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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the matter of)
)
JAMES A. KAY, JR.)
)
Licensee of one hundred fifty two Part 90)
Licenses in the Los Angeles, California area)

WT Docket No. 94-147

To: ALJ Richard L. Sippel

MOTION FOR PARTIAL SUMMARY DECCISION

James A. Kay, Jr. ("Kay"), by his attorneys and pursuant to Section 1.251 of the Commission's Rules and Regulations, 47 C.F.R. § 1.251, hereby respectfully moves for summary decision as to issues designated in paragraphs 10(b) and 10(f) of the *Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture ("HDO")*, 10 FCC Rcd 2062 (1994), and as to issue 10(d) insofar as it makes reference to Section 90.629 of the Rules, in support whereof the following is respectfully shown:

1. This request is being timely filed more than twenty days prior to the date set for commencement of the hearing in accordance with Section 1.251(a) of the Rules. By his *Order*, FCC 98M-40, released April 2, 1998, the Presiding Judge has scheduled the admissions session for this proceeding for August 4-5, 1998, and has scheduled the first phase of the hearing itself to commence on September 2, 1998, in Washington, D.C. This pleading is being filed substantially more than twenty days in advance of either of these dates.

2. In the *Wireless Telecommunications Bureau's Statement of Readiness for Hearing ("Bureau Statement")*, filed Wednesday, June 3, 1998, the Bureau announced that it would not present evidence on or otherwise pursue or prosecute certain designated issues in this case. As explained more fully herein, this announcement by the Bureau warrants summary decision as to

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those issues. Kay informally suggested that the Bureau submit a motion for summary decision in order to formalize its position, but the Bureau appears reluctant to do so. Kay is therefore submitting this request in order to formally narrow the issues prior to hearing.¹

3. Issue 10(b) was framed by the Commission as follows:

To determine whether James A. Kay, Jr. has willfully or repeatedly operated a conventional station in the trunked mode in violation of Section 90.113 of the Commission's Rules.

HDO at ¶ 10(b). The Bureau, after completing extensive discovery in this case, has advised that "it does not believe there is sufficient evidence that Kay utilized conventional channels in trunked configuration to proceed with this issue." *Bureau Statement* at p. 6, ¶ 11.

4. Issue 10(f) was framed by the Commission as follows:

To determine whether James A. Kay, Jr. has abused the Commission's processes in order to obtain cancellation of other licenses

HDO at ¶ 10(f). The Bureau now states as to this issue:

The Bureau has reviewed the available evidence and has decided not to proceed on this issue. The Bureau has taken discovery regarding the complaints it has received and has decided that the *allegations* of misconduct by Kay to obtain cancellation of licenses of which the Bureau is aware involve *allegations* of civil fraud or contractual disputes more appropriately resolved in civil courts of competent jurisdiction.

Bureau Statement at p. 9, ¶ 20 (emphasis added).

¹ Kay believes that the appropriate procedural mechanism in this instance is a motion for summary decision. Nevertheless, if the Presiding Judge deems it appropriate, Kay alternatively asks that this pleading be deemed a motion, pursuant to Section 1.229 of the Commission's Rules and Regulations, 47 C.F.R. § 1.229, for the deletion of the issues designated in paragraphs 10(b) and 10(f) of the *HDO* and for the modification of issue 10(d) to delete the reference to Section 90.629 of the Rules. This alternative request is timely filed, pursuant to Section 1.229(b)(3) of the Rules, within fifteen days of the discovery of new facts by Kay. Specifically, on Wednesday, June 3, 1998, counsel for Kay were served with the *Bureau Statement* in which it was disclosed to Kay for the first time that the Bureau will not be presenting evidence on or otherwise prosecuting the specified issues. This pleading is being filed less than fifteen days after discovery of this fact by Kay. The substantive reasons warranting deletion and modification are the same as those advanced herein for summary decision.

5. Issue 10(d) was framed by the Commission as follows:

To determine whether James A. Kay, Jr. has abused the Commission's processes by filing applications in multiple names in order to avoid compliance with the Commission's channel sharing and recovery provisions in violation of Sections 90.623 and 90.629.

HDO at ¶ 10(d). The Bureau has "note[ed] that the issue erroneously sites to § 90.629 instead of § 90.627 [but that] the error ... is harmless since the Bureau intends only to proceed with evidence regarding ... conventional stations subject to the provisions of § 90.623." *Bureau Statement* at p. 8, ¶ 18. In other words, the Bureau will not be presenting evidence of or otherwise prosecuting alleged violations of either Section 90.627 or 90.629.

6. The Bureau has admitted that there is insufficient evidence to proceed on these issues and it will not be doing so. As such, the Bureau is effectively defaulting on its burden of proceeding, not to mention its burden of proof, on these issues.² Since there will be no evidence offered or arguments advanced by the Bureau as to these particular matters, "there is no genuine issue of material fact for determination at the hearing." 47 C.F.R. § 1.251(a)(1), and summary decision is therefore appropriate.

7. Equity and due process also dictate in favor of summary decision on these issues. Insofar as Kay bears neither the burden of proceeding nor the burden of proof in this hearing, he is entitled to know with some degree of certainty and in advance of the presentation of his direct case what issues will be litigated and which will not

² Consistent with the requirements of Section 312(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 312(d), both the burdens of proceeding and of proof in this proceeding have been placed on the Bureau as to all issues. *HDO* at ¶ 15.

WHEREFORE, it is respectfully requested that the Presiding Judge issue a partial summary decision resolving issues 10(b), 10(d) (insofar as it refers to Section 90.629 of the Rules), and 10(f) in Kay's favor.

Respectfully submitted this 18th day of June, 1998

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CERTIFICATE OF SERVICE

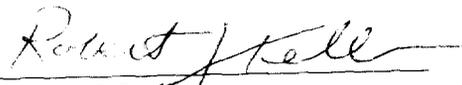
I, Robert J. Keller, counsel for James A. Kay, Jr., hereby certify that on this 18th day of June, 1998, I caused copies of the foregoing **MOTION FOR PARTIAL SUMMARY DECCISION** to be served by facsimile and by regular mail on the officials and parties in WT Docket No. 94-147, as follows:

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