

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC

7/29/98  
1998

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**  
**OPPOSITION TO SUPPLEMENT TO MOTION**  
**TO RECUSE PRESIDING JUDGE**

1. The Chief, Wireless Telecommunications Bureau, by his attorneys, now opposes the "Supplement to Motion to Recuse Presiding Judge" filed by James A. Kay, Jr. (Kay) on July 28, 1998

2. Kay's supplement accuses the Presiding Judge of "Jew Baiting" (Kay Supplement, p. 2) and anti-Semitic conduct (Id., p. 8) based upon a question the Presiding Judge asked counsel for Kay during a prehearing conference on July 23, 1998. Kay argues that "counsel's professional ability to represent his client and function ethically as an officer of the court has been jeopardized by the Presiding Judge's discriminatory treatment of counsel's religious beliefs and observances." Id., p. 7. While one could consider the Presiding Judge's questions to be insensitive, Kay's motion falls far short of demonstrating any bias on the part of the Presiding Judge. Indeed, it is clear that the Presiding Judge was attempting to accommodate

  
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counsel's religious beliefs instead of ridiculing those beliefs.

3. Initially, no bias can be found in the Presiding Judge raising the question of how to deal with the fact that Rosh Hashanah fell during the Los Angeles portion of the hearing. Kay's current primary litigation counsel did not represent Kay in this proceeding when the procedural schedule was set. Indeed, the Los Angeles portion of the hearing was set for those dates because Kay's then-lead counsel indicated an intention to be on vacation from August 15-30. See Wireless Telecommunications Bureau's March 12, 1998 Status Report. With new counsel entering the case, the question of how to accommodate the holiday was a legitimate procedural issue.

4. More importantly, the Presiding Judge's comments make abundantly clear that he was attempting to accommodate counsel's religious beliefs (as opposed to ridiculing those beliefs). At the prehearing conference, the Presiding Judge specifically ruled that "Mr. Kay will be represented throughout this hearing by whichever counsel he chooses to be represented by on every day of the hearing." Tr. 422. Indeed, the Presiding Judge ultimately ruled "that his two-day observance of a religious holiday on September 21-22, 1998, would be honored and, if necessary, the hearing session in Los Angeles will not be held on those dates." Order, FCC 98M-99 (released July 27, 1998). Kay cannot point to any statement in which the Presiding Judge ridiculed or disparaged any religion.

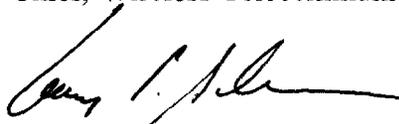
5. With all due respect to the Presiding Judge, the Bureau believes it was perhaps inappropriate to ask counsel for Kay whether he is Reform, Conservative, or Orthodox. Since the Presiding Judge had already decided to accommodate counsel's religious beliefs by recessing the hearing for two days if necessary, there was no need to ask the question. The Presiding Judge's question, however, does not demonstrate or even suggest bias on his part. In Phelps v. Hamilton, 122 F.3d 1309, 1323 (10th Cir. 1997), the court of appeals rejected a claim that a state court judge was biased even though the judge had called the defendant's "religious activities" "shocking." The Bureau must note that Kay and his counsel ultimately received a favorable ruling on the issue in question. "To warrant recusal, bias or prejudice must be directed against a party and bias exhibited against an attorney will only merit recusal when it results in material and identifiable harm to that party's case." Baldwin Hardware Corp. v. Franksu Enterprise Corp., 78 F.3d 550, 557 (Fed. Cir. 1996). Here, the Presiding Judge specifically reassured Kay that "Mr. Kay will be represented throughout this hearing by whichever counsel he chooses to be represented by on every day of the hearing." Tr. 422.

6. While the Bureau can understand that the Presiding Judge's question caused a certain amount of discomfort to counsel, the wild accusations of "Jew Baiting" and "anti-Semitic conduct" simply have no basis whatsoever. The Bureau fully agrees with Kay that discrimination on the basis of religion has absolutely no role in government. There is a huge difference, however, between a lack of knowledge concerning a religious holiday and purposeful discrimination intended to target and harass members of a religion. The

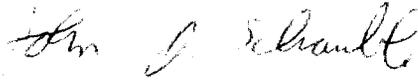
accusations trivialize what has historically been a very serious problem. There is simply no basis for concluding that the Presiding Judge is biased.

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

Respectfully submitted,  
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July 30, 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 30th day of July, 1998, sent by hand delivery (unless otherwise indicated), copies of the foregoing "Wireless Telecommunications Bureau's Opposition to Supplement to Motion to Recuse Presiding Judge" to:

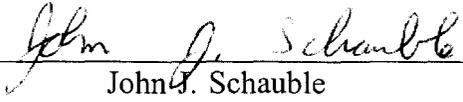
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