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FEDERAL COMMUNICATIONS
COMMISSION
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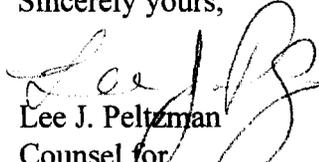
Magalie R. Salas, Esq.
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: WT Docket No. 94-147

Dear Ms. Salas:

Transmitted herewith, on behalf of James A. Kay, Jr., is an original and fourteen (14) copies of his Appeal. Should the Commission have any questions with respect to this filing, please communicate with the undersigned.

Sincerely yours,


Lee J. Peltzman
Counsel for
JAMES A. KAY, JR.

Enclosure

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ORIGINAL

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

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AUG - 4 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In Matter of)
)
James A. Kay, Jr.) WT DOCKET NO. 94-147
)
License of one hundred fifty two)
Part 90 licenses in the)
Los Angeles, California area)

To: The Commission

APPEAL

James A. Kay, Jr. ("Kay"), by his attorneys, pursuant to Sections 1.245(b)(3) and 1.301(a) of the Commission's rules, hereby appeals from the Memorandum Opinion and Order of the Presiding Judge, FCC 98M-101, released July 30, 1998 ("Recusal Order"), denying Kay's motion that the Judge withdraw from this proceeding due to personal bias. In support of his position, Kay states the following:

To establish a basis for a Judge's disqualification, a party must show personal bias or prejudice that will impair his ability to act in an impartial manner. See Barnes Enterprises, Inc., 41 RR 2d 1035, 1037 (1977). A heavy burden of proof is placed on a party seeking to establish bias. Such a showing "must give fair support to the charge for a bent of mind that may prevent or impede impartiality of judgment." Berger v. U.S., 255 U.S. 22, 33-34 (1921). Ordinarily, "[t]he alleged bias and prejudice to be disqualifying must stem from an extra-judicial source and result in an opinion on the merits or some basis other than what the judge learned from his participation in the case." Wolfson v. Palmieri, 396 F.2d 121, 124 (2d Cir. 1968). The Commission has recognized, however, that "it is not always possible to establish an extra-judicial source for bias, and, therefore, comments and rulings of the trier of fact may be relevant to the existence of prejudice." KAYE Broadcasters, Inc., 24 RR 2d 772, 773 (1972). Also, "contacts during a trial might themselves have created such a degree of irritation with a party or his lawyer as to create the bent of mind [requiring disqualification]." Wolfson v. Palmieri, 396 F.2d at 124-

125. The Commission, then, must review the statements and rulings of the ALJ in each case to determine if they evidence bias. See Webster-Fuller Communication Association, 66 RR 2d 1093, 1094 (1989); Roy Davis, 66 RR 2d 1103, 1104 (1989).

In this case, it is clear from a review of the Presiding Judge's statements and rulings that he has developed such a personal bias toward Kay and counsel that he is unable to render a fair and even-handed decision in this case. There is "such a high degree of favoritism or antagonism as to make fair judgment impossible." Liteky v. U.S., 114 S.Ct. 1147, 1157 (1994). Thus, Kay is compelled to request that the Presiding Judge be disqualified from presiding over this case.¹

Two years ago, the same Presiding Judge disqualified Kay by improperly granting a Motion for Summary Decision. 11 FCC Rcd. 6585 (Adm.L.J. 1996) (the "Summary Decision Order"). In essence, the Judge held that Kay was guilty of repeated abuses of the Commission's processes warranting license revocation and a substantial forfeiture: "the second episode of [Kay's] stonewalling" (para. 27); "[Kay's violation] is intentionally obstructive to the prosecution of this case" (para. 31); "Kay's behavior...constitutes a 'grave abuse of the Commission's processes'" (para. 32); "Kay's repeated refusal to fully respond...is a grave abuse of the Commission's processes" (para. 35).

On appeal, the Commission, through its General Counsel, vacated the Summary Decision Order and remanded the case for a full hearing on the designated issues, concluding that the Presiding Judge had not accorded Kay his full due process rights. 12 FCC Rcd. 2898, 2905 (OGC) (the "Remand Order").

In response to the reversal of his Summary Decision Order, and despite his previous stated conclusions that Kay was guilty of "stonewalling," and "grave abuse of the Commission's processes," the Presiding Officer claimed that he was prepared to look at the case "in a fresh new way." See Prehearing Conference, March 19, 1997 at Tr. 191. If the Presiding Judge's actions had lived up to his words of impartiality, there would be no need to file any motion to disqualify.

¹ Kay has filed a Supplement to his Motion to Recuse which remains pending before the Presiding Judge. Kay reserves the right to file a Supplement to this Appeal in the event the Judge affirms his denial. It should be noted that the Presiding Judge has stated on the record that he has discussed this case with at least one unnamed individual. See Conference of July 23, 1998 at Tr. 425.

However, a review of his rulings and the language used therein show a bent of mind that cannot help but prevent or impede impartiality of judgment.

For it is abundantly clear that, contrary to the ALJ's promise of even-handed fairness, he continues until this day to view Kay as a villain guilty of "grave abuse of the Commission's processes." In his most recent Recusal Order, the Presiding Judge has concluded that "the history of the case shows continuing efforts to delay a hearing...[and] that Kay is utilizing all remedies available in order to further delay a hearing." (*Id.* at paras. 2, 5).² The Judge also concluded that "Kay [is guilty of filing] motions to appeal interlocutory rulings to bypass the Commission's policy and rules." *Id.* at para. 4.

First, there is no legal basis for the Presiding Judge's conclusions. Kay is not attempting to delay a hearing; to the contrary, given the fact that Commission charges have been pending against him for over three years at grave financial and emotional cost to him, it is Kay's desire to get to the hearing phase. However, there is one, not so small caveat to Kay's wish to expedite. Like most parties, Kay desires to be tried by a decision maker who is not predisposed to rule against him.³ The Presiding Judge's conclusions contained in his own Recusal Order show that he is not that person. Only a short time after concluding in one Order that Kay has "stonewalled" and abused the Commission's processes by not cooperating with the Bureau, the Presiding Judge has now concluded that Kay is guilty of abusing the Commission's processes by seeking to delay a hearing on those very Bureau charges. Given the Judge's recent statement that Kay is abusing the Commission's processes, it is clear that he is not impartial. How can Kay expect a fair decision from a Judge who accuses Kay of abusive conduct in his own Order refusing to withdraw.

² Prior to his conclusion that Kay is now purposefully attempting to delay a hearing, the Judge detailed the history of this case, characterizing Kay's previous effort to disqualify him as resulting in a "six month hiatus." *Id.* at para. 4. The ALJ makes no comparable description of the ten months lost as a result of the need to reverse his illegal Summary Decision Order. Rather than take responsibility for the lethargic pace of this proceeding, the Presiding Judge seeks to blame Kay for all delays.

³ Kay is using all legal remedies available to him to preserve his due process rights. That a hearing is delayed is an unfortunate byproduct of the need to preserve those rights. That the Presiding Judge would blame Kay for seeking the reversal of an improper Summary Decision Order or for seeking an impartial Judge is evidence of the bias which this Judge has toward Kay.

Similarly, the Presiding Judge's conclusion that Kay has abused the Commission's processes by seeking to appeal interlocutory rulings in order "to bypass the Commission's policies and rules," is without substantive merit and is further evidence of his bias toward Kay. The Judge apparently views Kay's efforts to vindicate his due process rights as part of some overall conspiracy aimed at abusing the FCC's policies and rules. Nothing could be further from the truth. Yet, when one considers that a separate abuse of process issue is pending against Kay, the Judge's advance conclusion that Kay seeks to bypass FCC rules and policies could scarcely be more harmful to Kay's position.

Given the fact that Kay's previous effort to raise a due process concern with the Commission met with vindication in the Remand Order, Kay can hardly be considered to have previously engaged in illegitimate and abusive conduct. To the contrary, Kay is deeply concerned that the Presiding Judge has consistently ignored Kay's statutory and due process rights throughout this proceeding. Thus, while paying lip service to Section 312 of the Communications Act's mandate that the Bureau has the burden of proceeding, the Judge is requiring Kay to commence the presentation of his case even before the Bureau has satisfied its burden by submitting its case in chief. See Order, FCC 98M-91, released July 6, 1998. The Judge points to Algreg Cellular Engineering, 9 FCC Rcd. 5098 (Rev. Bd. 1994) in support of that decision, yet Algreg, while upholding an order of a Presiding Judge requiring a licensee in a revocation proceeding to exchange exhibits in advance of the Bureau's presentation of its case, specifically noted that this procedure did not violate Section 312(d) because the Bureau had to present its evidence ahead of the license. In the instant case, the Presiding Judge is attempting to force Kay to introduce his exhibits into the record before the Bureau has even begun presenting its witnesses much less been determined to have made a prima facie case.⁴ The Presiding Judge is also requiring Kay to present one of his expert witnesses and, Kay himself, at a Washington, D.C., hearing session, even though the vast majority of the Bureau's witnesses will not be

⁴ The Presiding Judge has also concluded that after the Bureau has introduced its documents at the Admissions Session, "it probably will have met its document production burden." Recusal Order at note 5. Yet the Judge's conclusion is further evidence of "a high degree of favoritism as to make fair judgment impossible." It assumes admission and gives no [Continued....]

presented until a subsequent session in Los Angeles. See Order FCC 98M-40, released April 12, 1998. This procedure renders Section 312 a nullity. The Judge's bias is evidenced both by his willingness to ignore Section 312 of the Act as well as his conclusion that Kay is already guilty of abuse because he has requested that the Judge certify this due process question to the Commission.

Likewise, the Presiding Judge's rulings that Kay should be aware of his alleged wrongs based on "his knowledge of the conduct of his business"⁵ and that Kay "could still possibly prevail on the merits of the case."⁶ evidence real bias. Kay should not be viewed as guilty of abusive conduct because he sought to have those rulings corrected.

The facts here are not unlike those occurring in Muncie Broadcasting Corp., 2 RR 2d 865, 868 (1964), where the Commission, when faced with an Examiner who had violated a parties' due process rights, remanded the proceeding for assignment to an Examiner other than the one who presided at the original hearing. As in Muncie, here there has been here "a premature breach of the ALJ's neutrality." Barnes Enterprises, Inc., 41 RR 2d 1038 n. 8.

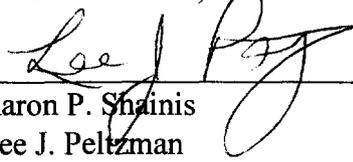
It is imperative that the Commission appoint a new Judge immediately since the Presiding Judge has shown a predisposition against Kay's qualifications. Cf. Nicodemus v. Chrysler Corp., 596 F.2d 152, 155-157 (6th Cir. 1979). Therefore, for the reasons set forth above, Kay respectfully requests that the Commission reverse the Judge's Order and appoint a new Judge to preside over this case.

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Respectfully submitted,
JAMES A. KAY, JR.

By:



Aaron P. Shainis
Lee J. Peltzman

By:



Robert J. Keller, Esq.

August 4, 1998

thought to the possibility that Kay may object successfully to the introduction of those documents into evidence.

⁵ Memorandum Opinion and Order, FCC 98M-55, released May 15, 1998.

⁶ Memorandum Opinion and Order, FCC 98M-85, released June 26, 1998.

CERTIFICATE OF SERVICE

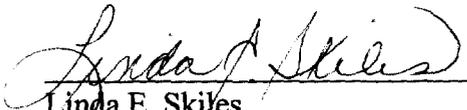
I, Linda E. Skiles, Office Administrator, in the law firm of Shainis & Peltzman, Chartered, do hereby certify that on this 4th day of August, 1998, copies of the foregoing document were sent, via hand delivery to the following:

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