

Q: So far as you know, the only place your name appears with regard to Carrier Communications is on the one FCC license?
A: That's correct.
Q: Carrier Communications uses that license in the business, is that correct?
A: I don't know.

Killian Deposition Transcript at p. 21

Q: So you have never read ... any of the FCC rules, you don't keep around the FCC rule book or anything like that?
A: No, I don't.

Killian Deposition Transcript at p. 23

Q: Let's see now. The radio station that we have discussed earlier that is in your name, do you know if anybody manages that particular station?
A: I know nothing about that.
Q: You don't know who it is that manages it; correct?
A: That's correct.
Q: You don't know whether or not it is pursuant to a written contract or oral contract; is that correct?
A: That's correct.
Q: You don't even know where the contract is, correct?
A: That's correct.
Q: You don't even know whether or not a contract at all exists; is that correct?
A: That's correct.
Q: Who would know these things?
A: I would imagine my husband, Chris.
Q: If somebody was in possession of any contracts about that particular station and knew where the documents would be, it would be Chris?
A: Chris.
Q: I would imagine from what you know that with regard to that particular station, you don't know whether it has been constructed, when it has been operated, or any of the details of it?
A: I know no details about it, no.
Q: You don't know whether it has been constructed?
A: I don't know.
Q: You don't know whether or not it is operating; is that correct?
A: That's correct.

Killian Deposition Transcript at pp. 26-27.

7. It is clear from the foregoing that Chris Killian has intentionally misrepresented material facts to the Commission, intentionally concealed material facts from the Commission, and otherwise lacked candor with the Commission. He obtained the Carrier Communications License by means of this fraudulent conduct. Upon information and belief, Chris Killian d/b/a Carrier Communications would not have been eligible for the two channels requested at Mount

Adelaide in the Carrier Communications Application if it had, at the same time, held an authorization for or been an applicant for the third channel requested at Mount Adelaide in the Deborah Killian Application. Accordingly, Chris Killian had the Deborah Killian Application prepared in his wife's name and used an address other than his normal business mailing address. He departed from accepted procedures in giving the applicant name in the Carrier Communications Application so as to make it less likely that the two applications would be connected. Finally, he failed to disclose that he was the real party in interest in the Deborah Killian Application.

8. As a result of this fraud on the Commission Chris Killian obtained the Carrier Communications License, a valuable asset which he subsequently sold to Nextel Communications for a substantial sum of money. Appended hereto as Attachment No. 4 is a copy of the application (FCC Form 490) for Commission consent to the assignment of the Carrier Communications License from "Carrier Communications and Electronics" to Smart SMR of California, a wholly-owned subsidiary of Nextel Communications, Inc. Appended hereto as Attachment No. 5 is a reference copy of the resulting authorization. While Kay does not know the price paid by Nextel, based on his knowledge of the industry, he estimates that Chris and/or Deborah Killian received, or have contracted to receive, between \$50,000 and \$100,000 for the Carrier Communications License, and quite possibly more. Insofar as the authorization was obtained by means of misrepresentation and lack of candor, the Commission should act immediately to require the disgorgement of this unjust enrichment.

C. The Assignment of the License for Station WPCM497 to Nextel is Null and Void.

9. In addition to the fact that Chris Killian fraudulently obtained the Carrier Communications License and should not be permitted to profit from such unlawful conduct, the assignment of the authorization to Nextel is void for yet another reason. Appended hereto as Attachment No. 6 are the papers in connection with a finder's preference request filed by Applied Technology Group, Inc. in which Station WPCM487 was the target. Although the request was subsequently dismissed on procedural grounds, it nonetheless presented substantial prima facie evidence that the authorized facilities were never constructed. At the relevant time, Section

90.155(a) of the Commission's Rules required that Station WPCM487 be constructed and "placed in operation within eight (8) months from the date of license grant." 47 C.F.R. § 90.155(a).² Upon the licensee's failure to meet the deadline, "the authorization cancels automatically and must be returned to the Commission." *Id.* Accordingly, the Carrier Communications License automatically cancelled by operation of law, and Chris Killian therefore had nothing to assign to Nextel. On this basis alone the Commission should rescind the license.

10. The assignment application constitutes a further instance of misrepresentation and lack of candor. Chris Killian certainly knew that the facilities he was attempting to assign to Nextel had not been timely constructed. Nextel, who presumably did a thorough due diligence review before contracting to acquire the application and submitting an FCC application therefor, knew or should have known the same thing. Nonetheless, both parties proceeded with the assignment of license application without disclosing this highly material fact to the Commission.

11. It appears from a review of the Commission's files that the application did not contain the usual certifications of timely construction typically required by the Commission. If such certifications were included (and are simply absent from the publicly available copy of the application), they are, of course, direct and affirmative misrepresentations. Even in the absence of such certifications, however, the mere filing of the application without disclosing the nonconstruction is a constructive representation that timely construction occurred and that the subject authorization is valid. At a minimum such conduct constitutes lack of candor. Nonetheless, both Chris Killian and Nextel executed the application thereby certifying under penalty of perjury that all statements in the application were true.

D. Conclusion and Prayer for Relief

12. Chris Killian has engaged in behavior that calls into serious question his qualifications to remain a Commission licensee. The Commission therefore should immediately (a) rescind any grants made to Chris Killian or any affiliate within the past 30 days, (b) suspend processing on any pending applications by Chris Killian or any affiliate, and (c) designate all

² There have been some amendments to Section 90.155 since, but the essential requirements set forth in the subsections (a) and (c) of the rule were the same then as they are now (with the significant exception being the increase of the construction period from 8 to 12 months).

applications by and authorizations issued to Chris Killian or any affiliate for license revocation proceedings pursuant to Section 312(a) of the Communications Act. In addition, the Commission should consider whether appropriate forfeitures should be levied against Chris Killian for his conduct in violation of the Communications Act, Commission regulations, and Commission policy.

13. With regard to Call Sign WPCM497, it is respectfully submitted that the Commission need not await the conclusion of formal revocation proceedings. It is clear that both the original application by Chris Killian as well as the subsequent assignment application to Nextel were fraudulent. 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 by operation of law. 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) require Chris and/or Deborah Killian to disgorge any monies or other consideration received from the sale of the station to Nextel.

14. The Commission should also investigate the role of Nextel Communications, Inc. in this matter. At a minimum, it appears that Nextel knew or should have known that the authorizations it was obtaining from Chris Killian had not been timely constructed. The Commission should therefore investigate the extent of Nextel's knowledge, the adequacy of its due diligence procedures, and the possibility that Nextel (who has for the past few years been in an extensive acquisition mode) may be party to many more such fraudulent assignments. Based on the results of such investigation, the Commission should take appropriate enforcement actions against Nextel.

WHEREFORE, good cause having been shown herein, it is respectfully requested that the relief prayed for in Section D, above, be granted forthwith.

Respectfully submitted,

James A. Kay, Jr.



By: Robert J. Keller
His Attorney

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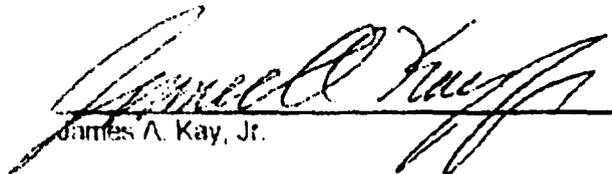
Dated: 22 October 1997

DECLARATION OF JAMES A. KAY, JR.

I, James A. Kay, Jr., hereby state that I assisted in the preparation of the pleading entitled *PETITION FOR INSTITUTION OF LICENSE REVOCATION PROCEEDINGS*; that I reviewed a final draft of the pleading; and that all factual statements and assertions contained therein are true to the best of my personal knowledge, save and except matters specifically stated to be made on information and belief and matters of which the Commission may take official notice.

I declare, certify, verify, and state under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 22nd day of October 1997.


James A. Kay, Jr.

ATTACHMENT 3

RECEIVED

DEC 1 - 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

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

REPLY TO OPPOSITION

James A. Kay, Jr. ("Kay"), by his attorney, hereby replies to the *Opposition to Petition for License Revocation Proceedings ("Opposition")* filed by Smart SMR of California, Inc., a subsidiary of Nextel Communications, Inc. ("Nextel"), in support whereof, the following is respectfully shown:

A. **Kay's Request is Not Untimely.**

1. Nextel asserts that Kay's 22 October 1997 *Petition for Institution of License Revocation Proceedings* is untimely because Kay neither timely protested nor timely sought reconsideration of the grant of (a) the initial application by Chris Killian d/b/a Carrier Communications ("Killian") for the facility in 1993 or (b) Nextel's early 1997 application for

assignment of the authorization. *Opposition* at 2-3. But in attempting to mischaracterize Kay's pleading as an untimely protest or reconsideration, Nextel conveniently ignores that what Kay seeks is the institution of license revocation proceedings pursuant to Section 312 of the Communications Act, based on a compelling showing Killian obtained the authorization for Station WPCM497 by means of fraudulent misrepresentation to the Commission. Revocation proceedings may be instituted at any time during the course of a license term, even after the action issuing the license has become final.

2. Nextel further asserts that Kay's request is untimely because it relies, in part, on a finder's preference request that was dismissed by the Bureau in 1996. Nextel complains that "Kay fails to explain why he didn't participate in that finder's preference proceeding or seek reconsideration of the decision in a timely manner" and that "Kay's reliance on a dismissed SMR finder's preference claim comes nearly two years after the SMR finder's preference program has been abolished. *Opposition* at 3. As explained more fully in the following section of this reply, Kay does he seek reconsideration of or in any way challenge the dismissal of the finder's preference request. Nextel's timeliness objection is therefore misplaced.¹

B. Kay Is Not Seeking to Take Assignment of a Finder's Preference Request.

3. Nextel erroneously accuses Kay of attempting to take assignment of the Applied Technology Group, Inc. ("ATG") 1996 finder's preference request without demonstration of ATG's consent and without showing that ATG's rights in the finder's preference request have been assigned to Kay. These arguments totally misconstrue the significance of the finder's preference documents and the purpose for which they were offered. Kay does not seek or claim any rights under the finder's preference request, nor does he seek reconsideration of or in any way challenge the dismissal of the finder's preference. Rather, Kay points to the finder's preference request as support for certain factual allegations that were presented to the Commission. Those allegations, namely, that Killian did not timely construct and placed into

¹ Kay alternatively requested that his pleading be treated as an informal request for Commission action pursuant to Section 1.41 of the Commission's Rules, 47 C.F.R. § 1.41. As an informal request, the pleading would not be defective even assuming Nextel's untimeliness arguments were correct.

operation Station WPCM497, although previously offered in support of ATG's finder's preference request, are equally pertinent to Kay's instant request for license revocation proceedings. The Commission never passed on the factual allegations, having dismissed the finder's preference request on purely procedural grounds, and it is therefore entirely appropriate for the allegations to be re-presented in other contexts where they have relevance.²

C. Nextel Dissembles Rather Than Answer the Applicable Allegations.

4. Throughout its opposition, Nextel does not once refute the factual allegation, documented in the ATG finder's preference request, that Killian did not meet the initial construction deadline. Nextel repeatedly states that the facilities were constructed and operational in 1996 when it filed its assignment application, *Opposition* at 6-9, but that is not the issue. The question is whether the station had been constructed and placed into operation within eight months of grant, *i.e.*, in April of 1994. Because the station was not timely constructed, the authorization automatically canceled by operation of law, and Killian had nothing to assign to Nextel. That the station may have been later constructed in order to accomplish a profitable sale to Nextel does not change the legal consequences of a failure to timely construct in 1994. It is disingenuous for Nextel to respond to the serious allegation of nonconstruction in 1994 by repeatedly asserting that the station was constructed in 1996. Kay would not be surprised to learn that Killian untimely completed construction of his fallow authorization, possibly even using Nextel funds to do so, in order to be able to sell the dead license to Nextel for great financial gain. What is disturbing is the Bureau's abdication of its duty to guard against such unjust enrichment by the fraudulent sale of a public resource held in trust.³

² In view of the foregoing, Nextel's objection that Kay has not complied with the procedural requirements applicable to finder's preference requests, *Opposition* at 4-5, is inapposite. Kay is not requesting a finder's preference, nor is he seeking rights in ATG's dismissed finder's preference request. The procedural requirements of Section 90.173(k)(3), the Finder's Preference Checklist, therefore have no applicability.

³ It is common Commission practice in Part 90 assignment of license applications to require both the assignor and the assignee to sign certifications of timely initial construction. For some unknown reason, the Bureau processed the captioned assignment to Nextel without requiring such a showing.

D. **Killian Obtained the Captioned Licenses by Fraud and Misrepresentation.**

5. Kay demonstrated that the above-captioned applications were obtained by Killian and his wife by means of fraudulent misrepresentations to the Commission. Killian himself has not come forward to deny this claim, nor does Nextel offer any declaration of Killian in response. Nextel does not refute the plain facts supporting this conclusion, and offers instead only weak and feeble excuses and objections. Specifically, Nextel demurs that Kay has not demonstrated that Killian lacked sufficient loading to qualify for two SMR stations within the same area or that he was the real party-in-interest behind his wife's co-located, simultaneous, single-channel application. *Opposition* at 10-12.

6. Nextel is once again disingenuously playing games. The issue is not whether Killian qualified for two channels⁴ but, rather, whether he qualified for three: the two he filed for in his own name, plus the one he applied for using his wife as a shell. Moreover, the demonstration offered by Kay is much more substantial than anything pointed to by the Commission when it made similar accusations against Kay. See *Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture* (FCC 94-315; PR Docket No. 94-147), 10 FCC Rcd 2062 76 Rad. Reg. 2d (P&F) 1393 (1994). The Commission there designated, inter alia, an issue whether Kay had violated Section 90.263, but there is no factual statement, much less documentation or support, in the designation order or in any discovery produced to Kay, that Kay lacked sufficient loading or was otherwise not qualified for any applications at issue. Indeed, it has not even been disclosed to Kay what particular applications are at issue. There can be no double standard—if the designation order in Kay's proceeding makes a sufficient prima facie case, then Kay's pleading against Killian constitutes an overwhelming showing.

7. Nextel next asserts the following defense: "In any event, now that the SMR 40-Mile Rule has been repealed, the issue is moot." *Opposition* at 10. Kay will not even respond to this ludicrous suggestion except to say this. If the Bureau adopts Nextel's position that a licensee

⁴ As it happens, however, Killian apparently was not even qualified for two channels. In his certification to Nextel as part of the sale transaction, Killian admits to having only ten units on Station WPCM497. See *Opposition* at Exhibit 3.

can not be called to account for past violations of rules that have since been repealed or modified, the Kay expects the Bureau to promptly join him in a motion for summary decision on many of the issues designated in Kay's own proceeding, including, but not limited to, allegations that Kay has violated channel loading requirements.

8. The suggestion that Kay has not demonstrated that Killian was the real party-in-interest behind his wife's sham application is absurd on its face. Mrs. Killian has established this fact, beyond any possible dispute, by her own sworn testimony. She knows nothing about the license, she simply has her name on the license, something she did for her husband's business. *Killian Deposition Transcript*⁵ at p. 11. She has no idea what the license is or was used for, *id.* at 21, nor does she know anything about the station's construction, operation, or management. *Id.* at 26-27. These are matters known only to her husband. *Id.*

9. Apparently realizing how laughable its position on this point is, Nextel attempts to invoke a legal technicality, by grossly misapplying the Commission's 1992 modification of its spousal attribution policy. *Opposition* at 10-11. In making this futile attempt, however, Nextel resembles a 300 pound man trying to hide behind a sapling. In *Clarification of Commission Policies Regarding Spousal Attribution*, 7 FCC Rcd 1920, 70 Rad. Reg. (P&F) 768 (1992), the Commission stated that "the media interests of one spouse will not be *presumptively* attributed to the other *solely* on the basis of marital status." *Id.* at ¶ 1 (emphasis added). But Kay does not ask the Commission to "presume" an attribution from Mrs. Killian to her husband, nor does Kay base his charge "solely" on the basis of her marital status. Here, Mrs. Killian herself has testified, under oath and subject to penalty of perjury, that she had no interest whatsoever in the application or the resulting license; that it was all her husband's doing.

⁵ Attachment No. 3 to Kay's 22 October 1997 *Petition for Institution of License Revocation Proceedings*.

10. Although it relaxed the spousal attribution policy, the Commission nonetheless stated that it will

review the relationship between the spouses and their respective media interests to determine whether attribution of their media interests is necessary to preserve the objectives of economic competition and diversity. As with all family relationships, spouses' media interests will not be attributed where the spouses' disclosures confirm that such media interests are independently held and are not subject to common influence or control.

Id. Moreover, it was explained that:

Under our adopted approach, the Commission must be satisfied in each case that the spouses' media interests are independent, and that a marital relationship is not being used to evade the ownership rules. To that end, all family relationships must be disclosed and described in full, and we retain the option of requiring submission of further information and explanation if necessary. This process will enable us to evaluate carefully whether the spouses in fact will act independently of each other, and at the same time will avoid imposing burdensome and potentially misplaced presumptions on married individuals.

Id. at ¶ 12. Finally the Commission cautioned: "[I]f it appears that spouses (or other family members) have misrepresented the nature or extent of their media interests in order to evade the ownership rules, we will apply the full weight of available sanctions." *Id.* at ¶ 18. Thus, there is no protection for the Killian's under the Commission's spousal attribution policy; to the contrary, that policy requires immediate sanctions against Killian on the basis of the showing made by Kay.

E. Kay's Exercise of His Constitutional Rights is Not an Abuse of Process.

11. In an attempt to avoid the required and inevitable Commission response to Kay's substantial showing of disqualifying conduct on the part of Killian, Nextel desperately accuses Kay of abusing the Commission's processes by filing his petition. *Opposition* at 12-17. There is absolutely no foundation in fact or law for this accusation. It is clear beyond dispute that the well-supported allegations in the petition raise substantial and material questions within the purview of the Commission. And it has long been settled Title III licensee 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 Bros. Radio Station*, 309 U.S. 470 (1940); *Scripps-Howard Radio Inc. v. FCC*, 316 U.S. 4 (1942).

12. Moreover, Kay has a First Amendment right to petition the government, and he has exercised that right by filing his petition in the captioned matter. The concoction of an "abuse of process" theory to avoid reaching the merits of Kay's pleading would be Unconstitutional. See *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965). Out of these two cases grew the so-called *Noerr-Pennington* doctrine which essentially states that the essence of the doctrine is that parties who petition for governmental action favorable to them cannot be prosecuted under the antitrust laws even if their petitions are motivated by anticompetitive intent. The point is to protect private parties when they petition the government for laws or interpretations of its existing laws even if those private parties are pursuing their goals with anticompetitive intent.

13. The *Noerr-Pennington* doctrine initially arose in the antitrust field, but it has been expanded to protect first amendment petitioning of the government from claims brought under various federal and state laws. See, e.g., *Video International Production, Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075 (5th Cir. 1988), *Evers v. County of Custer*, 745 F.2d 1196, 1204 (9th Cir.1984); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 614 (8th Cir.1980), and cases cited therein. The Constitutional right to petition extends also to a Title III licensee filing pleadings with the FCC seeking denial of applications or other appropriate sanctions against competitors. See, generally, *Faulkner Radio, Inc. v. FCC*, 577 F. 2d 866 (D.C. Cir. 1977) and *Radio Carrollton*, 69 FCC 2d 1139, 1151 (1978); *Gill Industries*, 56 FCC 2d 765, 768 (1975), quoted in *WGMS Radio, Inc.*, 2 FCC Rcd 4565 (1987) ("The right of any person, licensee or otherwise, to file pleadings with the Commission is protected by the Constitution 'as an exercise of free speech and of the right to petition the government'").

14. One alleging that a pleading is abusive, or what the Commission sometimes calls a "strike petition," is obliged to "make a strong showing that delay [or some other illegitimate objective] is the primary and substantial purpose behind" the filing. *Radio Carrollton*, 69 FCC 2d at 1151. "Where a petition raises legitimate public interest questions concerning an applicant's fitness to become or remain a Commission licensee ... the Commission will not impute to the petitioner a subjective [improper] intent ... based on the speculative or coincidental existence of a possible [improper] motivation." *WGMS Radio, Inc.*, 2 FCC Rcd at ¶ 9. Kay has presented legitimate public interest questions concerning Killian's qualifications and the propriety of his sale to Nextel. The meager objections interposed by Nextel are woefully inadequate to eradicate Kay's Constitutional rights.

WHEREFORE, good cause having been shown herein, it is respectfully requested that the relief prayed for in Section D of the *Petition for Institution of License Revocation Proceedings* be granted forthwith.

Respectfully submitted,

James A. Kay, Jr.



By: Robert J. Keller
His Attorney

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Dated: 1 December 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 1ST day of December, 1997, I have caused copies of the foregoing *Reply to Opposition* to be sent by facsimile and regular mail to the following:

**JAMES B GOLDSTEIN ESQ
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ATTACHMENT 4

Federal Communications Commission

1270 Fairfield Road
Gettysburg, PA 17325-7245

May 20, 1994

VIA REGULAR AND CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Dennis C. Brown, Esquire
1835 K Street, N.W.
Suite 650
Washington, D.C. 20006

Re: Compliance File No. 94G001; James Kay

Dear Mr. Brown:

On April 8, 1994, you submitted a letter on behalf of your client, James A. Kay, Jr., in reply to a Commission inquiry dated January 31, 1994, requesting information pursuant to § 308(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 308(b).

Kay's letter is inadequate, evasive, and contrived to avoid full and candid disclosure to the Commission. Kay's letter represented a studied effort to avoid producing any information. His failure to disclose pertinent information to the Commission has raised a substantial question about his qualifications to be a Commission licensee. The response is elusive and apparently designed to conceal his operating practices. Kay failed to adequately answer any single question included in our inquiry. Kay is directed to file a fully responsive submission within fourteen (14) days of the date of this letter.

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. Under the provisions of Commission Rules 0.457(d)(2)(i) and 0.461, 47 C.F.R. §§ 0.457(d)(2)(i) and 0.461, a persuasive showing as to the reasons for inspection will be required for requests submitted by the public pursuant to Rule 0.461, which seek information not routinely made available for public inspection under Rule 0.457. You are reminded of your obligation to physically separate those materials to which the request for nondisclosure applies from any materials to which the request does not apply. If a physical separation is not feasible,

the portion of the materials to which the request for nondisclosure applies must be identified. See, Rule 0.459(a).

Kay's claim that the Commission recently disclosed financial information in a finder's preference matter, which target Joseph Hiram requested be kept confidential, is frivolous. In response to a finder's preference request filed by your office on behalf of Kay, Hiram filed three letters stamped "confidential" as part of his Opposition. Hiram later advised the Commission that the three letters could be released to your law office. In a conversation with a member of my staff on March 17, 1994, attorney Katherine Kaercher of your office was advised that the three letters were being released with Hiram's permission. The letters were sent via telefax to your office that same day, with a note that Kay had an additional ten day period in which to comment on the letters. In light of your firm's knowledge that Hiram's request for confidentiality had been withdrawn, your claim on behalf of Kay that the Commission wrongfully released confidential information is deceptive and highly improper.

We clearly stated in our letter that we have received complaints alleging that numerous facilities are licensed to Kay on U.S. Forest Service lands but do not have the requisite permits for such use. We went on to explain that without the permits, there is a presumption that those facilities were not constructed and made operational as required by our Rules. Whether or not a station is located on U.S. Forest Service lands is therefore relevant to the stated purpose of the Commission's inquiry. The Commission has also received complaints that Kay's actual loading is inconsistent with the loading that he has reported to the Commission and to the U.S. Forest Service.

Kay should be advised that under the provisions of § 308(b) of the Act, id., the Commission has authority from Congress to require from an applicant or licensee "such other information as it (the Commission) may require," at any time after the filing of an application or during the term of any license. The Commission's resources are to benefit the entire public, not solely to benefit only one licensee.

When asked to name the "type of facility" for each call sign, Kay argued that this request was "not sufficiently specific" to allow him to be sure what the Commission requested. However, he suggested that the requested information is already within the Commission's records.

If Kay did not understand how to respond to the question calling for "type of facility", he had ample opportunity to contact the Commission during the initial 60 day time period provided to respond. Furthermore, on February 17, 1994, your office submitted

a request with the Commission, on Kay's behalf, seeking a tolling of the 60 day period of time in which Kay had to respond to our inquiry, until such time as the Commission replied to the statements in the February 17, 1994 request. In reply, Kay was granted an additional 14 days to supply the information we requested in our January 31, 1994 inquiry letter. If Kay needed clarification of one of our questions, it was his duty to seek it from us prior to the April 14, 1994 revised deadline. He had ample time to seek clarification, but elected not to do so. However, Kay is advised that the term "type of facility", as requested under heading number 2 of our January 31, 1994 inquiry letter, relates to the radio service in which the facility was licensed (i.e., YX, GX, YB, GB, etc.).

As part of our inquiry, the Commission requested that Kay provide a listing of the total number of units operated on each station, with a demonstration of such use substantiated by business records. Kay refused to respond, stating that the question was not sufficiently specific for him to supply the requested information, since "at any given instant of time, Mr. Kay may not know the number of mobile units operated on each of his stations." Kay later states that he "is currently spending one full day per week in the activity of collecting his charges from delinquent customers." Kay's refusal explanation is therefore contradictory, since he must have knowledge of his customer base to be aware of account delinquencies. His refusal to respond is also inexcusable since he was afforded an ample opportunity to clarify the window of time during which the information was requested. Kay is advised, however, that the Commission requests a listing of the total number of units operated on each station for all facilities owned or operated by Kay, or by any companies under which he does business, as of January 31, 1994, (the date of our initial inquiry). Kay is reminded that such demonstration of use during this period must be substantiated by business records.

Failure to provide the requested information constitutes a violation of the Commission's Rules and will subject Kay to sanctions, including a hearing before an Administrative Law Judge to determine whether Kay's licenses should be revoked.

We note that on May 11 and 13, 1994 Kay was notified that we would need an answer to our inquiry in order to determine what action to take on application numbers 415060, 415243, 415255, 628816, 632210 and 415274. We asked for responses by May 25 and May 27, respectively. Those response dates are extended to June 3, 1994 to conform with the instant letter.

The Communications Act requires that a response to a § 308(b) inquiry be signed by the applicant and/or licensee. Please direct Kay's signed response to my attention at the letterhead address.

Sincerely,



W. Riley Hollingsworth
Deputy Chief, Licensing Division

ATTACHMENT 5

Federal Communications Commission

1270 Fairfield Road
Gettysburg, PA 17325-7245

May 27, 1994

VIA FACSIMILE - CERTIFIED MAIL - RETURN RECEIPT REQUESTED -
REGULAR MAIL

Dennis C. Brown, Esquire
Brown and Schwaninger
Suite 650
1835 K Street, N.W.
Washington, DC 20006

Re: Compliance File No. 94G001; James Kay

Dear Mr. Brown:

This is in response to your letter of May 26, 1994,
submitted on behalf of James A. Kay, Jr.

In paragraphs two and four of your letter you asked that we clarify the "call sign and licensee information requested by item one which (we) do not already have in our possession and which (we) have any actual need for Mr. Kay to submit." If that was your intended wording, it is readily apparent that if we were assured we had all the information we needed in order to carry out our statutory responsibility in this case, we would not request more. Your letter asks us to determine what we do not have and clarify it, a daunting if not impossible task for anyone.

Our requests for information referred to in paragraphs three and five of your letter, relating to systems on U.S. Forest Service land, are self-explanatory.

Regarding the request for user information, we have no intention of disclosing Mr. Kay's proprietary business information, such as customer lists, except to the extent we would be required by law to do so. Our intent is not to divulge Mr. Kay's proprietary business information to competitors or any non-Commission personnel, but rather to carry out our statutory responsibility to determine whether grant of an application or retention of a license is in the public interest.

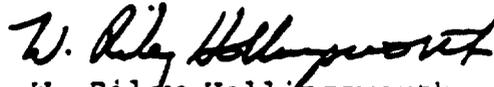
Your response on behalf of Mr. Kay in paragraph eight is ludicrous. We asked for the total number of units operated on each station. Your answer of "7,000" is hardly helpful and is not acceptable unless you are contending that each system

serves 7,000 mobiles and control stations. We respectfully suggest that a substantial time savings would result to both the Commission and Mr. Kay if the effort devoted to submitting a frivolous answer such as that were instead devoted to gathering information the Commission has rightfully requested.

In regard to what action you would expect to take if a hearing were designated, that is a decision you and your client would have to make at the appropriate time, and we cannot advise you in that regard.

Mr. Kay's response remains due on June 3, 1994.

Sincerely,



W. Riley Hollingsworth
Deputy Chief, Licensing Division

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 24th day of March, 1998, sent by hand delivery (unless otherwise indicated), copies of the foregoing "Wireless Telecommunications Bureau's Opposition to Petition for Extraordinary Relief" 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 First Class Mail)

Aaron Shainis, Esq.
Shainis & 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