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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	)	

To: The Commission

WIRELESS TELECOMMUNICATIONS BUREAU'S OPPOSITION TO MOTION FOR STAY OF PROCEDURAL DATES

1. The Chief, Wireless Telecommunications Bureau, by his attorneys, now opposes the "Motion for Stay of Procedural Dates" filed by James A. Kay, Jr. (Kay) on June 15, 1998.[1]

2. Kay seeks a stay of the proceeding pending a ruling on his "Petition for Extraordinary Relief." Kay argues that it would be unfair and prejudicial to proceed with a hearing under the circumstances he presents and that the balance of the equities supports the imposition of a stay. In fact, Kay meets none of the requirements for a stay, and it would be a major disservice to the public interest to stay this proceeding. Accordingly, his stay request should be denied.

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[1] Kay also filed a virtually identical motion with the Presiding Judge in this proceeding. The Bureau is filing its opposition to that motion simultaneously with this opposition.

3. In order to properly understand Kay's motion, the Commission must consider the context in which Kay's motion is being offered. The history of this proceeding is largely set forth in James A. Kay, Jr., 12 FCC Rcd 2898, 2899-2900 (Gen. Coun. 1997):

> Numerous complaints were received about Kay's operations including allegations that he was 'falsely reporting the number of mobile units he serves... in order to avoid the channel sharing and recovery provisions of [the] rules.' James A. Kay, Jr., 10 FCC Rcd 2062 ¶ 2 (1994) (Order to Show Cause), modified, 11 FCC Rcd 5324 (1996). Section 308(b) of the Communications Act provides that: 'The Commission at any time ... during the term of any such licenses, may require from [a] licensee further written statements of fact to enable it to determine whether ... such license [should be] revoked.' Similarly, Section 1.17 of the rules authorizes the 'Commission or its representatives ... in writing' to request such additional 'written statements of fact relevant to a determination ... whether a license should be revoked....'
>
> 6. On January 31, 1994, the Commission's staff served Kay with a letter of inquiry which, inter alia, directed him 'to provide information detailing the loading of end users on Kay's base stations in order to assess Kay's compliance with the channel loading requirements of our rules. 47 C.F.R. § § 90.313, 90.623, 90.627, 90.631 and 90.633.' Kay was also requested to 'substantiate the loading of his stations by providing customer lists and telephone numbers. Such business records are the Commission's acceptable proof of loading.' James A. Kay, Jr., 10 FCC Rcd [2062], 2063-64 ¶¶ 6-7 [Kay HDO], citing Amendment of Part 90 of the Commission's Rules to Eliminate Separate Licensing of End Users of Specialized Mobile Radio Systems, 7 FCC Rcd 5558, 5560 (1992). See also Report and Order, 7 FCC Rcd 6344, 6345 n. 21 (1992) (amending rules pertaining to end user and mobile licensing information).

The Kay HDO then reports:

> Kay filed a response, but it provided none of the requested information. He simply referenced some unrelated information provided to the Commission staff at other times. Kay failed to provide the requested information after numerous

> extensions of time, reporting at one time that "there is no date. . .for which submission of the requested information would be convenient."

10 FCC Rcd at 2064 (¶8). Accordingly, Kay's licenses were designated for a revocation hearing.

4. This proceeding has been subject to a series of delays. First, the Presiding Judge stayed the proceeding to give Kay an opportunity to settle the proceeding (Order, FCC 95M-144, released June 21, 1995), but Kay was unable to effectuate a settlement. Then, the Presiding Judge issued a summary decision revoking Kay's licenses (James A. Kay, Jr., 11 FCC Rcd 6585 (ALJ 1996)), but the General Counsel set aside that decision and remanded the proceeding for a hearing. James A. Kay, Jr., 12 FCC Rcd 2898 (Gen. Coun. 1997). Shortly afterwards, Kay filed a motion to disqualify the Presiding Judge on grounds of bias, and he appealed the Presiding Judge's denial of that motion to the Commission. The Commission denied Kay's appeal. James A. Kay, Jr., 12 FCC Rcd 15662 (1997), recon. denied 13 FCC Rcd 6349 (1998). During the pendency of that appeal, however, the proceeding was stayed pursuant to Section 1.245 of the Commission's Rules. Since October 1997, the parties have conducted multiple rounds of depositions. On June 12, 1998 (the day Kay filed the pleading portion of his "Petition for Extraordinary Relief"), the Bureau exchanged its direct case exhibits.

5. Using the test of Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958), the Commission looks at four factors in determining whether to stay an

administrative orders: (1) "Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal?" (2) "Has the petitioner shown that without such relief, it will be irreparably injured?" (3) "Would the issuance of a stay substantially harm other parties interested in the proceedings?" and (4) "Where lies the public interest?" Contrary to Kay's argument, each of the elements of the Virginia Petroleum test supports denial of his stay request.

6. Kay's "Petition for Extraordinary Relief" has virtually no chance of success on the merits. As the Bureau will show in greater detail in its opposition to Kay's petition, Kay's accusations are totally groundless. His petition is nothing more than a crude attempt to deflect attention from the evidence showing he has engaged in egregious misconduct. For example, Kay deliberately refused to respond to a legitimate request for information issued by the Bureau pursuant to Section 308(b) of the Communications Act. The Bureau will also show at hearing that Kay repeatedly and deliberately misrepresented his loading to the Commission on countless occasions in an attempt to "warehouse" spectrum. The Bureau will also show at hearing that while Kay represented to the Presiding Judge in this proceeding that he had no interest in any station or license licensed to Marc Sobel, another Administrative Law Judge has found it "abundantly clear" that Kay controlled certain stations licensed to Sobel. Marc Sobel, 12 FCC Rcd 22879, 22901(ALJ 1997), exceptions pending.

7. An important point to keep in mind in determining Kay's likelihood of success on the merits is the fact that his petition is an unauthorized interlocutory appeal of a series of

rulings of the Presiding Judge. Where, as here, the Presiding Judge has not granted authority to file an immediate interlocutory appeal, the appeal will not be considered unless there exists:

> a flagrant abuse of discretion as would inevitably require a reversal of the Initial Decision and a hearing de novo; or where the proceeding involves basic and far reaching considerations of public policy and vital concerns relating to the public interest which could not otherwise adequately be protected.

Communications Satellite Corporation, 32 FCC 2d 533, 534 (1971). This standard is "very stringent." Id. A careful review of Kay's pleading shows that he has not met this test. For the most part, and as the Bureau will show in its opposition to Kay's petition, Kay is in reality challenging the Commission's decision to designate his licenses for hearing in the first place. Section 1.106(a)(1) of the Commission's Rules provides that, except to the extent a hearing designation order adversely affects a party's right to participate in a hearing, interlocutory petitions for reconsideration of a hearing designation order shall not be entertained. Trinity Broadcasting of Florida, Inc., 9 FCC Rcd 2567 (1994). In light of the stringency of the standards, as well as the utter lack of merit in Kay's arguments, this factor supports denial of a stay.

8. Kay has also failed to show he would be "irreparably injured" if a stay is not granted. While Kay makes a conclusory claim that he would be irreparably harmed if the hearing proceeded, he has not explained the nature of the harm. If, assuming purely for the sake of argument, that the Bureau does not possess sufficient evidence to support adverse resolution of the issues against Kay, the Presiding Judge will so rule. In that regard, the

Bureau would note that most of Kay's allegations have nothing to do with witnesses or evidence that the Bureau intends to rely upon at hearing. "Moreover, litigation expenses, even substantial irrecoverable costs, do not constitute an irreparable injury that would justify a stay of a proceeding." Rio Grande Broadcasting Co., 6 FCC Rcd 7464 (Rev. Bd. 1991). The Commission has also specifically represented:

> Review by the Commission is a real and effective remedy because the Commission is not bound by a 'clearly erroneous' rule, FCC v. Allentown Broadcasting Corp., 349 U.S. 358, 364 (1955), but is authorized 'to draw its own inferences and reach its own conclusions for implementing the statutory mandate.' see Lorain Journal Co. v. FCC, 351 F.2d 824, 828 (D.C. Cir. 1965), cert. denied, 383 U.S.967 (1966). Ultimately, the Commission will consider all of Kay's contentions and 'carefully review the record to ensure that justice is done in this case.' See Nancy Naleszkiewicz, 10 FCC Rcd 1083 at para. 4 (1995).

James A. Kay, Jr., supra, 12 FCC Rcd at 15667. In light of those principles, Kay will not suffer any cognizable injury by going forward with the hearing and raising any pertinent arguments in exceptions to the initial decision.

9. In contrast, the public interest (and, since the Bureau's role is to vindicate the public interest, the Bureau's interest) will be harmed if a stay is issued. This proceeding was designated for hearing three and one-half years ago, but has not yet gone to trial. The Bureau submits that the public interest would be best served by going forward uninterrupted with this much-delayed hearing in order to expeditiously resolve the very serious issues that have been designated against Kay. If Kay truly believes that he has not engaged in misconduct, it would

seemingly be in his interest to take the opportunity to present evidence supporting his contentions. This proceeding has been severely delayed already. Furthermore, Kay has presented no reason why his arguments cannot be effectively considered in exceptions to the Presiding Judge's Initial Decision.

10. Accordingly, the Bureau asks the Presiding Judge to deny Kay's "Motion for Stay of Procedural Dates."

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

June 19, 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 19th day of June, 1998, sent by hand delivery (unless otherwise indicated), copies of the foregoing "Wireless Telecommunications Bureau's Opposition to Motion to Stay Procedural Dates" to:

Robert J. Keller, Esq.
Robert J. Keller, P.C.
4200 Wisconsin Avenue, N.W.
Suite 106 - Box 233
Washington, DC 20016-2157
(Counsel for James A. Kay, Jr.)
(Via Facsimile and Mail)

Aaron Shanis, Esq.
Shanis & Peltzman
1901 L Street, N.W., Suite 290
Washington, DC 20036
(Co-Counsel for James A. Kay, Jr.)

John I. Riffer, Esq.
Assistant General Counsel - Administrative Law
Office of General Counsel
Federal Communications Commission
1919 M Street, N.W., Suite 610
Washington, DC 20554

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

John J. Schauble

John J. Schauble