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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**

Washington, D.C. 20554

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In Matter of	)	WT DOCKET NO. 94-147
	)	
JAMES A. KAY, JR.	)	
	)	
Licensee of one hundred fifty two	)	
Part 90 licenses in the	)	
Los Angeles, California area	)	

**MEMORANDUM OPINION AND ORDER**

Issued: July 28, 1998

;

Released: July 30, 1998

**Preliminary Statement**

1. A Motion To Recuse Presiding Judge was filed by James A. Kay, Jr. ("Kay") on July 22, 1998.<sup>1</sup> The summary of Kay's argument is as follows:

The Presiding Judge has prejudged the case. His Orders unequivocally display his prejudgment. His orders further display bias. It is impossible, under the circumstances, for the Judge to render a fair decision. Thus, recusal is mandated and is appropriate.

The Presiding Judge has considered the reasons and the arguments advanced by Kay for the above conclusions and finds that there is no basis under the facts and the law for an obligatory recusal.

2. Kay claims to be offended by phraseology employed by the Presiding Judge in his rulings. Recusal is requested based on language selected from interlocutory orders which Kay and his current counsel assert are determinative of the conclusion that "the Presiding Judge is incapable of rendering an unbiased and fair decision." Recusal Motion at 1. (Emphasis in original.) An analysis of the rulings under the applicable law does not support that conclusion. Rather, the history of this case shows continuing efforts to delay a hearing.

3. Kay also advises that he has decided in advance of seeing it to appeal any decision of the Presiding Judge to remain in the case. With an assured appeal, the proceeding would be stayed. In view of that assured delay: "[E]ven if the Judge determines that he is not biased, he should nonetheless, in the interest of expedition, recuse himself." Recusal Motion at 12. A

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<sup>1</sup> The Wireless Telecommunications Bureau's Opposition to Motion to Recuse Presiding Judge was filed on July 28, 1998.

Presiding Judge who is qualified to hear the case should not voluntarily recuse merely because the dissatisfied party prefers to have another Judge hear the case. To accede to such a request would empower parties to select a Judge of choice through the recusal procedure, and thereby subvert the hearing process.<sup>2</sup>

#### Procedural Overview

4. This hearing was instituted on December 13, 1994. Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing and Forfeiture, FCC 94-315, 10 F.C.C. Rcd 2062 (1994) ("Designation Order"). After discovery was commenced, the case was stayed for four months to explore settlement. There was an adverse summary decision that was remanded. There was a subsequent request for the disqualification of the Presiding Judge that resulted in a six-month hiatus, and there was a request for reconsideration which was denied by the Commission. Memorandum Opinion and Order, FCC 97-349, released October 2, 1997, and Order, FCC 98-32, released March 10, 1998. Kay frequently has filed motions to appeal interlocutory rulings to bypass the Commission's policy and rules prohibiting their reconsideration.

5. All discovery has been completed, including depositions. The case is set for an Admissions Session to commence in Washington, D.C. on August 4, 1998, a hearing in Washington, D.C. to commence on September 2, 1998, and a field hearing in Los Angeles to commence on September 15, 1998, and to conclude on September 24, 1998. Order FCC 98M-40, released April 2, 1998. Additional hearing days were reserved for October 1 - 7, 1998, if needed. Id. The dates had been voluntarily agreed to by the parties and the Los Angeles hearing dates were submitted by Bureau counsel and former counsel for Kay. On June 15, 1998, Kay filed a Motion For Stay with the Presiding Judge which was denied. Order FCC 98M-85, released June 26, 1998. Kay simultaneously filed a Motion For Stay with the Commission and a Motion for Leave to File a Petition for Extraordinary Relief which are still pending. This record shows that Kay is utilizing all remedies available in order to further delay a hearing.

#### The Interlocutory Orders

##### FCC 98M-85

6. This ruling was issued on June 24, 1998, in considering a Motion for Stay of Procedural Dates. Recusal Motion at Att. A. In assessing the key ingredient for a stay - irreparable harm - the Presiding Judge looked to case law in this jurisdiction and simply paraphrased a "well settled" judicially recognized principle that "mere injuries --- in the absence of a stay are not enough [because] [t]he possibility [of] other corrective relief will be available a later date---. Wisconsin Gas Co. v. F.E.R.C., 758 F.2d 669, 674 (D.C.Cir. 1985). (Emphasis supplied.) Here the stay request

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<sup>2</sup> A Chief United States District Judge characterized a lawsuit by Kay against Commission investigative staff as a "thinly veiled and frivolous attempt to improperly influence or subvert the pending administrative proceedings," quoted by the District of Columbia Court of Appeals in Kay v. Pick, (No. 96-CV-1727), Slip Op. 1998 WL 255082 n.5, decided May 21, 1998.

was denied because by application of that principle Kay could possibly succeed in this case. The mere application of syllogistic reasoning based on an established principle of law could not reasonably be taken as a "message that the Judge is not impartial." Recusal Motion at 2. From the mere phraseology of the possibility of an outcome that could be favorable to Kay, and without giving any credit to its judicial origin, Kay baldly asserts that the Presiding Judge has rejected a presumption of Kay's qualifications for holding a license. It is an unreasonable conclusion for Kay to draw from the use by the Presiding Judge of a precedential possible case outcome usage in an analysis of irreparable harm, particularly where the possibility is favorable to Kay. There is no citation given to support Kay's contention.

### **FCC 98M-55**

7. This ruling was issued on May 14, 1998, in considering Kay's Motion to Compel Answers to Interrogatories. The quoted portion of that Order is the conclusion of a general observation that over the life of this case Kay was put on notice of the Bureau's concerns of possible violations and he would know of neutral objective facts which relate to the operation of his business. There is no reference or inference of a preordained judicial conclusion from this ruling that was limited to whether or not Kay was entitled to discovery that he was seeking. Kay does not refer to a directly related ruling on Kay's Request for Leave to File Interlocutory Appeal and Supplement to Request for Leave to File Interlocutory Appeal. See Memorandum Opinion and Order, FCC 98M-69, released June 9, 1998. The Presiding Judge made a comprehensive review of the broad scope of the discovery allowed to Kay in this proceeding that included an unprecedented authorization early in the case to pose ten interrogatory questions on each of the eight issues of the Designation Order and that provided a staggered exchange of exhibits and witness identification that operated in Kay's favor. Id. at Para. 2.

8. The Presiding Judge also addresses the conclusory language that he had employed in Order FCC 98M-55 on the adequacy of the Designation Order's notice.

The Presiding Judge observed that after three years of litigation and from Kay's knowledge of the conduct of his business, "Kay can reasonably ascertain whether or not there are factual merits to the charges and whether or not he has a defense with which to meet them." Kay asserts that the Presiding Judge has concluded that "the Commission need not give notice on the theory that an accused would surely know whether he committed the alleged wrongs." See Memorandum Opinion and Order, FCC 98M-55, supra at 5 and Kay's Motion at 3. Kay is a licensee who is responsible for operating his business in accordance with the Commission's rules and regulations. Kay knows how he has been operating his business through those licenses. The Bureau even relied on aspects of Kay's deposition testimony concerning his business practices in the preparation of its Statement of Readiness. The interlocutory conclusion reached here

is that the notice of the designation order was adequate in light of Kay's knowledge of his business practices and the history of his discovery.

Order, FCC 98M-69, supra at Para. 9. There was no complaint from Kay on the above quoted language. It certainly does not connote a predisposition against Kay. To the contrary, the care with which Kay's discovery needs have been addressed by the Presiding Judge in his two rulings negates Kay's contention that the Presiding Judge does not have "an open and unbiased mind." Recusal Motion at 3. There is no citation given to support Kay's contention.

### **FCC 98M-91**

9. This ruling was issued on July 1, 1998, to memorialize the results of a telephone conference that the Presiding Judge had initiated in the interest of keeping the case on course. See Order 98M-40, and references therein; Recusal Motion, Att. D. The conference was initiated in response to a representation in Kay's transmittal letter that accompanied his exchange of exhibits prefatory to the scheduled Admissions Session. The Presiding Judge accurately recounted that:

Counsel advised in a transmittal letter dated June 29, 1998, that he was exchanging "preliminary exhibits" thereby indicating that these exhibits were not for use as Direct Case exhibits at the Admissions Session. Counsel advised in the letter and confirmed in the telephone conference that he did not intend to offer the exchanged exhibits into evidence until after the Bureau finished presenting its case-in-chief.

Kay argues that he is prejudiced "by [the Presiding Judge] insisting that Kay commence the presentation of his case prior to the Bureau presenting its case-in-chief." Kay complains that the Presiding Judge has cited "only renewal cases" to support this procedure and has shown a "bias" by willingness "to ignore Section 312(d) of the Communications Act of 1934."

### **Section 312(d)**

10. The relevant statutory language of Section 312(d) states that :

In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding and the burden of proof shall be upon the Commission.

The Designation Order assigns those burdens to the Bureau. The Bureau has been required to exchange its exhibits and witness list before Kay must exchange any hearing evidence. Kay argues that:

[B]y operation of law, both the initial burden of proceeding and the ultimate burden of proof have been placed on the Bureau. Mr. Kay does not need to make any affirmative showing. See Algreg Cellular Engineering, 9 F.C.C. Rcd. 5098, 75 RR2d 956 (1994).

Recusal Motion at 3-4. Upon analysis, it is concluded that the Algreg decision actually supports the procedures set by the Presiding Judge in this case of which Kay complains.<sup>3</sup> There the Review Board held:

[The licensees] argue that the simultaneous exchange of direct case exhibits effectively shifted the burden of proceeding onto the Licensees by requiring them to formulate a direct case prior to knowing the scope of the Bureau's case.

9 F.C.C. Rcd at 5144, Para. 73. The Review Board found no shifting of the burden by the Presiding Judge's requirement for the simultaneous exchange of direct case exhibits which procedure did not shift to the licensees the burden of proceeding or the burden of proof. Id. at Para. 74. It was held that:

The Licensees suffered no prejudice by having to prepare their cases at the same time as all of the other parties. Moreover, the ALJ, who is vested with plenary authority to regulate the course of the hearing, 47 C.F.R. §1.243, assured the parties that his procedures would be adequate and fair and informed them that he would set down an order of presentation whereby the Bureau and intervenors would present their evidence ahead of the Licensees.

Id. at Para. 74.

11. Substantially the same procedures have been implemented to manage the exchange and introduction of evidence in this case. The Bureau exchanged their direct case exhibits and list of witnesses before Kay. Order FCC 98M-40, supra. Kay was even given an additional week to prepare exhibits as he requested. Order, FCC 98 M-82, released June 22, 1998. The Bureau and Kay are required to exchange Trial Briefs simultaneously. But that exchange is a far lesser procedural requirement than the simultaneous exchange of Direct Case exhibits. The Trial Briefs are not evidence. They are used as a trial preparation tool for the fact finder to have an advance outline of the expected Direct Cases based on the documents which have been exchanged and the witnesses who have been identified and deposed. The Trial Briefs also assist trial counsel in preparing for hearing. There will be no new disclosures in a Trial Brief. There is no chance of

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<sup>3</sup> Kay also relies on Radio Station WTIF, Inc., 2 Radio Reg. 2d (P&F) 305 (1964), which is inapposite because in that case the order of proceeding was voluntarily agreed to by the parties and there was no analysis of Section 312 of the Act.

surprise or prejudice in the exchange of Trial Briefs and certainly requirement for Trial Briefs does not evidence a bias or a partiality. When the evidence is introduced the Bureau must proceed first at the Admissions Session in the marking and introduction of documentary evidence<sup>4</sup> and must proceed first with witnesses at the subsequent hearing. Therefore, the burdens of proof and proceeding were not shifted to Kay.

12. The burdens of proceeding and proof have been assigned to the Bureau. See Designation Order, supra at Para. 15. Kay has no obligation to put on an affirmative case and he has never been ordered to do so. Kay could elect to do nothing at the Admissions Session and wait to put on his rebuttal case after the Bureau rests. But under the prescribed prehearing procedures, Kay must exchange his Affirmative Case documents and witnesses and he is required to participate in the Admissions Session by marking and offering his affirmative case exhibits immediately after the Bureau has concluded. Kay has exchanged his "preliminary" Direct Case exhibits and advises that he will only participate in the Admission Session by marking his documents for identification and arguing any objections to their admissibility. But he refuses to offer the documents into evidence at the Admissions Session. Kay is thereby refusing to follow the Presiding Judge's order of proof in the Admissions Session. The United States Supreme Court has made clear that the Bureau, having been assigned the burden of proof, would have the burden of persuasion throughout the hearing. Director, OWCP v. Greenwich Collieries, 114 S.Ct. 2251, 2255 (1994). The Admissions Session procedure does not shift that burden. But there can be a shifting of the order of production after the Bureau has made its documentary "prima facie" showing. Id. at 2256.<sup>5</sup> With the exchange of extensive exhibits and deposition discovery before the Admissions Session, the procedures prescribed for both parties to introduce their documentary evidence (where the Bureau goes first) does not shift the burden, is merely a non-prejudicial order of proof, and is used as a permissible method of case management of voluminous documentary evidence.

13. The Commission has held, with respect to the Admissions Session procedure, that a party who fails to participate waives his right to put on an affirmative case. See analysis of Center For Study And Application Of Black Economic Development, 7 F.C.C. Rcd 3101 (Review Bd. 1992) at Paras. 5-6, aff'd 11 F.C.C. Rcd 1144 (1996). In that case, involving a disqualifying issue (which is the consequential equivalent of a license revocation issue) where the licensee exchanged Direct

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<sup>4</sup> There may be some documents that are not admitted at the Admissions Session that will have to be ruled on later in the hearing such as where a witness is needed to establish authenticity or other reliability. But by far the majority of exchanged documentary evidence, which is extensive in this case, will have been received or rejected at the Admissions Session so that counsel and the Presiding Judge will have made adequate preparation before a witness takes the stand. This established practice of an Admissions Session in a high volume document case also substantially reduces the time of witnesses since they will not need to be in the courtroom for the tedious marking and arguing for the admission or rejection of documentary evidence.

<sup>5</sup> It is hornbook law that a production burden has been met when the party with the burden can safely rest without fear of a directed verdict. Rothstein, Evidence in a Nutshell, 79, 82-83 (1970). After the Bureau introduces its nine volumes of documents at the Admissions Session, it probably will have met its document production burden.

Case exhibits as instructed, but defaulted by not appearing at the Admissions Session, the Presiding Judge's decision to preclude an affirmative case and limit the licensee to a rebuttal case was upheld by the Review Board and by the Commission. That case was cited in the ruling which Kay considers to be biased (Order FCC 98M-91). The case is rejected in Kay's Recusal Motion as "lip service" because the case was comparative renewal and not revocation. Kay makes a distinction without a difference. In this case, the burden of persuasion and the burden of production are always with the Bureau, and if the Bureau fails to meet either burden when the record is closed, the Bureau loses its case and Kay wins. Greenwich Collieries, *supra* and n.3 *supra*.

#### **Miscellaneous Unfounded Allegations**

14. Kay further alleges a string of asserted manifestations of disqualifying conduct on the part of the Presiding Judge: (a) requiring detailed trial briefs; (b) requiring the offering of evidence at the Admissions Session; (c) demonstrated bias for failing to follow the Algreg precedent; (d) failure to follow Section 312(d) of the Act ("so outrageous as to compel recusal"); (e) judgment contaminated by partiality; (f) prejudgment of the law and facts; and (g) failure to deal with Kay in an evenhanded manner. See Recusal Motion at 6-12. These scattered charges of bias and prejudice are unfounded and do not support Kay's assertion that the Presiding Judge has failed to conduct the proceeding in accordance with Section 312(d) of the Act.

#### **Standards For Recusal**

15. The relevant Commission Rule provides:

Any party may request the presiding officer to withdraw on the grounds of personal bias or other disqualification.

The person seeking disqualification shall file with the presiding officer an affidavit setting forth in detail the facts alleged to constitute grounds for disqualification.

The presiding officer may file a response to the affidavit; and if he believes himself not disqualified, shall so rule and proceed with the hearing.

47 C.F.R. §1.245(b)(1). Kay has joined and adopted the Motion To Recuse by his Declaration dated July 21, 1998. Recusal Motion, Att. E.

16. To establish a basis for disqualification, a party's affidavit must show a personal bias or prejudice that will impair the ability to act in an impartial manner. Barnes Enterprises Inc., 66 F.C.C. 2d 499, 501 (1977). Any party requesting disqualification has a heavy burden of proof. Id. at 502-503. The Commission holds that the personal bias "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his

participation in the case." WWOR-TV, Inc., 5 F.C.C. Rcd 2845, Para. 5 (1990). See also Black Television Workshop of Los Angeles, Inc., 6 F.C.C. Rcd 6525 (1991) (subsequent history omitted). In KAYE Broadcasters, Inc., 24 Radio Reg. 2d (P&F) 772 at para. 3 (1972) it was held that comments and rulings of the Presiding Judge during the course of the proceeding do not ordinarily afford a basis for a claim of personal bias. The only matters which Kay argues for recusal are interlocutory rulings and hearing procedures adopted in the interest of case management. Kay also argues for recusal based on a revisit to a remanded Summary Decision. There are no disqualifying matters alleged to have been learned by the Presiding Judge from an extrajudicial source.

17. Interlocutory rulings are subject to ultimate review and can be corrected through the normal appellate process. The four rulings that are attached to the Recusal Motion are explained above and show non-bias. In addition, those rulings are subject to review by the Commission in any exceptions that are filed. The Commission will consider all of Kay's contentions and will "carefully review the record to ensure that justice is done in this case." James A. Kay, Jr., FCC 97-349, released October 2, 1997, 12 F.C.C. Rcd 2898 (1997), recon. denied, 13 F.C.C. Rcd 6349 (1998). Under the Commission's earlier ruling, which is the law of the case, there is no basis for a recusal of the Presiding Judge on the basis of interlocutory orders.

18. Kay also argues for a second time that the Presiding Judge's earlier Summary Decision, 11 F.C.C. Rcd 6585 (1996) shows through its phraseology that he is biased and has prejudged the case. Recusal Motion at 10 - 11. But the Commission has already considered the question of disqualification based on the Summary Decision. See James A. Kay, Jr., *supra* at Para. 12. There is no purpose served in revisiting the Summary Decision because there is nothing new that was not considered in the earlier ruling. Kay is seeking to have the Commission reconsider its decision without any justification. The Commission concluded that the Summary Decision does not reveal "such a high degree of favoritism or antagonism as to make fair judgment impossible", citing Liteky v. U.S., 114 S.Ct. 1147, 1157 (1994). There is no authority cited by Kay for a reconsideration.

19. The Presiding Judge has explained how the procedures that he has set for the trial of this case comply with Section 312(d) of the Act. See Paras. 10-13, *supra*. The Commission has held that parties may not disobey a Presiding Judge's order "merely because they believe that antecedent rulings were legally erroneous." Scioto Broadcasters Limited Partnership, 5 F.C.C. Rcd 5902 (1990). Therefore, Kay is not authorized to choose whether to comply with the order of proof set by the Presiding Judge in the Admissions Session. There is no precedent cited by Kay for his attacks on interlocutory rulings and Kay has failed to show through precedent, authority, or convincing analysis the manner in which the procedures set by the Presiding Judge for the presentation of evidence through an Admissions Session is in violation of the Communications Act, the Administrative Procedure Act, or the Constitution of the United States.

**Conclusion**

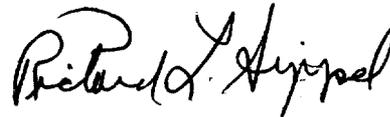
The Presiding Judge is satisfied that he has been impartial at all times and can continue to be impartial in hearing this case and in rendering an impartial Initial Decision after the record is closed. Therefore, the Presiding Judge will not recuse himself.

It is also determined that the Motion To Recuse Presiding Judge that was filed by James A. Kay, Jr. on July 22, 1998, fails to meet the criteria for disqualification of a Presiding Judge under the Commission's rules and applicable case law.

**Order**

Accordingly, IT IS ORDERED that the Motion To Recuse Presiding Judge IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, appearing to read "Richard L. Sippel". The signature is written in a cursive, flowing style.

Richard L. Sippel  
Administrative Law Judge