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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

JUL - 2 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: Honorable Richard L. Sippel
Administrative Law Judge

WIRELESS TELECOMMUNICATIONS BUREAU'S
COMMENTS ON MOTION FOR PARTIAL SUMMARY DECISION

1. The Chief, Wireless Telecommunications Bureau, by his attorneys, now offers its comments on the "Motion for Partial Summary Decision" filed by James A. Kay, Jr. (Kay) on June 18, 1998.

2. Kay seeks summary decision on two issues and on a portion of a third issue. The issues in question are: Issue 10(b), which sought to determine whether Kay willfully or repeatedly operated a conventional station in trunked mode; Issue 10(f), which sought to determine whether Kay abused the Commission's processes in order to obtain cancellation of licenses; and that portion of Issue 10(d) which sought to determine whether Kay violated Section 90.629 of the Commission's Rules by filing applications in multiple names.¹ Kay's

¹ Kay does not seek summary decision on that portion of the issue relating to Section 90.623 of the Commission's Rules, which addresses conventional stations.

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sole basis for summary decision is the Bureau's statement in its June 3, 1998 "Statement of Readiness for Hearing" that the Bureau did not intend to proceed on these issues or, in the case of the trunking issue, to seek sanctions against Kay under the issue.

3. Section 1.251(a)(1) of the Commission's Rules provides that a party filing a motion for summary decision "may not rest upon mere allegations or denials but must show, by affidavit or other materials subject to consideration by the presiding officer, that there is no genuine issue of material fact for determination at the hearing." Kay has not shown that he meets that standard. Instead of making an affirmative showing that there is no genuine issue of material fact, he has merely relied upon the Bureau's statements in seeking summary decision.

4. Nonetheless, given the Bureau's statement that it does not intend to present evidence under Issue 10(d) with respect to Section 90.629 of the Commission's Rules or Issue 10(f) or to seek sanctions against Kay under Issue 10(b), the Bureau does not affirmatively oppose Kay's motion, with one caveat. As the Bureau explained in its "Statement of Readiness for Hearing," the Bureau intends to present some evidence on Kay's system configuration with respect to the § 308(b) issue discussed above and with respect to the loading issue discussed below. Kay's refusal to disclose which mobiles were operating on which channels was exacerbated by his failure to disclose which channels he was operating as LTR trunked groups. The loading records he first provided to the Commission indicated that mobiles operating as part of 470-512 MHz band trunked groups operated on frequency 500

MHz, and that mobiles operating on 800 MHz band trunked groups operated on frequency 800 MHz. His failure to describe which conventional channels were operating as trunked groups at various sites made it impossible for the Commission to interpret the records he provided and greatly aggravated his other failures to provide loading records. If the Presiding Judge grants Kay summary decision on the trunking issue, he should make clear that his action does not preclude the Bureau from offering evidence concerning Kay's system configuration under the 308(b) and loading issues. The Bureau would oppose summary decision on the trunking issue if it would preclude the receipt of evidence concerning Kay's system configuration under other issues.

5. The Bureau believes that the Presiding Judge could either grant Kay's motion for summary decision or resolve the issues in favor of Kay at the time of the initial decision because the Bureau did not meet its evidentiary burdens. The Bureau believes that the

manner in which the Presiding Judge wishes to proceed is within the sound discretion of the Presiding Judge.

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

Gary P. Schonman by GJS

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July 2, 1998

CERTIFICATE OF SERVICE

I, John J. Schauble, an attorney in the Enforcement and Consumer Information Division, Wireless Telecommunications Bureau, certify that I have, on this 2nd day of July, 1998, sent by hand delivery (unless otherwise indicated), copies of the foregoing "Wireless Telecommunications Bureau's Comments on Motion for Partial Summary Decision" to:

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