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FEDERAL COMMUNICATIONS COMMISSION JUL 28 1998  
Washington, DC

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  
OPPOSITION TO MOTION TO RECUSE PRESIDING JUDGE**

1. The Chief, Wireless Telecommunications Bureau, by his attorneys, now opposes the "Motion to Recuse Presiding Judge" filed by James A. Kay, Jr. (Kay) on July 22, 1998.<sup>1</sup>

2. Kay asks the Presiding Judge to recuse himself on grounds of bias and prejudice. Kay alleges that certain rulings contain statements which show "that the Presiding Judge is incapable of rendering an unbiased and fair decision." (Kay Motion, p. 1, emphasis in original). Kay's motion appears to be nothing more than a crude attempt to stay the proceeding in order to prevent the hearing from taking place as scheduled. Kay's instant motion distorts the Presiding Judge's words, fails to mention critical facts, and makes no serious attempt to show the existence of an extrajudicial source of bias required by the case law. Accordingly, Kay's motion should be expeditiously denied.

<sup>1</sup> Kay has informally advised the Bureau that he will be filing a supplement to his motion later today. The Bureau will promptly file comments on any supplement Kay may file

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3. This proceeding was designated for hearing in December 1994, but 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 his first 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 (from April 1997 to October 1997), however, the proceeding was stayed pursuant to Section 1.245 of the Commission's Rules. Since October 1997, the parties have conducted extensive discovery and exchanged exhibits. The admissions session is scheduled to begin on August 4, 1998, and testimony is scheduled to be taken starting on September 2, 1998. Now, virtually on the eve of the hearing, Kay has filed a second motion to disqualify the Presiding Judge.

4. In denying Kay's first disqualification motion, the Commission set forth the applicable standards for disqualification:

In his motion for disqualification, at p. 9, Kay recognized that the Supreme Court in [Liteky v. U.S., 114 S.Ct. 1147, 1157 (1997)], held that "judicial rulings alone almost never constitute valid basis for a bias or partiality motion." Similarly, this Commission has consistently held that the presiding officer's

personal bias "must stem from an extrajudicial source and result in an opinion on the merits on some other basis other than what the judge learned from his participation in the case." WWOR-TV, Inc., *supra*, 5 FCC Rcd at 2845 para. 5. See also Black Television Workshop of Los Angeles, Inc., 6 FCC Rcd 6525 (1991) (subsequent history omitted); KAYE Broadcasters, Inc., 24 RR 2d 772, at para. 3 (1972) (explaining that comments and rulings of the judge during the course of the proceeding do not ordinarily afford a basis for a claim of personal bias; since such matters are subject to review, they can be corrected through the normal appellate process).

James A. Kay, Jr., 12 FCC Rcd 15662, 15663-15664 (1997). Kay's motion wholly fails to meet that standard. Kay does not identify any "extrajudicial" source of bias, and his instant motion relies wholly upon five judicial rulings, contrary to the Supreme Court's holding in Liteky. Moreover, none of the rulings in question constitutes any evidence of bias on the part of the Presiding Judge. The Bureau will discuss each of those rulings in turn.

5. The first ruling is an excerpt from the Memorandum Opinion and Order, FCC 98M-85 (released June 26, 1998), where the Presiding Judge noted in denying a stay that Kay had an adequate legal remedy "since Kay could still possibly prevail on the merits of the case before the Presiding Judge, the Commission, or the Courts. . ." Kay alleges that this statement "conveys the message" that Kay has the burden of proving his qualifications, as opposed to the Bureau proving that Kay is not qualified. Kay Motion, p. 2. Kay's argument totally misstates the context in which the Presiding Judge made the statement. Kay sought a stay of the proceeding. One of the factors the Commission uses to determine whether a stay should be granted is whether the party seeking a stay will be irreparably injured if a stay is not granted. Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921 (D.C. Cir. 1958).

The Presiding Judge's statement was nothing more than an acknowledgement that Kay could prevail in this case. There was no discussion in the underlying order of evidentiary burdens. If anything, the statement shows that the Presiding Judge is not biased and has an open mind to resolving issues in favor of Kay if the evidence supports such a conclusion.

6. The second ruling Kay relies upon is the Memorandum Opinion and Order, FCC 98M-55 (released May 15, 1998) where the Presiding Judge rejected Kay's argument that the Hearing Designation Order in this proceeding violated the Administrative Procedure Act by failing to give adequate notice of the matters at issue. Kay interprets paragraph 8 of that order as a presumption on the part of the Presiding Judge that Kay was involved in wrongdoing. First, this charge has nothing to do with bias -- it is merely a disagreement with the Presiding Judge's ruling on the issue. Second, the Presiding Judge's statement restates an obvious fact: given that the subject of the proceeding is Kay's business, and given the discovery Kay has received from the Bureau and his participation in depositions in this proceeding, Kay has had more than adequate notice of the matters at issue in this proceeding. This fact is particularly evident because the Administrative Procedure Act does not require notice of when, where, and how each violation occurred. Boston Carrier, Inc. v. ICC, 746 F.2d 1555, 1560 (D.C. Cir. 1984). No bias whatsoever is evident from this statement.

7. The third "ruling" of the Presiding Judge which Kay relies upon is the Order, FCC 98M-91 (released July 6, 1998), which tentatively expressed the Presiding Judge's belief that Kay could be required to offer his direct case exhibits into evidence at the admission session

scheduled for August 4, 1998. Kay argued that such a procedure would somehow shift the evidentiary burdens to him in violation of Section 312 of the Communications Act. In the same regard, Kay also complained about the following requirements contained in another ruling (the Presiding Judge's Order, FCC 98M-40 (released April 2, 1998)): the requirement to exchange direct case exhibits shortly after the Bureau exchanges its exhibits (Kay Motion, p. 5; the requirement to file trial briefs containing a summary of anticipated testimony (Kay Motion, pp. 5-6); and the scheduling of the admissions session on August 4, 1998. Initially, the Bureau must note that the July 6 Order was not a definitive ruling but a tentative expression of the Presiding Judge's position. Page 2 of that Order specifically states that no ruling has been made on Kay's exhibits and that the parties have a month to reach an agreement on the position. Indeed, the Presiding Judge stated that he would give Kay and the Bureau the opportunity to brief their positions in a status report to be filed on July 30, 1998.

8. Furthermore, Kay fails to mention that he **voluntarily agreed** to the procedural schedule which included a single admission session covering all direct case exhibits and a trial brief. See Order, FCC 98M-40, supra at n.2 and "James A. Kay, Jr.'s March 1998 Status Report" filed on March 12, 1998. Kay previously expressed no concern about the date for the exchange of Kay's direct case exhibits or the requirement for both parties to exchange trial briefs on July 29. Indeed, he endorsed the procedural dates. If Kay objected to exchanging direct case exhibits, trial briefs, or having one admissions session, he had an obligation to propose a different procedural schedule to the Presiding Judge. Kay's current complaint about

the Presiding Judge's procedural schedule is simply inconsistent with his prior approval of that schedule.

9. Furthermore, while Kay claims that the manner in which the Presiding Judge is proceeding is inconsistent with the requirement in Section 312 of the Communications Act that the Bureau have the evidentiary burdens under each issue, he cites no applicable authority for that proposition. Indeed, the only pertinent case Kay cites, Algreg Cellular Engineering, 9 FCC Rcd 5098, 5144-5145 (Rev. Bd. 1994)<sup>2</sup> demonstrates that the Presiding Judge's procedures are consistent with the Act. In Algreg, the Review Board held that there was no violation of Section 312 of the Act in requiring a licensee in a revocation hearing to exchange its direct case exhibits at the same time as the Bureau. Furthermore, although the ALJ in that proceeding had committed plain error in placing the burden of proof on the licensee, the Review Board determined that such error was harmless. In this case, the Presiding Judge allowed Kay to exchange his direct case exhibits two weeks after the Bureau exchanged its exhibits. Furthermore, Kay's theory that he cannot be required to do anything until the Bureau makes its direct case presentation is inconsistent with the ruling in Algreg that a licensee in a revocation proceeding may be required to present its direct case at the same time as the Bureau.

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<sup>2</sup> The other case cited by Kay, Radio Station WTIF, Inc., 2 RR 2d 305 (1964), has no bearing on this situation. The Commission held in that case, which involved both a proposed revocation of license and denial of a renewal application, that it was appropriate to place the burden of proof on the renewal applicant with respect to the renewal application. The order of proceeding was voluntarily agreed to by the parties (2 RR 2d at 310), so the case says nothing about the requirements imposed by Section 312 of the Act.

10. Furthermore, while Kay complains that he would be prejudiced by the Presiding Judge's procedures, he has not explained how that prejudice would result. First, Kay was not required to put on any sort of direct case -- he voluntarily decided to make a direct case presentation. Second, if he admits a document into evidence during the admissions session, and decided after the Bureau's presentation that the document is unnecessary, he may seek leave to withdraw the exhibit. Third, the fact that the document is in evidence during the Bureau's presentation is meaningless because, even if a relevant document was not in evidence, the Bureau could still show the document to witnesses and ask questions concerning the document.

11. The conduct of Kay and his counsel in the Marc Sobel proceeding (WT Docket No. 97-56) also shows the speciousness of Kay's current position. In that proceeding, which contemplated revocation of Sobel's licenses and denial of Sobel's pending applications, the parties simultaneously exchanged direct case exhibits. Both the Bureau and Sobel called Sobel as a direct case witness, and the Bureau called Kay as a witness. Counsel for Sobel, who now also represents Kay in this proceeding, agreed to conduct his cross-examination of Sobel with respect to the Bureau's case at the same time he conducted his own direct examination of Sobel. See Hearing Transcript in WT Docket No. 97-56, Tr. 19-20 (submitted as Attachment 1 to this opposition). The Bureau must question why Kay's counsel would have embraced such a procedure in one proceeding only to characterize it in another proceeding as "so outrageous as to compel recusal." See Kay Motion, p. 8. Indeed, the Sobel proceeding points out another problem with Kay's position. Under his rationale, there could

never be a combined revocation and renewal proceeding because each party would be able to insist that the other party proceed first.

12. For all of the above reasons, the Presiding Judge's rulings concerning the admission of exhibits and the procedural schedule were well within his discretion to regulate the hearing under Section 1.243 of the Commission's Rules. Even if the Presiding Judge's rulings were erroneous, that error utterly fails to show any bias on his part, since judicial rulings alone are insufficient to establish bias. See ¶3, supra.

13. The final ruling Kay relies upon is the Presiding Judge's summary decision in this proceeding, which was subsequently reversed by the General Counsel. James A. Kay, Jr., 11 FCC Rcd 6585 (1996). The Commission has already ruled that none of the findings or comments in the summary decision establishes bias or prejudice. James A. Kay, Jr., supra, 12 FCC Rcd at 15666 (¶13).

14. Kay's remaining arguments in favor of recusal only show how weak his position is. First, he suggests that because he has filed his motion, the Presiding Judge should recuse himself because "[t]he parties will wonder whether the Presiding Judge is subconsciously overcompensating or undercompensating because of this charge." Kay Motion, p. 8 n.6.<sup>3</sup> Under that logic, the mere filing of a frivolous disqualification motion would obtain the

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<sup>3</sup> Kay fails to inform the Presiding Judge that the order Kay cites, Barnes Enterprises, Inc., 40 RR 2d 887 (ALJ 1997) is an interlocutory order of an Administrative Law Judge who expressed this concern but declined to recuse himself.

desired result because the Presiding Judge would have to recuse himself. Second, Kay cites his own belief that "Mr. Kay has no confidence in the Judge's ability to be fair" (Kay Motion, p. 11), and he argues that the Presiding Judge should therefore recuse himself for the sake of appearances. Kay Motion, pp. 11-12. Again, such logic would require that a judge honor every disqualification motion filed against him, no matter how little merit the motion had, for the sake of "appearances." Third, Kay argues that even if the Presiding Judge believes that disqualification is not appropriate, he should recuse himself for the sake of "expedition" because Kay will appeal any denial of this motion. Kay Motion, p. 12. This argument is outrageous. Kay is using the threat of delay in a crude attempt to coerce the Presiding Judge into granting a frivolous motion. The disqualification motion must be evaluated on its merits, not upon the suggestion that the Presiding Judge should capitulate in order to avoid delay. Moreover, if another Administrative Law Judge were appointed, there would certainly be delays involved while the judge familiarized himself with the case and proceeded to organize and schedule the trial.

15. Accordingly, it is clear that none of the charges of bias on the part of the Presiding Judge has any merit whatsoever. Indeed, this motion appears to be nothing more than a frivolous attempt to prevent this proceeding from going to hearing. "A pleading may be deemed frivolous under 47 C.F.R. § 1.52 if there is no 'good ground to support it' or it is 'interposed for delay.'" Commission Takes Tough Measures Against Frivolous Pleadings, 11 FCC Rcd 3030 (1996). The Bureau believes that Kay lacked "good ground" to support the filing of his motion. That belief is based upon several factors, including the Commission's

prior ruling denying Kay's first disqualification motion, Kay's failure to point to any extrajudicial source of bias as required by the pertinent case law, the absurd interpretations Kay places on the words of the Presiding Judge, and Kay's failure to mention pertinent facts such as his prior agreement to the procedural schedule. Furthermore, the circumstances surrounding the timing and filing of Kay's motion suggest that the motion was filed for the purpose of delaying the scheduled hearing. First, the motion was filed shortly before the August 4 admissions session. Second, Kay has filed a "Petition for Extraordinary Relief" with the Commission in which he sought to avoid the hearing in this proceeding.<sup>4</sup> Third, Kay's suggestion that the Presiding Judge recuse himself in order to avoid delay shows that Kay is very aware that an appeal of his motion would have the effect of delaying this proceeding. Fourth, as a licensee subject to a revocation hearing, Kay has a strong incentive to delay this proceeding. If Kay carries through on his intent to file exceptions and trigger the automatic stay provisions in the Commission's Rules, the Bureau will file an emergency motion with the Commission seeking expedited action on Kay's exceptions so the procedural schedule agreed to by the parties can continue with as little disruption as possible. The Bureau also reserves the right to seek other relief against Kay before the Commission.

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<sup>4</sup> This petition remains pending before the Commission.

16. Accordingly, the Bureau urges the Presiding Judge to deny Kay's "Motion to Recuse Presiding Judge."

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



Gary P. Schonman  
Chief, Compliance and Litigation Branch  
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July 28, 1998

ATTACHMENT 1

FCC Received August 12, 1997 @ 2:55 p.m.  
Anna G. Bradshaw

UTB  
Mr. Schauble  
Mr. Knowles-Kellett

# FEDERAL COMMUNICATIONS COMMISSION

In the Matter of:	)	Docket No.:	WT97-56
	)		
MARC SOBEL, APPLICANT	)		
FOR CERTAIN PART 90	)		
AUTHORIZATIONS IN THE LOS	)		
ANGELES AREA AND REQUESTOR OF	)		
CERTAIN FINDERS PREFERENCES	)		
	)		
MARC SOBEL AND MARC SOBEL	)		
D/B/A AIR WAVE COMMUNICATIONS	)		
	)		
LICENSEE OF CERTAIN PART 90	)		
STATIONS IN THE LOS ANGELES	)		
AREA	)		

C O R R E C T E D C O P Y

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JUDGE FRYSIAK: Good morning. Please be seated. This is a hearing in WT docket number 97-56. May we note your appearances for the record?

MR. SCHAUBLE: Good morning, Your Honor. On behalf of the Wireless Telecommunications Bureau, John J. Schauble and William H. Knowles-Kellet.

JUDGE FRYSIAK: Good morning.

MR. KELLER: Your Honor, on behalf of Marc Sobel, AirWave Communications, I am Robert J. Keller.

MR. FENSKE: Good morning, Your Honor. On behalf of Plaintiff, Scott Fenske.

JUDGE FRYSIAK: Are there any preliminary matters to attend to?

MR. SCHAUBLE: Yes, Your Honor. I have several preliminary matters.

JUDGE FRYSIAK: Yes.

MR. SCHAUBLE: First, Your Honor, in reviewing the exhibits we exchanged, we noted that there was a duplication error on page four of WTB exhibit 39. The page was cut off. This morning we distributed a corrected page to counsel for Sobel and Kay, and at this time I would like to provide Your Honor with a corrected page.

JUDGE FRYSIAK: All right.

MR. SCHAUBLE: This is our WTB Exhibit 39. A

1 second preliminary matter, Your Honor, concerns the order in  
2 which we will take the testimony of Mr. Sobel. We have a  
3 situation here, Your Honor, where the Bureau has the burden  
4 in proceeding in proof with respect to the licenses of the  
5 transfer of control issue, and Mr. Sobel has the evidentiary  
6 burdens on those issues with respect to the pending  
7 applications. The Bureau has the sole evidentiary burden on  
8 the misrepresentation lack of candor issue.

9 Mr. Sobel has been notified as an adverse direct  
10 case witness from the Bureau, and he is also a direct case  
11 witness on his own behalf. The Bureau believes there is no  
12 need to have two separate presentations from Mr. Sobel, and  
13 the Bureau will propose the following order, that the Bureau  
14 take direct testimony from Mr. Sobel first, and then counsel  
15 for Sobel then examine Mr. Sobel both on his direct case and  
16 with respect to cross-examination on the Bureau's direct  
17 case. The Bureau will then have cross and redirect  
18 testimony and then Mr. Sobel's counsel would have the final  
19 opportunity to examine the witness in redirect or re-cross  
20 testimony, as the case may be.

21 JUDGE FRYSIAK: Mr. Keller, is that agreeable with  
22 you?

23 MR. KELLER: We have no problem with that, Your  
24 Honor.

25 MR. SCHAUBLE: Third, Your Honor, we request that

## 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 28th day of July, 1998, sent by hand delivery (unless otherwise indicated), copies of the foregoing "Wireless Telecommunications Bureau's Opposition to Motion to Motion to Recuse Presiding Judge" to:

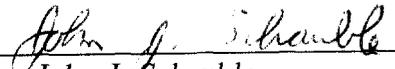
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