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AUG 1 1 1998

Federal Communications Commission
Office of Secretary

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	)	

To: The Commission

WIRELESS TELECOMMUNICATIONS BUREAU'S OPPOSITION TO APPEAL

1. The Chief, Wireless Telecommunications Bureau, by his attorneys, now opposes the "Appeal" filed by James A. Kay, Jr. (Kay) on August 4, 1998. Kay appeals the Presiding Judge's Memorandum Opinion and Order, FCC 98M-101 (released July 30, 1998), in which the Presiding Judge again refused to disqualify himself from further participation in this proceeding. Kay's appeal is nothing more than a frivolous attempt to forestall the hearing in this proceeding. The Commission should expeditiously deny Kay's appeal and direct that this proceeding shall go forward on a schedule as close as possible to the existing schedule.

2. This appeal is Kay's second attempt to have the Presiding Judge disqualified. In denying Kay's first disqualification motion, the Commission denied Kay's motion, noted that Kay "has taken the ALJ's words out of context, and unfairly distorted their meaning," and reassured Kay that it would consider Kay's contentions and "'ensure that justice is done.'" James A. Kay, Jr., 12 FCC Rcd 15662 (1997). The Commission noted that the Supreme Court held in Liteky v. U.S., 114 S.Ct. 1147, 1157 (1997) that "judicial rulings alone almost never constitute valid basis for a bias or partiality motion." Id. at 15663-15664. The Commission also noted that it "has consistently held that the presiding officer's personal bias

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'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.'" James A. Kay, Jr., 12 FCC Rcd 15662, 15663-15664 (1997). Kay's motion does not identify any "extrajudicial" source of bias. His instant appeal primarily relies upon three judicial rulings. The rulings are the Presiding Judge's prior grant of a summary decision in this proceeding (James A. Kay, Jr., 11 FCC Rcd 6585 (ALJ 1996), reversed and remanded James A. Kay, Jr., 12 FCC Rcd 2898 (Gen. Coun. 1997)), certain observations made by the Presiding Judge in his most recent order refusing to disqualify himself (Memorandum Opinion and Order, FCC 98M-101, supra), and the Presiding Judge's tentative ruling concerning when Kay must offer direct case exhibits (Memorandum Opinion and Order, FCC 98M-91 (released July 6, 1998)). None of these rulings constitutes any evidence of bias of the Presiding Judge.

3. Kay first relies upon comments in the Presiding Judge's summary decision in this proceeding. See Kay Appeal, p. 2. The Commission has already ruled that the vacated summary decision does not establish bias or prejudice. James A. Kay, Jr., supra, 12 FCC Rcd at 15666 (¶13).

4. Second, Kay objects to the Presiding Judge's observations that "Kay is utilizing all remedies available in order to further delay a hearing" and that Kay "frequently has filed motions to appeal interlocutory rulings to bypass the Commission's policy and rules prohibiting their reconsideration." Kay Appeal, pp. 2-4, Memorandum Opinion and Order, FCC 98M-101, supra, at ¶¶ 5, 4. The Presiding Judge, however, is absolutely correct. This motion appears to be nothing more than a frivolous attempt to delay the 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 his motion. That belief is based upon 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 which he now complains of. Furthermore, the circumstances surrounding and timing of Kay's motion suggest that the motion was filed in order to delay the hearing. The motion was filed shortly before the August 4, 1998 admissions session. Second, Kay has filed a pending "Petition for Extraordinary Relief" with the Commission seeking a stay of the hearing in this proceeding. Third, Kay's suggestion that the Presiding Judge recuse himself in order to avoid delay (Kay Motion, p. 12) shows that Kay is aware that his appeal would delay the hearing. Fourth, as a licensee subject to a revocation hearing, Kay has a strong incentive to delay this proceeding.[1]

5. 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 Appeal, p. 5. Kay argues that such a procedure would

[1] Kay has filed 11 petitions for leave to file interlocutory appeals (on 1/23/95, 2/6/95, 2/7/95, 2/10/95, 5/8/95, 6/20/95, 1/26/98, 2/9/98, 3/2/98, 3/16/98, and 3/25/98). In many of those petitions, Kay made no serious attempt to comply with the standards contained in Section 1.301(b) of the Commission's Rules. The clear purpose of these filings was to reargue matters already decided, in violation of Section 1.106 of the Commission's Rules, which prohibits petitions for reconsideration of interlocutory rulings.

somehow shift the evidentiary burdens to him, in violation of Section 312 of the Communications Act. Page 2 of the Order relied upon by Kay 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 issue. The Presiding Judge gave Kay and the Bureau the opportunity to brief their positions in a status report to be filed on July 30, 1998. Furthermore, Kay **voluntarily agreed** to the procedural schedule which included a single admission session covering all direct case exhibits. 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's current complaint about the Presiding Judge's procedural schedule is simply inconsistent with his prior approval of that schedule. The only pertinent case Kay cites, Algreg Cellular Engineering, 9 FCC Rcd 5098, 5144-5145 (Rev. Bd. 1994) 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. Moreover, in Algreg, all the parties, including the licensees who were subject to revocation, were required to place their direct case exhibits into evidence before any live testimony was taken.[2] 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. Kay also ignores the Presiding Judge's ruling that the Bureau "must proceed first with witnesses at the hearing . . ." Memorandum Opinion and Order, FCC 98M-101, supra, at ¶ 11.

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[2] *See* the excerpts from the hearing transcript submitted as Attachment 1 to this opposition. The Commission will note that the licensees placed their direct cases into evidence in Volume 5, while the live testimony began in Volume 6.

6. Kay has not explained how any prejudice would result from the Presiding Judge's procedure. Kay was not required to put on any sort of direct case. If Kay seeks to admit a document into evidence during the admissions session, and decides after the Bureau's presentation that the document is unnecessary, he may seek leave to withdraw the exhibit. Moreover, if Kay decides to enter a document into evidence, the Bureau will have the right to cross-examine on that document, regardless of when Kay enters the document into evidence.

7. The Presiding Judge's rulings concerning the admission of exhibits and the procedural schedule were thus 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, such erroneous judicial rulings alone are insufficient to establish bias. See ¶3, supra. This case is totally unlike Muncie Broadcasting Corp., 2 RR 2d 865, 868 (1964), where the hearing examiner announced how he would rule before witnesses were examined or findings filed.

8. Accordingly, the Bureau urges the Commission to promptly deny Kay's "Appeal."

Respectfully submitted,
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August 11, 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 11th day of August, 1998, sent by hand delivery (unless otherwise indicated), copies of the foregoing "Wireless Telecommunications Bureau's Opposition to Appeal" to:

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