

letter "threatened criminal prosecution" is a misreading of the statement. The statement in question did not refer to criminal prosecution for the alleged misconduct but that a "willful false reply to a letter of this type may result in fine or imprisonment." Since Kay had not responded to a letter that had just been issued, the Bureau could not have been accusing him of a violation of 18 U.S.C. § 1001. Moreover, Kay's semantic quibbling over the language of the letter is wholly insufficient to show any prejudgment on the part of the Bureau.

24. Kay also suggests that because the initial 308(b) letter to Kay and the Kay HDO were based in part upon complaints from competitors of Kay, the 308(b) letter and the Kay HDO were somehow improper. Kay Petition, p. 34. As noted above, the Commission has held that the staff has wide discretion to investigate allegations of misconduct by Commission licensees based upon complaints of competitors. Tidewater Radio Show, Inc., supra.

Moreover, Kay has cogently explained why this argument is frivolous:

And it has long been settled Title III licensee [sic] has standing to challenge the applications or licenses of a competitor. *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940). In fact, the presentation of violations by competitors is to be encouraged, not discouraged, on the theory that competitors are, because of their private interest, likely to bring to the attention of the Commission matters that might otherwise go undiscovered by the Commission's own enforcement activities, *i.e.*, the competitor serves as a kind of "private attorney general." *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940), *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942).

Section 1001, in which Congress has determined that a willful false reply to a letter of this type may result in fine or imprisonment."

"Reply to Opposition," filed December 1, 1997, pp. 6-7 (submitted as Attachment 3 to this opposition). Kay lamely responds it is "unlawful" for the Commission to "come to conclusions (even if only preliminary) as to the qualifications of a licensee based solely on unsupported and conclusory allegations from biased competitors." Kay Request, p. 34. That statement should be contrasted with Kay's earlier claim with respect to his petition against Christopher Killian that he has provided "documented and conclusive disqualifying misconduct . . ." Kay Request, p. 29. Kay wishes to have his filings accepted at the Commission as gospel truth, but he wants the filings of his "biased" competitors ignored. Moreover, the Bureau did not merely accept the complaints at face value. Instead, it asked Kay to provide information so it could make its own independent judgment. Rather than providing the information, however, Kay repeatedly declined to provide the information required to be produced by the 308(b) letter. James A. Kay, Jr., supra, 10 FCC Rcd at 2064.

D. Ex Parte Allegations and Damage to Kay's Business

1. The 308(b) Letter

25. Kay claims that the Bureau intended to use its 308(b) letter to damage Kay, apparently by intending to disseminate Kay's customer lists to his competitors. Kay Request, pp. 35-38. Kay also alleges that it was somehow improper to send blind carbon copies of the 308(b) letter to people who had filed complaints against Kay. Kay Petition, pp. 35-36. Kay's arguments do not accurately reflect the facts and fail to show anything other than legitimate actions by the Bureau. In any event, any concerns Kay had concerning confidentiality could not justify his refusal to provide the information required by the Commission. He was under

an obligation to provide the information and exercise his rights to seek confidential treatment of the information.

26. Kay repeatedly claims that "the Bureau repeatedly refused Kay's requests for assurances that any information provided would be kept confidential." Kay Petition, p. 35. That statement is false. In a letter dated May 20, 1994 addressed to Kay's counsel, Mr. Hollingsworth wrote:⁹

With respect to Kay's request that information provided to the Commission in response to our inquiry be withheld from public inspection, we will not make those materials which are specifically listed under the provisions of Rule 0.457, 47 C.F.R. § 0.457, routinely available for inspection to the public. Therefore, materials which include any information containing trade secrets or commercial, financial, or technical data which would customarily be guarded from competitors, will not be made routinely available to the public.

Mr. Hollingsworth provided a more direct assurance to Mr. Kay in a May 27, 1994 letter to Kay's counsel:¹⁰

Regarding the request for user information, we have no intention of disclosing Mr. Kay's proprietary business information, except to the extent we would be required by law to do so.

⁹ A copy of this letter is submitted as Attachment 4 to this opposition.

¹⁰ A copy of this letter is submitted as Attachment 5 to this opposition.

Unless Kay expected the Bureau staff to break the law in order to accommodate his wishes, he had no right to expect any further assurance. Notwithstanding those assurances, however, Kay still refused to provide the required information. Kay complains that the information "would be subject to possible FOIA requests by Kay's competitors." Kay Request, p. 37. That possibility cannot serve as justification for refusing to provide the information. Kay fails to even acknowledge Mr. Hollingsworth's May 27, 1994 statement that the records would not be released unless the law required otherwise. Moreover, Kay's claim that "if the Bureau decided in response to such a FOIA request to release the information over Kay's objection (assuming the Bureau even bothered to inform Kay of the request), there would be little Kay could do to prevent the ultimate release of the information" (*id.*) is wrong. Under Section 0.459(g) of the Commission's Rules, if the Bureau had ruled that the documents were not confidential, Kay could have filed an immediate application for review of that action. If the application for review had been denied, Kay would then have an opportunity to seek a judicial stay. *Id.*

27. The argument that it was somehow improper to send copies of the 308(b) letter to those people who had filed complaints against Kay is baseless. The Commission routinely provides complainants with information concerning the status of investigations. There is nothing improper or inappropriate about this. Since the investigation was not restricted for *ex parte* purposes, and since Kay naturally received the 308(b) letter, there was no violation of the Commission's *ex parte* rules. While Kay suggests that the Bureau should have conducted its investigation differently (Kay Petition, p. 38), it is absurd to require the Bureau to allow a

licensee to control the manner in which it is investigated. Kay's claim that "[t]he Bureau did nothing to reassure Kay . . ." (id.) is false, and his argument is frivolous.

2. Thompson Tree

28. Sobel also cites an alleged ex parte communication by Anne Marie Wypijewski, a member of the Bureau staff, involving the cancellation of Business Radio Service authorization WIH275, formerly held by Thompson Tree Service. Kay Petition, pp. 32-34. On September 20, 1993, Kay filed a letter seeking cancellation of the Thompson license because the station had allegedly discontinued operation. Kay Petition, p. 39. In response, on December 23, 1993, Mr. Hollingsworth sent a letter to Thompson Tree Service seeking to determine whether the licensee had discontinued operation. The letter was sent as part of the Bureau's independent investigation into Thompson's operation. The Bureau initiated that investigation at the request of Kay. On January 31, 1994, after the investigation began, Kay filed a finder's preference request for the channel.

29. The distinction is important because, as Kay admits, the finder's preference request was dismissed "on the grounds that the Commission was already investigating the matter prior to receipt of Kay's finder's preference request." Kay Petition, p. 40. The investigation was not a restricted proceeding for ex parte purposes. Kay's finder's preference was a nullity which did not convert the Bureau's independent investigation of Thompson into a restricted proceeding. If Kay had wanted a formal restricted proceeding, he should have filed his finder's preference request first. Ironically, Kay's unhappiness is caused by the fact

that the Commission acted on his complaint before he filed his finder's preference request. Accordingly, any conversations Ms. Wypijewski had with Mrs. Thompson did not violate the ex parte rules.

3. Pro Roofing

30. Kay describes at length his attempt to prosecute Harold Pick for allegedly stealing Kay's repeater service by placing one of Pick's customers on Kay's repeater. Kay Petition, pp. 42-45. He then argues, with no evidence whatsoever, that "Hollingsworth, or persons acting under his direction, apparently interfered with a legitimate attempt by Kay to press criminal charges against [Harold Pick]." Kay Petition, p. 42. Kay not only fails to provide any competent evidence of such "interference," but the documents he provides conclusively show that his allegations are baseless.

31. In acting upon Kay's request, the Commission need not decide whether Harold Pick in fact stole service from Kay. Kay's pertinent allegations are that Mr. Hollingsworth in some way acted to prevent the criminal prosecution. In particular, Kay notes a statement that the detective reviewing the matter received "certain confidential information" from Sharon Bowers, the Chief of the Informal Complaints & Public Inquiry Branch of the Bureau's Enforcement and Consumer Information Division. Kay notes that the Los Angeles Police Department and the City Attorney decided that criminal prosecution was inappropriate. After citing two cases involving another individual with unknown facts in which Kay alleges that criminal prosecutions were instituted, Kay writes:

It is thus clear that Los Angeles law enforcement officials in fact do not consider theft of a licensee's airtime to be a purely civil matter; rather, it is criminally prosecuted. The evidence that Pick engaged in theft of service from Kay is extremely compelling, but the police and prosecutors are not pursuing the matter. It appears very likely that their inaction on this matter is somehow related to or caused by the "confidential information" provided to Detective Martinez. Hollingsworth certainly has knowledge of what information was provided, and he may have even directed the disclosure. Kay was the victim of a criminal act by Pick. Regardless of what Hollingsworth or any other Bureau staff member may think of Kay or may try to prove about Kay in an enforcement proceeding, it is entirely inappropriate for the Bureau to interfere with Kay's efforts to seek redress for criminal acts committed against him.

Kay Petition, pp. 44-45. Clearly, Kay has absolutely no evidence that the Bureau had any role in dissuading Detective Martinez or the City Attorney from prosecuting Harold Pick. It is irresponsible for Kay to make scandalous charges with no evidence whatsoever. The argument that, because theft of radio service was prosecuted in two cases, it would be prosecuted in every such case, is risible. While the Bureau is hardly an expert on criminal prosecutions, it would expect that the decision would be made on the individual facts of each case. In this case, the investigating officer wrote, "The I/O could find no evidence of crime. The case is going to be unfounded." Kay Petition, Attachment No. 29, p. 4. Moreover, Kay's private investigator reports, "Det. Martinez indicated that if he had originally reviewed the case he would have it rejected it out of hand as a civil matter and not a criminal one based upon the information presented." *Id.*, Attachment No. 30 (emphasis added). Neither office based its conclusions on information received from the Commission. Kay's argument is therefore groundless.

E. Failure to Verify "Biased" Informants

32. Kay takes issue with a single passage in a paragraph of a witness statement signed and sworn to by Harold Pick, in which Harold Pick discusses the theft of three of his repeaters. Kay Petition, pp. 45-50. Kay makes the fantastic accusation "that Hollingsworth, in his pursuit of Kay, solicited from potential witnesses against Kay sworn statements that Hollingsworth knew or should have known were false." Kay Petition, p. 45. As with Kay's other charges, they are totally devoid of a factual basis.

33. The Bureau must point out that it does not intend to call Harold Pick as a witness in the Kay proceeding. While Kay speaks repeatedly of Mr. Hollingsworth's intention to "use" Harold Pick's statement, the Bureau has not used that statement in any way, and it does not intend to use that statement in any way. Kay apparently obtained that statement through discovery against Pick in civil litigation. Kay is therefore arguing over a meaningless document.

34. Moreover, Kay's real disagreement appears to be with Harold Pick. The statements in question were sworn to by Pick, not Mr. Hollingsworth. Pick's statement was subject to further checking, review, and investigation. After further evaluation, the Bureau made the decision not to use Harold Pick as a witness. While Kay would have had Mr. Hollingsworth fully evaluate and investigate the statement before having Pick reduce the statement to writing, Mr. Hollingsworth had Harold Pick swear to the statement in writing, and the Bureau then evaluated the statement and decided not to use it. Kay's responses to

these points are nonsensical. First, he speculates that the document was somehow "used internally to fuel the Bureau against Kay." Kay Petition, p. 49. It is difficult to decipher what Kay could conceivably mean by that statement. Second, he appears to question the appropriateness of even obtaining a sworn statement from Pick. If somebody could potentially be a witness, it makes sense to have the witness reduce their potential testimony to writing. The statement can then be analyzed, reviewed, and tested, and a determination can then be made whether to use that witness. Kay's argument is based upon the false premise that because a witness statement is prepared, the Commission had made a firm decision to have a witness testify to all the matters in that statement. There is nothing improper or sinister in such a procedure.¹¹

F. "Coaching" of a Witness

35. Kay accuses Mr. Hollingsworth of "coaching" Richard Lewis into making statements designed to implicate Kay and supposedly to make false statements against Kay. Kay Petition, pp. 52-64. This argument is baseless. The Bureau does not intend to use Richard Lewis as a witness in the Kay proceeding. The Bureau has not used the Lewis statement for any purpose, and it does not intend to use that statement. Despite Kay's claim to the contrary, that fact is central, it is not "irrelevant" (Kay Petition, p. 62). In the absence of any evidence that the statement was used against Kay, Kay was not harmed by the

¹¹ Kay then goes on and generally criticizes Mr. Hollingsworth's investigatory methods. Kay Petition, pp. 50-51. This criticism appears to be based upon nothing more than Kay's personal opinions and "reruns of NYPD Blue." In any event, the staff has wide discretion in determining how to conduct its investigations. Tidewater Radio Show, Inc., supra.

statement. Kay is thus presenting a meaningless argument. In any event, Kay is unable to point to any statement in the Lewis statement which was false (other than some possible confusion by Mr. Lewis over dates). Mr. Lewis testified at his deposition that he believed his written statement was true and correct. Kay Petition, Attachment No. 40, pp. 40-41. It is clear that Kay's argument is not with the statement but with any possible inferences to be drawn from that statement about Kay's conduct. The Bureau had other information before it (which, to its knowledge, Kay does not have in his possession), which tended to show that Kay deliberately caused interference to the School District and that he was involved in changing the School District license to a general business license. It was this other information (which is exempt from disclosure under the law enforcement privilege), together with Lewis' testimony, which led the Bureau to believe that Kay had engaged in misconduct. In the normal course of evaluating the available evidence, the Bureau has decided not to use Mr. Lewis' testimony. As for the decision to identify Mr. Lewis in the Bureau's responses to interrogatories as a person "believed to have knowledge of instances of deliberate and/or malicious interference," the Bureau's answers were designed to put Kay on notice as to the universe of allegations against him. If the Bureau had not listed Mr. Lewis as a person believed to have knowledge relevant to deliberate and malicious interference, and then attempted to call Mr. Lewis as a witness, Kay no doubt would have claimed that he was unfairly surprised. Under those circumstances, it was entirely appropriate to list Mr. Lewis as a person believed to have relevant knowledge.

IV. KAY'S REQUESTS FOR RELIEF

36. Kay makes, in the alternative, several requests for relief. First, he asks for an investigation into the facts and circumstances concerning the investigation, designation, and prosecution of this proceeding and that the Commission set aside the HDO. Second, if the Commission does not set aside the HDO, he asks that the Commission stay the proceedings pending completion of its investigation. Third, if neither of those requests are granted, he asks that the Presiding Judge be ordered to (a) delete, defer, or modify certain issues, (b) authorize additional discovery, and (c) rule that the Bureau's conduct is relevant to the designated issues in this proceeding. None of these requests has any merit whatsoever.

A. Request for Investigation and Reconsideration of Designation Order

37. First, as the Bureau has shown throughout this pleading, the Bureau's investigation of Kay, the designation of his licenses for a revocation hearing, and the Bureau's prosecution of this proceeding have been conducted in a manner fully consistent with the Communications Act, the Administrative Procedure Act, the Commission's Rules, and due process. The Bureau received complaints concerning Kay's operations. Kay was directed to provide certain information to assist in the Commission's investigation, but he refused to provide that information. The Commission then designated Kay's licenses for a revocation hearing. The Bureau gave Kay access to thousands of pages of documents, and Kay has had the opportunity to depose every witness on the Bureau's witness list. Now, after discovery has been completed and the hearing is approaching, Kay has shown he is desperate to stop the hearing. He has filed a collection of half-truths, distortions, and outright misrepresentations in

a crude attempt to deflect attention from his misconduct. If the Commission sets aside the HDO, it would be rewarding Kay for his efforts to obstruct the Commission's investigation of his misconduct.

38. Second, even if Kay had shown some sort of irregularity, he has failed to show how the irregularity has prejudiced his position in the hearing. Kay repeatedly complains about individuals who are not on the Bureau's proposed witness list (such as Pick, Doering, and Killian). If the individual is not going to be a witness, that individual's conduct is irrelevant to the hearing proceeding. Moreover, Kay has had every opportunity to learn the particulars of the case against him, including depositions of the Bureau's witnesses, interrogatories upon the Bureau, the Bureau's questioning of Kay and other witnesses, and documents received from the Bureau through FOIA. Kay has not offered any valid reason why his complaints could not be considered as exceptions to the initial decision in this proceeding.

B. Request for Stay

39. With respect to Kay's request for a stay of the proceeding, Section 1.44(e) of the Commission's Rules provides that a request for stay shall be filed as a separate proceeding, and that a request for stay which is not filed separately shall not be considered. In light of that rule and the fact that Kay has already filed separate stay motions with the Presiding Judge and the Commission (which the Bureau has opposed), the Bureau will not consider that request further.

C. Requests to Reverse Orders of the Presiding Judge

40. Kay asks the Commission to either delete, defer action on, or modify the issues the Presiding Judge added by Memorandum Opinion and Order, FCC 98M-15 (released February 2, 1998). The issues in question are as follows:

To determine, based upon the findings and conclusions 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 the "Motion to Enlarge, Change, or Delete Issues" filed by Kay on January 12, 1995 and January 25, 1995.

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.

First, Kay argues that the issues be deleted because the Bureau's petition to enlarge issues was allegedly untimely. Kay Petition, p. 72. Kay fails to inform the Commission that after the Initial Decision in the Sobel proceeding was released on November 30, 1997, the Presiding Judge gave the Bureau until January 9, 1998 to file a motion to enlarge issues concerning the effect of that decision on Kay's qualifications. Memorandum Opinion and Order, FCC 97M-201 (released December 9, 1997). The Bureau's motion was filed on December 30, 1997, and was therefore timely under the Presiding Judge's order. Second, when the Bureau had earlier filed a petition to enlarge issues on this matter, the Presiding Judge had denied the petition because, inter alia, "the underlying factual issues were being litigated in the Sobel proceeding." Id. If the Bureau had filed its petition back in 1995, when Kay urges the

petition should have been filed, there could have been simultaneous litigation of these matters in two different proceedings. Third, even if the petition is considered untimely, it would still meet the test for consideration contained in Section 1.229(c) of the Commission's Rules.

41. Alternatively, Kay argues that litigation of these issues should be deferred while the Sobel Initial Decision is being reviewed. Kay Petition, pp. 72-73. While Kay claims that it would be "unfair" for the hearing on these issues to go forward, he utterly fails to explain the nature of the unfairness. In contrast, if the hearing were deferred, it would disserve the public interest by delaying the ultimate resolution of this proceeding, which has already been excessively delayed.

42. Finally, Kay takes issue with the Presiding Judge's ruling that Kay is collaterally estopped from relitigating the issue of whether he had assumed *de facto* control of Sobel's stations in violation of Section 310(d) of the Communications Act. Kay Petition, pp. 73-75. Kay argues that it is improper to apply collateral estoppel because the Sobel Initial Decision is being appealed. Of the four elements of collateral estoppel cited by Kay at page 74 of his petition, three of those elements are clearly present. The issue of whether Kay had *de facto* control of Sobel's stations was tried in the Sobel proceeding. Kay voluntarily intervened in the Sobel proceeding as a party. Finally, Kay had a full and fair opportunity to litigate the issue in the Sobel proceeding. While the Sobel decision is not a final decision, the Review Board held in Ocean Pines FM Partnership, 4 FCC Rcd 3490, 3491 (Rev. Bd. 1989):

Unless and until the adverse resolution against Dr. Berger and his applicant in the Fenwick Island case is reversed or modified on appeal, the Ocean Pines ALJ was eminently correct in adding the subject issue(s) in this proceeding. As explained more fully in our recent memorandum in Montgomery County Media Network, Inc., d/b/a/ Imagists, FCC 89R-17, released March 29, 1989, the findings and conclusions regarding a particular party in one hearing proceeding are plainly relevant in another proceeding, where the parties and the issues are similar or interrelated. After all, "[a]n initial decision is not a mere report to be arbitrarily disregarded." Stereo Broadcasters, Inc., 74 FCC 2d 543, 545 (1979), aff'd, 652 F.2d 1026,1030 (D.C. Cir. 1981). . .

We find no predisposition in the ALJ's language; only an intent to take full cognizance of the findings and conclusions reached, thus far in the Fenwick Island case. Should those adverse Fenwick Island findings and conclusions be reversed or modified on appeal, conforming action -- either by the Ocean Pines ALJ or by the appellate body having jurisdiction -- will assuredly be taken in the instant case.

Similarly, in this case, if the Commission modifies or reverses the findings or conclusions reached in the Sobel proceeding, the Presiding Judge has ruled that he will take cognizance of that action. Memorandum Opinion and Order, FCC 98M-26 (released March 5, 1998). Since Kay has had and will have every opportunity to fully litigate the transfer of control question in the Sobel proceeding, he has no due process right to relitigate that question in this proceeding.¹²

¹² Kay argues that collateral estoppel was not invoked in Ocean Pines. Kay Petition, p. 75 n.48. Kay ignores the language of the issue added in that case, which sought, "To determine whether the findings and conclusions about the conduct of Leonard Berger, as a real-party-in-interest in Key Broadcasting Corporation, 3 FCC Rcd 6587 (ALJ 1988) should disqualify Ocean Pines LP Broadcast Corp." That language clearly does not contemplate relitigation of the issues decided in the earlier proceeding.

43. Finally, Kay asks to be granted additional discovery (Kay Petition, pp. 75-76) or that the Commission rule that he be allowed to conduct discovery into the Bureau's conduct (Kay Petition, p. 76). Kay's request must be summarily denied because he fails to even explain what sort of additional discovery he explains is necessary or how the discovery he was granted was insufficient. Kay was allowed to depose every single one of the Bureau's witnesses and has received over 8,000 pages of documents from the Bureau. In any event, Kay's statement that the Bureau's conduct is directly intertwined with Kay's conduct (Kay Petition, p. 76) is just plain wrong. The manner in which the Bureau investigated Kay has nothing to do with whether he committed the alleged misconduct. The Bureau's inquiry was legitimate, and the Bureau's actions, as a matter of law, cannot serve as a defense to Kay's deliberate failure to comply with a legitimate Section 308(b) request for information.¹³

V. CONCLUSION

44. The Bureau believes the record in this proceeding shows that Kay has totally failed to meet his fundamental responsibility to comply with the Commission's Rules and to be honest with the Commission. Kay's petition is merely a procedurally improper attempt to distract the Commission from that record. While Kay attempts to paint a picture of misconduct and unfair treatment by the Bureau, his picture misstates or ignores pertinent facts

¹³ Kay's argument that it was somehow "meretricious" for the Bureau to argue in the Sobel proceeding that Kay's arguments of Bureau misconduct should be considered in this proceeding while opposing discovery on that matter in this proceeding is specious. The question of whether the matters raised by Kay are germane to the issues in this proceeding is more appropriately considered in this proceeding, instead of the Sobel proceeding. It is perfectly appropriate to make that point while arguing that the matters are irrelevant to the designated issues in this proceeding.

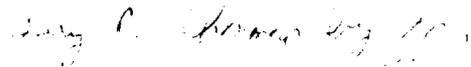
and simply ignores applicable case law. Such tactics should not be countenanced. The Bureau urges the Commission to allow hearing in this proceeding to go forward in its normal course. The Commission has represented:

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. Kay's wild accusations are nothing more than a crude attempt to deflect attention from the evidence concerning his misconduct. The Commission should send a strong signal that the hearing shall go forward and that it will not allow frivolous accusations of misconduct to derail its administrative proceedings. The public interest demands a prompt resolution of the question of whether Kay is qualified to remain a Commission licensee.

45. Accordingly, the Bureau asks the Commission to dismiss or to deny Kay's "Petition for Extraordinary Relief."

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



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



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

June 24, 1998

ATTACHMENT 1

CALLSIGN HISTORY SCREEN

#1 of 2

Callsign **WNZB262** Code **C** Service **GB** Date of Action: **10/10/97**

Name
PICK, HAROLD

Reason for deletion:

PER 405A REQUEST AND ATTORNEY LETTER DATED 10/1/97. EHH

Callsign **WNZB262** Code **O** Service **GB** Date of Action: **10/17/95**

Name
PICK, HAROLD

Reason for deletion:

APPLICANT REQUEST LETTER DATED 9-18-95.

CALLSIGN HISTORY SCREEN

#1 of 2

Callsign	WNZB276	Code	C	Service	GX	Date of Action:	10/10/97
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Name
PICK, HAROLD

Reason for deletion:
PER 405A REQUEST AND ATTORNEY LETTER DATED 10/1/97 EHH

Callsign	WNZB276	Code	C	Service	GX	Date of Action:	9/21/95
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Name
PICK, HAROLD

Reason for deletion:
PER APPLICANT'S REQUEST ON 405A

ATTACHMENT 2

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

OCT 23 '97
REGISTRATION
BUREAU

In the matter of]	
NEXTEL COMMUNICATIONS, SMART SMR OF CALIFORNIA, INC., D/B/A]	FCC File No. 9301618165
Conventional SMR (GX) Station WPCM497 851.2375 and 854.1625 MHz at Mount Adalaide near Bakersfield (Kern) CA]	
CARRIER COMMUNICATIONS]	FCC File No. 9301618165
Conventional SMR (GX) Station WPCM497 851.2375 and 854.1625 MHz at Mount Adalaide near Bakersfield (Kern) CA]	
DEBORAH KILLIAN]	FCC File No. 9301617966
Conventional SMR (GX) Station WPCE285 851.6125 MHz at Mount Adalaide near Bakersfield (Kern) CA]	
CHRIS KILLIAN, DEBORAH KILLIAN, CARRIER COMMUNICATIONS, AND/OR CARRIER COMMUNICATIONS AND ELECTRONICS]	
Licensee of and/or Applicant for various facilities pursuant to Part 90 of the FCC Rules and Regulations, 47 C.F.R. § 90.1 et seq.]	

To: Chief, Wireless Telecommunications Bureau

PETITION FOR INSTITUTION OF LICENSE REVOCATION PROCEEDINGS

James A. Kay, Jr., by his attorney, hereby respectfully requests the institution of license revocation proceedings, in support whereof, the following is respectfully shown:

A. KAY HAS STANDING TO CHALLENGE THE CAPTIONED AUTHORIZATIONS.

1. Kay herein seeks the commencement of license revocation proceedings pursuant to Section 312(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 321(a). As a direct commercial competitor with both Chris Killian d/b/a Carrier Communications ("Killian") and Smart SMR of California, Inc. d/b/a Nextel Communications ("Nextel") in the Los Angeles, California, land mobile radio communications industry, Kay is a party in interest with standing to intervene in licensing matters affecting those companies on the grounds of economic

injury. See *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940). To the extent the Commission determines that Section 312(a) does not confer private rights to seek such actions, Kay asks that this filing be deemed an informal request for Commission action pursuant to Section 1.41 of the Commission's Rules and Regulations. 47 C.F.R. § 1.41. In any event, the matters presented herein raise substantial and very serious public interest questions that must be addressed by the Commission, in the discharge of its statutory duties, regardless of Kay's formal procedural rights, or lack thereof. Cf. *Clarksburg Publishing Co. v. FCC*, 225 F.2d 511 (D.C. Cir. 1955).¹

B. KILLIAN INITIALLY OBTAINED THE CAPTIONED LICENSES BY FRAUD AND MISREPRESENTATION.

2. A review of Commission records will show that Chris Killian, in 1993, made application in the name of Carrier Communications, requesting authorization for the frequencies 851.2375 and 854.1625 MHz at Mount Adalaide, near Bakersfield (Kern County) California. It appears that the application was originally filed in late 1992 or January of 1993, was returned by the Commission, and then resubmitted by Chris Killian in June of 1993, whereupon it was processed and granted by the Commission, resulting in the issuance to Carrier Communications the authorization bearing call sign WPCM497, a reference copy of which is appended hereto as Attachment No. 1. We shall hereafter refer to this application as the "Carrier Communications Application" and to the resulting authorization as the "Carrier Communications License."

3. A further review of the Commission's records will show that on or about the same date that the above-described Carrier Communications application was originally filed, another application was filed in the name of Deborah Killian. This application requested

¹ In *Clarksburg Publishing* the Court stated:

the Commission's inquiry [must] extend beyond matters alleged in the protest in order to reach any issue which may be relevant in determining the legality of the challenged grant. Clearly, then, the inquiry cannot be limited to the facts alleged in the protest where the Commission has reason to believe, either from the protest or its own files, that a full evidentiary hearing may develop other relevant information not in the possession of the protestant.

225 F.2d at 515. A logical extension of this principal is that the Commission therefore may not avoid addressing a serious challenge to a licensee's qualifications because of lack of standing on the part of a whistle blower.

authorization for the frequency 851.6125 MHz, also at Mount Adalaide, near Bakersfield (Kern County) California. The Commission processed and granted this application, resulting in the issuance to Deborah Killian the authorization bearing call sign WPCE285, a reference copy of which is appended hereto as Attachment No. 2. We shall hereafter refer to this application as the "Deborah Killian Application" and to the resulting authorization as the "Deborah Killian License."

4. The business address for Carrier Communications is 42326 Tenth Street West, Lancaster, California, 93534, and this is the address that was used in the Carrier Communications Application. The address used in the Deborah Killian Application was 44349 Lowtree, Suite 163, Lancaster, California 93534. Upon information and belief, this address was at the time merely a mail drop. Deborah Killian is the spouse of Chris Killian. This relationship is not disclosed anywhere in either the Deborah Killian Application or in the Carrier Communications Application.

5. Upon information and belief, Carrier Communications was not, at the time of these applications, a corporation or a partnership, but rather a sole proprietorship owned by Chris Killian and/or an unincorporated business owned jointly by Chris and Deborah Killian. Nevertheless, the proper procedure was not followed in filling out the FCC Form 574 used for the Carrier Communications application, in that the applicant name was given as "Carrier Communications" rather than as "Chris Killian, DBA Carrier Communications." See *FCC Form 574 Instructions*, Item 21, page 22 (August 1989).

6. Deborah Killian recently testified, under oath, at a deposition in which she was questioned regarding the Deborah Killian License. A copy of the transcript is appended hereto as Attachment No. 3. The pertinent parts of here testimony are as follows:

Q: Do you hold any FCC licenses?
A: I believe I hold one.
Q: What do you use that one for?
A: I don't know, I just have my name on the license.
Q: Is that something you did for your husband's business?
A: Yes.

Killian Deposition Transcript at p. 11.