communications Act of 1934, as amended, and D and E Broadcasting Co., 1 FCC 2d 78, 80 n.1 (1965), that the Communications Act requires that the burden of proof be placed on the Bureau. In light of Section 312(d) of the Communications Act, the Bureau believes it is appropriate for the Bureau to assume the burden of proof. The Bureau believes it will not be prejudiced by placing the burden of proof for the added issues on the Bureau. Moreover, placing the burden of proof on the Bureau will eliminate any possible argument by Kay on appeal that the evidentiary burdens may have been initially improperly assigned.

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[1] Kay refers to the Presiding Judge's Memorandum Opinion and Order, FCC 98M-26 (released March 5, 1998). In fact, it was the order adding the issues (FCC 98M-15) which placed the burden of proof upon Kay. Thus, to the extent Kay seeks leave to appeal the order placing the burden of proof upon him, his petition is untimely because it was not made within five days after the order was released. Under these circumstances, however, the Bureau has no objection to consideration of Kay's pleading as a motion to shift the burden of proof.

3. Accordingly, the Bureau supports Kay's request that the burden of proof under the added issues be placed on the Bureau.

Respectfully submitted,
Daniel B. Phythyon
Chief, Wireless Telecommunications Bureau

Gary P. Schonman
Chief, Compliance and Litigation Branch
Enforcement and Consumer Information Division

William H. Knowles-Kellett
John J. Schauble
Attorneys
Wireless Telecommunications Bureau

Federal Communications Commission
2025 M Street, N.W., Suite 8308
Washington, D.C. 20554
(202) 418-0569

March 9, 1998

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 9th day of March, 1998, sent by hand delivery, copies of the foregoing, "Wireless Telecommunications Bureau's Comments on Motion to Shift Burden of Proof or, in the Alternative, Petition for Leave to File Appeal" to:

Barry A. Friedman, Esq.
Thompson, Hine & Flory
1920 N Street, N.W., Suite 800
Washington, D.C. 20036
(Counsel for James A. Kay, Jr.)

Administrative Law Judge Richard L. Sippel
Federal Communications Commission
2000 L Street, N.W.
Second Floor
Washington, D.C. 20554

John J. Schauble