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FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC

JUN 24 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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 PETITION FOR EXTRAORDINARY RELIEF**

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## SUMMARY

James A. Kay, Jr.'s "Petition for Extraordinary Relief" is nothing more than a transparent attempt to delay the resolution of the issues in this proceeding and to distract the Commission from the pertinent issues of whether Kay has engaged in serious misconduct justifying revocation of his licenses.

Kay has failed to show that Kay has been subject to discriminatory treatment vis-a-vis people who filed complaints against him. With respect to Harold Pick, Kay has received the relief he sought in one instance, and in the other instance, the hearing designation order in the Sobel proceeding barred the Bureau from acting on the matter at hand. The other matters all involve filings which are pending in due course before the Bureau.

Kay's arguments concerning the Bureau's conduct in this proceeding are baseless. There is no support for the claim that the Bureau prejudged Kay before sending out the initial 308(b) letter to Kay. The claim that the Bureau intended to damage Kay by disseminating his customer lists to his competitors is totally contrary to the record. Kay's allegations that a staff member engaged in improper ex parte communications ignore the fact that the matter was an investigation not restricted under the ex parte rules. Finally, the claim that the Commission interfered in Kay's attempt to have Harold Pick criminally prosecuted by communicating information to the Los Angeles Police Department is utterly without support. The argument that certain issues in the Kay HDO were improperly designated for hearing fails

to take into account the standards for designation for hearing and Kay's refusal to provide the Commission with required information. Finally, Kay's arguments concerning written statements signed by individuals whom the Bureau is not planning to call as witnesses has no significance to this proceeding. Kay's argument ignores the context in which the statements were prepared and fails to show improper action by Commission staff.

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1. The Chief, Wireless Telecommunications Bureau, by his attorneys, now opposes the "Petition for Extraordinary Relief" filed by James A. Kay, Jr. (Kay) on June 15, 1998.<sup>1</sup>

2. Kay's "Petition for Extraordinary Relief" is an unauthorized pleading which is nothing more than a desperate attempt by a licensee who has engaged in serious misconduct to avoid having to answer for his misconduct. While Kay makes very serious charges of Bureau misconduct, he has no support whatsoever for these charges. Indeed, in making these charges, Kay misstates material facts, fails to disclose important facts to the Commission, and makes charges of impropriety with no competent supporting evidence. Kay's pleading is nothing more than a crude attempt to derail the upcoming hearing to determine whether he is

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<sup>1</sup> Kay filed the pleading on June 12, 1998 without the supporting exhibits. The exhibits were filed on Monday, June 15, 1998. Kay has agreed that the starting date for calculating a response date is June 15. See Kay's "Motion for Leave to File Petition for Extraordinary Relief" filed by Kay on June 15, 1998, p. 1. Pursuant to Sections 1.294(b), 1.4(g), and 1.4(h) of the Commission's Rules, this opposition is due June 24, 1998.

qualified to remain a Commission licensee. The pleading should be expeditiously dismissed or denied as a frivolous pleading, and the Commission should make clear that the hearing in this proceeding shall proceed in the normal course of business.

## I. BACKGROUND

3. 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).

According to the Kay HDO:

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 served its direct case exhibits

on the Presiding Judge and Kay. The Presiding Judge has set June 29, 1998 as the date for Kay to serve his direct case exhibits. Memorandum Opinion and Order, FCC 98M-82 (released June 22, 1998).

## II. PROCEDURAL MATTERS

5. As the Bureau explains in more detail in its opposition to Kay's "Motion for Leave to File Petition for Extraordinary Relief" being filed simultaneously with this opposition, this petition should be dismissed as grossly improper under the Commission's procedural rules. Many parts of Kay's petition seek reconsideration of the Commission's decision to designate his licenses for a revocation hearing. 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). Many other portions of Kay's petition seek interlocutory review of rulings of the Presiding Judge which the Presiding Judge has denied Kay leave to appeal. In those circumstances, Kay's petition is a clear violation of Section 1.301(b) of the Commission's Rules, which provides that where the Presiding Judge had denied leave to file an interlocutory appeal, his ruling is final. In those circumstances, the Commission will not consider the appeal 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. Kay has not come close to meeting this standard.

6. Most of Kay's allegations have been filed previously with the Commission by Marc Sobel, a Commission licensee with extensive ties to Kay. See the "Revised Request for Inquiry and Investigation" filed by Marc D. Sobel (Sobel) in WT Docket 97-56 on March 2, 1998. One of Kay's counsel in this proceeding (Robert J. Keller, Esq.) represents Sobel in the Sobel proceeding. In the Sobel proceeding, Kay has been found to have *de facto* control over Sobel's licenses. Marc Sobel, 12 FCC Rcd 22879 (ALJ 1997). Sobel's and Kay's exceptions to that decision are pending before the Commission. This pleading will largely contain the same information contained in the Bureau's opposition to Sobel's proceeding.

### **III. THE INVESTIGATION AND DESIGNATION OF KAY'S LICENSES**

7. Kay bitterly complains about alleged "numerous examples of irregularities, improprieties, and even illegalities in the investigation, designation, and prosecution of this case." Kay Petition, p. 1. The accusations he makes against the Bureau are as follows:

- (a) The Bureau arranged for the designation of issues against Kay without any supporting evidence in the hope of using discovery as a fishing expedition.
- (b) The Bureau gives preferential and favored treatment to those who complain, inform, or testify against Kay. Substantial or even conclusive proof (indeed, very often actual under oath admissions) of their serious wrongdoing is ignored by the Bureau, while Kay, on the other hand, is subjected to star chamber proceedings.
- (c) The Bureau had already prejudged Kay and became determined to seek revocation of Kay's licenses before even advising him he was under investigation.
- (d) Certain members of the Bureau staff engaged in improper *ex parte* communications and disseminated inside information in contested proceedings so as to damage Kay, and otherwise improperly interfered with Kay's legitimate business activities.
- (e) In the course of its investigation, the Bureau accepted unquestioningly, relied upon, and used unsupported allegations against Kay from sources known to be biased against Kay, without making even minimal efforts to verify or corroborate the charges.
- (f) The Bureau has coached witnesses against Kay, even to the point of soliciting false sworn statements against Kay.

Kay Petition, pp. 5-6. Kay's charges are indeed serious. When the underlying evidence is examined, however, Kay's charges are utterly without substance. While Kay claims that his charges are supported by evidence, Kay has in fact substituted speculation, rhetoric, and misstatements for competent evidence. Indeed, when the Presiding Judge in this proceeding reviewed the allegations in the context of Sobel's filing, he struck the pleading as "baseless and speculative accusations against Commission employees which will be given no further consideration in this proceeding." Memorandum Opinion and Order, FCC 98M-32 (released

March 18, 1998) at 7. Notwithstanding that warning, and notwithstanding the Bureau's detailed refutation of these charges in the Sobel proceeding, Kay has continued to make these same specious allegations.

8. The predesignation investigation about which Kay complains was done in a manner fully consistent with all applicable laws and rules. In Tidewater Radio Show, Inc., 75 FCC 2d 670, 677-678 (1980), the Commission held that the staff has wide discretion in how it conducts investigations:

We also find unpersuasive the petitioners' claims of improper conduct by certain Commission staff members during the course of this proceeding. The first of these allegations, that it was improper for Commission personnel to launch an investigation into petitioners' broadcast operations on the basis of information supplied by arguably interested parties, can be dismissed forthwith. Under Section 403 of the Communications Act, as amended, 47 U.S.C. § 403, full authority and power are given to the Commission to institute an inquiry on its own motion, with or without complaint, as to any matter falling within its jurisdiction. See Stahlman v. FCC, 126 F.2d 124 (D.C. Cir. 1942). As we recently stated in PTL of Heritage Village Church and Missionary Fellowship, Inc., 71 FCC 2d 324 (1979), that power is frequently exercised by members of our staff, acting under delegated authority. The decision to investigate, moreover, is not purely discretionary. As the PTL decision also held, 'where, as in the instant case, the Commission has reason to believe a licensee may be violating the Act or its policies, rules, or regulations. . . it has a responsibility to inquire and determine whether, in fact, such activity is occurring.' 71 FCC 2d 324, 327. By virtue of this mandate and the provisions of Section 403, it is therefore irrelevant if (as is frequently the case) the party providing initial information to the Commission which leads to the investigation may be interested in its outcome. The decision to launch an inquiry, even in such a circumstance, is fully authorized by the Act and in fact required when a sufficient showing has been made.

Kay has utterly failed to show how the Bureau's investigation of him violated any rule, regulation, or policy. As the Commission said in Tidewater Radio Show, the staff is obliged to start an investigation when a sufficient showing of misconduct has been made. Here, the Bureau received a large number of complaints alleging that Kay had violated the Commission's Rules and policies. As part of its investigation, the Bureau asked for Kay for information to determine whether the complaints were correct. Although Section 308(b) of the Communications Act grants the Commission the authority to ask for information of licensees, Kay deliberately refused to provide the information. Kay had every opportunity to provide the information that, according to him, would prove his innocence. Instead, he has attempted to stonewall the Commission and then argue that the Commission did not have enough basis to designate his licenses for a revocation hearing. If the Commission ever granted any legitimacy to Kay's gamesmanship, licensees who had engaged in serious misconduct would make it virtually impossible for the Commission to enforce its rules and policies. The United States Court of Appeals for the District Of Columbia Circuit has eloquently described a licensee's fundamental responsibility to provide complete information to the Commission:

Unlike a private party haled into court, or a corporation such as General Tire facing an investigation by the SEC, RKO had an affirmative obligation to inform the Commission of the facts the FCC needed in order to license broadcasters in the public interest. As a licensing authority, the Commission is not expected to "play procedural games with those who come before it in order to ascertain the truth," FCC Brief at 60, and license applicants may not indulge in common-law pleading strategies of their own devise.

RKO General, Inc. v. FCC. 670 F.2d 215, 239 (D.C. Cir. 1981).

### A. The Hearing Designation Order

9. Kay complains that the HDO violated Section 554(b)(3) of the Administrative Procedure Act, which states that "[p]ersons entitled to notice of an agency hearing shall be timely informed of . . . the matters of fact and law asserted."<sup>2</sup> Kay Petition, pp. 7-8. Kay also mischaracterizes a memorandum from Riley Hollingsworth, one of the Commission employees involved in investigating Kay, and claims that the memorandum shows that issues were added to the HDO without an adequate factual foundation. Kay Petition, pp. 8-9. Kay's first argument ignores the language of the HDO and applicable precedent which the Bureau has previously cited to Kay. His second argument plainly misinterprets the memorandum in question and ignores the applicable standards for designation for hearing.

10. As the Bureau has repeatedly shown in this proceeding, the claim that Kay does not have notice of the matters at issue is just not true. The HDO clearly stated the type of misconduct which Kay was alleged to have engaged in. The Presiding Judge authorized Kay to serve interrogatories concerning the factual paragraphs of the HDO. Order, FCC 95M-28 (released February 1, 1995). The Bureau answered the original interrogatories offered by Kay which complied with the Commission's Rules. For example, in connection with an interrogatory concerning the trunking issue, the Bureau provided a very detailed answer setting forth in detail the date, methodology, and conclusions of a station inspection. See Kay Petition, p. 12. Moreover, in response to Kay's interrogatories, the Bureau provided Kay with

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<sup>2</sup> Kay also argues that the HDO violates the Due Process Clause of the United States Constitution. For purposes of this discussion, the Bureau will assume that compliance with the Administrative Procedure Act constitutes compliance with the Due Process Clause.

copies of over forty complaints alleging that Kay had violated the Commission's Rules or otherwise acted improperly. Kay has also received thousands of pages of documents the Commission provided him pursuant to the Freedom of Information Act. On October 24, 1997, the Bureau provided Kay with a list of potential witnesses who the Bureau believed had knowledge relevant to the designated issues. Kay had the opportunity to depose those individuals, and with one exception, he took advantage of that opportunity. The Bureau deposed Kay for three and one-half days, and he was asked many questions about specific incidents and documents. Under those circumstances, Kay's claim that his "right to know just what the issues are" has been violated is preposterous. The Presiding Judge's observation that "Kay can reasonably ascertain whether or not there are factual merits to the charges and whether or not he has a defense with which to meet them" (Memorandum Opinion and Order, FCC 98M-55, supra at ¶8) is not "prejudgment" as Kay claims (See Kay Petition, p. 9 n.6). It is the inevitable conclusion that follows from the facts in this case and Kay's knowledge of his own business.

11. Kay's argument that the HDO violated the APA is based upon the premise that in order to comply with the APA, the HDO was required to list specific acts or omissions that constituted the rule violations. In fact, applicable case law shows that an HDO or charging document is not required to set forth specific details so long as the licensee is placed on notice of the nature of the alleged wrongdoing. In Boston Carrier, Inc. v. Interstate

Commerce Commission, 746 F.2d 1555 (D.C. Cir. 1984),<sup>3</sup> an applicant for motor common carrier authority received, thirteen days before a hearing, the following notice of issues to be tried at the hearing:

In their verified statements, protestants Larrabee and Bedel contend, among other things, that applicant has been conducting interstate property transportation without the requisite authority from this Commission; that it has been engaging in fraudulent practices relative to the Commission's fuel surcharge program; and that it may knowingly have submitted false information to the Commission and otherwise unlawfully interfered with Commission investigation of its operations. Although applicant denies the allegations, it appears that questions exist concerning applicant's fitness....

746 F.2d at 1557. The Court of Appeals rejected the carrier's argument that the ICC violated Section 554(b)(3) of the APA because it failed to give adequate notice of "the matters of fact and law asserted." The Court noted the specific references to the types of violations described above, and then wrote:

The Commission is not burdened with the obligation to give every applicant a complete bill of particulars as to every allegation that carrier will confront. The agency need not anticipate every charge that will be made. Nor did the letters convey an impression that they contained the complete roster of objections which BC would encounter.

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<sup>3</sup> The Bureau cited this case before the Presiding Judge when Kay argued lack of compliance with the APA, and the Presiding Judge relied upon that case in ruling that the HDO complied with the APA. Memorandum Opinion and Order, FCC 98M-69 (released June 9, 1998). Under those circumstances, Kay's failure to even mention that case is telling.

746 F.2d at 1560. Thus, the Court concluded that although the notice of issues was not specific as to when, where, and how the alleged violations occurred, the agency complied with Section 554(b)(3) of the APA. As with the notice in Boston Carrier, the HDO placed Kay on specific notice as to the types of violations he was alleged to have engaged in. The HDO was not required to have listed every specific fact underlying the alleged rule violations.<sup>4</sup>

12. While Kay may desire for the HDO to contain more specific factual allegations, it was Kay's refusal to provide the information the Bureau required in response to its 308(b) letters that prevented the Commission from stating more specific facts in the HDO. Kay is attempting to put the Commission in an impossible position. On the one hand, he refused to comply with his statutory obligation to provide information requested by the Commission. On the other hand, he complains that the HDO does not contain specific allegations based on facts that he refused to provide the Commission. "As a licensing authority, the Commission is not expected to play procedural games with those who come before it in order to ascertain the truth." RKO General, Inc., supra. Kay may not refuse a legitimate request to provide information and then claim that he

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<sup>4</sup> Similarly, Kay's reliance upon Section 312(c) of the Act, which requires thirty days notice of the issues at a hearing, is misplaced. If one assumes for the sake of argument (and the Bureau does not agree with this assumption in the slightest) that Kay has not received adequate notice of the issues until this date, the hearing will not begin until August 4, which is the beginning of the admissions session. Thus, even under Kay's assumptions, there would be no violation of Section 312(c).

has been victimized because an order does not contain specifics which could not be provided unless he provided that information.

13. None of the cases Kay cites supports his proposition. In Wolfenbarger v. Hennessee, 520 P.2d 809 (Okla. 1974), the licensee in question did not receive notice of what rules he had violated, and he was denied the right to cross-examine witnesses. Here, the HDO specifically told Kay what sections of the Communications Act and the Commission's Rules he had violated. In Shaw v. Valdez, 819 F.2d 965 (10th Cir. 1987), the only notice a claimant for unemployment benefits received of the issues to be tried at a hearing was the statement that "[a]ll issues and factual matters affecting claimant's eligibility and qualifications for benefits will be heard under Chapter 8 of the Colorado Revised Statutes of 1973, as amended." If the Commission had told Kay that he was being designated for hearing without mentioning what provisions of the Act or the Rules that he had violated, Shaw might support the finding of a due process violation. In fact, the HDO did mention specific Act provisions and violations. In Soule Glass and Glazing Co. v. NLRB, 652 F.2d 1055, 1073 (1st. Cir. 1981), the agency's order was based in part upon statutory violations which were not alleged in the charging documents. Finally, Block v. Ambach, 73 N.Y.2d 323 (N.Y. 1989) actually supports the validity of the HDO because it rejected an argument that due process was violated because the complaint did not list specific time periods when the misconduct occurred.

14. Kay's other argument concerning the HDO is a claim that the Bureau has allegedly admitted that there was no "evidence whatsoever to support issues (b) through (f)." Kay Petition, p. 8. That claim is based upon one sentence in a memorandum from Mr. Hollingsworth which stated, "We have confidence that discovery will reveal that not all of Kay's stations are constructed, and that he exaggerates his loading to avoid the consequences of our channel sharing and channel recovery provisions." Kay's argument grossly distorts Mr. Hollingsworth's statement. It is axiomatic that the standard for designation for hearing is different than the standard required to meet a burden of proof. Kay appears to be arguing that the Bureau or the Commission must have conclusive evidence of wrongdoing before they can designate a licensee for hearing. In fact, Section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(e), provides that designation for hearing is required when a "substantial and material question of fact" is presented. In determining whether a "substantial and material question of fact" exists, the Commission must consider the entire record, including materials provided by the applicant or licensee. Astroline Communications Co. v. FCC, 857 F.2d 1556, 1561 (D.C. Cir. 1988). When the Bureau asked Kay to provide the information it needed to make its determination, Kay refused to provide the information. Accordingly, the Commission was required to make its determination based upon the information available to it, which established a prima facie case of rule violations. Moreover, complaints from competitors can form a valid basis for investigating a licensee and designating its licenses for hearing. Tidewater Radio Show, Inc., supra, Sanders Brothers Radio Station v. FCC, 309 U.S. 470 (1940). Viewed in that context, Mr. Hollingsworth was saying nothing more than he believed discovery would provide the quantum of proof necessary

to have the issues resolved adversely to Kay. Moreover, if, as Kay claims, Mr. Hollingsworth was out to "get" Kay, it would be supremely illogical to tell his superior that he had no evidence supporting issues contained in a hearing designation order. Kay's argument in this regard is based upon a distortion of Mr. Hollingsworth's memorandum, and the argument must be rejected.

15. Kay's argument concerning the impropriety of using discovery as a basis for issue enlargement (Kay Petition, pp. 10-11) is meaningless because that has not happened. Furthermore, his arguments concerning the "Statement of Readiness for Hearing" that the Bureau recently filed with the Presiding Judge are contrary to the facts. Kay accuses the Bureau of knowing prior to designation that Kay's system had a permissible technical configuration. Kay Petition, p. 12. Kay does not explain how the Bureau could tell the technical configuration of all his stations from an inspection of one station. Moreover, Kay fails to tell the Commission that until his deposition, Kay refused to state exactly what technical configuration he was using. When Kay finally produced loading records after designation for hearing, certain call signs were simply grouped together with the meaningless frequency designation "500.0000 MHz" or "800.0000 MHz." It was only at Kay's deposition that Kay explained that those particular stations were configured as part of an LTR format trunking system. Until Kay explained late in the proceeding how these systems were configured, it was impossible for the Bureau to determine whether he was improperly trunking

systems in violation of the Commission's Rules.<sup>5</sup> Similarly, with respect to issue (f) (Kay Petition, p. 12-13), Kay offers absurd charges with no factual basis whatsoever.

#### B. Alleged Discriminatory Treatment

16. Kay alleges that "the Bureau's treatment is born of a conscious animus toward him by certain members of the Bureau staff" and that such treatment "is clearly evidenced by the preferential treatment and favoritism afforded those who have come forward to complain of, inform on, or testify against Kay." Kay Petition, p. 13. If Kay's allegations are examined on the merits, it readily becomes clear that the allegations are utterly without merit. Kay's petition misstates or ignores critical facts. Indeed, many of the matters Kay discusses are matters which are currently before the Bureau. It would therefore be totally inappropriate for the Bureau to even discuss the merits of those proceedings.<sup>6</sup> Kay has utterly failed to show any error on the part of the Bureau. He has not even come close to supporting his serious charges that the Bureau has acted in bad faith.

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<sup>5</sup> A more detailed explanation of the Bureau's analysis of the trunking issue is contained in the June 3, 1998 "Wireless Telecommunications Bureau's Statement of Readiness for Hearing."

<sup>6</sup> It is ironic that while Kay complains about alleged violations of the *ex parte* rules, his own petition is a violation of the *ex parte* rules because he discusses the merits of restricted proceedings (e.g., the formal complaint filed against Doering) without serving his petition on other parties.

### 1. Harold Pick

17. Harold Pick is one of the individuals who filed complaints against Kay which led the Bureau to begin an investigation of Kay. Mr. Pick is not on the Bureau's list of contemplated witnesses in the Kay proceeding, so his credibility is not at issue in the Kay proceeding. Kay complains about the Bureau's action in reinstating two licenses held by Pick and the Bureau's and the Commission's supposed inaction on petitions for reconsideration or applications for review of that action. Kay Petition, pp. 13-18. Despite his protestations to the contrary (Kay Petition, p. 16), Kay offers nothing more than sheer speculation for his claim that the Commission or Pick violated the ex parte rules. Moreover, the two licenses in question, WNZB262 and WNZB276, were deleted from the Commission's data base.<sup>7</sup> Thus, Kay and the trustee have received the relief they sought. The pertinent questions for purposes of this proceeding is not whether the staff's action was correct. The pertinent question is whether the staff's actions was part of some nefarious deal to improperly favor Pick because of the Kay proceeding. Kay's charges in this regard are utterly unsupported, made without any regard for the truth, and should be summarily dismissed.

18. The second matter relating to Harold Pick raised by Kay is an allegation that Pick falsified a document and misrepresented facts in a finders preference proceeding initiated by Marc Sobel. Kay Request, pp. 18-19. First, the Bureau must point out that Kay lacks standing to complain about inaction taken on a complaint filed against Sobel. In order to

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<sup>7</sup> Copies of the records from the Commission's data base showing the deletions are submitted as Attachment 1 to this opposition.

have standing, Kay must show that the actions he complains of caused him "(1) personal injury, (2) that is 'fairly traceable' to the challenged action, and (3) a substantial likelihood that the relief requested will redress the injury claimed." MCI Communications Corp., 12 FCC Rcd 7790, 7793 (1997) and cases cited therein. Even if Kay had established that the Commission had not taken action against Pick because of an animus against Kay -- and he has not -- he has not shown that any failure to act on Sobel's finders preference request has caused him any injury. While Kay complains about the Bureau's inaction on Sobel's allegations, he ignores the fact that the Bureau was ordered to hold in abeyance all of Sobel's finders preference requests. Marc D. Sobel, 12 FCC Rcd 3298, 3302 (1997) (Finder's Preference Case 93F600). Once that proceeding was designated for hearing, the Bureau lost authority to unilaterally take action on that request. The Bureau has not resolved the issues relating to that finder's preference request because it does not have the authority to do so.

## 2. James Doering

19. Sobel complains about Commission inaction on a formal complaint filed by Kay and United Corporation of Southern California (United) against James Doering, another individual whose complaints against Kay led the Bureau to begin investigating Kay. Like Mr. Pick, Mr. Doering is not on the Bureau's list of contemplated witnesses in the Kay proceeding, so his credibility is not at issue in that proceeding. The complaint has not been served upon the defendants because the complaint is undergoing review in the normal course of business. It would be inappropriate for the Bureau to comment on the merits of a matter in which it is a decision maker. Sobel's allegations that Mr. Doering "is given free reign to

steal licenses, misrepresent, and falsify applications right under the Bureau's nose" (Kay Petition, p. 22) is specious.

### 3. Liberty Paving, Inc.

20. Kay complains about the Bureau's failure to act on Sobel's request for cancellation of a license held by Liberty Paving, Inc. (Liberty) on the grounds that the facility had discontinued operation for more than a year. Kay Petition, pp. 22-25. Sobel's request is pending before the Bureau and will be acted on in the normal course of business. The identity of the parties has nothing to do with why action has not yet been taken, and Kay offers absolutely no evidence supporting his charges of improper behavior. Furthermore, Kay's attacks on the credibility of Frank Barnett, Liberty's President, ignore the fact that the Bureau has dropped Mr. Barnett as a potential witness in the Kay proceeding. The Bureau has not ignored Mr. Barnett's deposition testimony, and Kay's failure to inform the Commission that Mr. Barnett was not listed as a potential witness in the Bureau's "Statement of Readiness for Hearing" is disingenuous.

### 4. Christopher Killian

21. Kay complains that the Bureau has not yet taken action on a petition he filed on October 22, 1997, alleging that Mr. Killian allegedly engaged in misconduct in connection with a license which was assigned to another party by an assignment application granted on February 25, 1997, or almost 8 months before Kay filed his petition. Kay alleges, based upon those facts, that:

Insofar as the authorization was obtained by means of misrepresentation and lack of candor which the Bureau refuses to sanction, and insofar as the Killian matter is but one in a host of examples of the Bureau pulling regulatory punches in favor of informants and witnesses against Kay, it is not too far fetched to characterize the Bureau's conduct as payment to Killian for testifying against Kay.

Kay Petition, p. 29. This overblown rhetoric has no relationship to the actual facts. First, Mr. Killian is not on the Bureau's current witness list in the Kay proceeding. Second, since Kay waited over eight months until after the assignment application for WPCM497 to file his petition, Kay can hardly blame the Bureau for granting the assignment application based upon a petition Kay did not file in a timely manner. Third, while Kay complains that the Bureau has not acted upon Kay's petition, he has utterly failed to explain why Kay waited eight months after the assignment application was granted to file the petition. The Bureau would note that over two years passed from the time complaints were filed against Kay to the time his licenses were designated for hearing. Kay's petition is pending before the Bureau, and Kay's claim that the Bureau is "pulling regulatory punches" in return for Mr. Killian's testimony is both ludicrous and totally unrelated to this proceeding.

22. In an attempt to rebut the Bureau's argument that Kay's filing was grossly untimely, Kay claims:

Kay was not challenging the assignment to Nextel as such; rather, he was challenging Killian's overall qualifications as a result of the irrefutable evidence of improper conduct.

Kay Petition, p. 29. Kay's claim that he was not challenging the assignment to Nextel "as such" is clearly false. In his petition, Kay wrote:

Even apart from the fraud, the assignment to Nextel is void *ab initio* for the further reason that the subject authorization had long before automatically cancelled for failure to timely construct. Accordingly, with respect to WPCM497, the Commission should immediately: (a) declare that the authorization automatically cancelled for failure to timely construct; (b) rescind its consent to the assignment of the authorization to Nextel; and (b) [sic] require Chris and/or Deborah Killian to disgorge any monies or other consideration received from the sale of the station to Nextel.

"Petition for Institution of License Revocation Proceedings," filed October 22, 1997  
(Attachment 2 to this opposition), p. 7.

### C. "Prejudgment" of Kay

23. Kay complains that the initial 308(b) letter the Bureau issued to Kay used language stating that information was needed "to determine whether you are qualified to be a Commission licensee" and language referring Kay to 18 U.S.C. § 1001 and noting "that a willful false reply to a letter of this type may result in fine or imprisonment." Kay Petition, pp. 31-33. Those two statements are wholly insufficient to support Kay's serious charge of prejudgment. As a matter of standard practice, whenever an investigation could potentially affect a licensee's qualifications, 308(b) letters issued by the Enforcement and Consumer Information Division of the Bureau routinely contain that language.<sup>8</sup> Kay's claim that the

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<sup>8</sup> Indeed, the 308(b) letter to Thompson Tree Service (Kay Petition, Attachment No. 21), contains the following language: "Your attention should be directed to Title 18, U.S.C.