Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

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	)	
	)	DOCKET FILE COPY ORIGINAL

To: Honorable Richard L. Sippel
Administrative Law Judge

WIRELESS TELECOMMUNICATIONS BUREAU'S
JULY 30, 1998 STATUS REPORT

1. The Chief, Wireless Telecommunications Bureau, by his attorneys, and pursuant to the Presiding Judge's Order, FCC 98M-91 (released July 6, 1998), and the Order, FCC 98M-95 (released July 16, 1998), now submits a status report concerning the Bureau's position concerning the exchange of exhibits at the admissions session and public witness testimony.

2. Kay argues that he cannot be required to introduce his direct case exhibits into evidence at the admission session scheduled for August 4, 1998. Kay argues that such a procedure would somehow shift the evidentiary burdens to him in violation of Section 312 of the Communications Act. The Bureau believes that the procedure proposed by the Presiding Judge is fully appropriate and consistent with the Communications Act. 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

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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.

3. 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)[1] demonstrates that the Presiding Judge's procedures are consistent with the Act. See Memorandum Opinion and Order, FCC 98M-101 (released July 30, 1998) at ¶¶ 10-13. 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

[1] 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.

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.

4. 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.

5. 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 the Bureau's "Opposition to Motion to Recuse Presiding Judge"). 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." 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.

6. 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. With respect to the order of witnesses, the Bureau, in general, agrees with the general principle that its witnesses should testify before Kay has his witnesses testify. See Memorandum Opinion and Order, FCC 98M-101, supra, at ¶11. The Bureau would note, however, that there may be witnesses (either Kay's witnesses or the Bureau's witnesses) who require accommodations in order to testify outside the normal order of the proceeding. The Bureau believes that the Presiding Judge has the authority to order witnesses to be taken out of turn.

7. With respect to public witness testimony, the Bureau has difficulty seeing how members of the public would have testimony relevant to the designated issues. The designated issues involve Kay's business operations and representations to the Commission,

matters which are generally outside the knowledge of the general public. Nonetheless, if members of the public come forward and offer evidence in a manner consistent with the Commission's Rules, the Bureau will evaluate their proffer and offer its opinion as to whether such testimony is relevant, material, competent, and otherwise admissible.

Respectfully submitted,
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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 30th day of July, 1998, sent by hand delivery (unless otherwise indicated), copies of the foregoing "Wireless Telecommunications Bureau's July 30, 1998 Status Report" to:

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