

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

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AUG 25 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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
EMERGENCY MOTION FOR EXPEDITED ACTION**

1. The Chief, Wireless Telecommunications Bureau, by his attorneys, now asks the Commission to act on the "Appeal" filed by James A. Kay, Jr. (Kay) on August 4, 1998 and the "Further Appeal" filed by Kay on August 11, 1998 on an emergency, expedited basis in order to maintain the integrity of the Commission's processes and prevent further delays to a proceeding that has already been subject to excessive delays. Kay filed his second motion to disqualify the Presiding Judge on the eve of a hearing to determine if all of his licenses should be revoked. The Bureau believes that the sole purpose of Kay's motion is to further delay the hearing, and that the Commission should not permit this misuse and abuse of its processes.

2. The Bureau rarely requests expedited action on a pending pleading, and it understands the extraordinary nature of its request. This proceeding, however, was designated for hearing more than 3 1/2 years ago, and already has been subject to an extraordinary set of

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delays. Kay's appeals threaten to interpose further substantial delay on the eve of the hearing. Kay's actions have threatened the integrity of the hearing process, and the Commission must act as expeditiously as possible in order to allow the existing hearing schedule to be maintained to the extent possible.

3. The procedural history of this case may be summarized as follows:

December 13, 1994: The Commission designated this proceeding for hearing. James A. Kay, Jr., 10 FCC Rcd 2062 (1994).

June 21, 1995: The Presiding Judge stayed the proceeding for 120 days in order to give Kay the opportunity to settle the proceeding. Order, FCC 95M-144 (released June 21, 1995). Kay's efforts were not successful, and the stay period lapsed.

May 31, 1996: The Presiding Judge issued a summary decision revoking all of Kay's licenses. James A. Kay, Jr., 11 FCC Rcd 6585 (ALJ 1996).

February 20, 1997: The General Counsel set aside the Summary Decision and remanded the proceeding to the Presiding Judge for a full hearing on all issues. James A. Kay, Jr., 12 FCC Rcd 2898 (Gen. Coun. 1997).

March 26, 1997: Kay filed a "Motion to Disqualify Presiding Officer."

April 21, 1997: After the Presiding Judge denied Kay's disqualification motion, Kay filed exceptions to the Presiding Judge's ruling, and the Presiding Judge stayed the proceeding pending a ruling by the Commission. Order, FCC 97M-58 (released April 21, 1997).

October 2, 1997: The Commission rejected Kay's appeal. James A. Kay, Jr., 12 FCC Rcd 15662 (1997), recon. denied 13 FCC Rcd 6349 (1998). The Commission found "that Kay has taken the ALJ's words out of context, and unfairly distorted their meaning." (§12). The Commission also reassured Kay that "the Commission will consider all of Kay's contentions and 'carefully review the record to ensure that justice is done in this case.'" (§14).

October 1997 to May 1998: The parties conducted extensive discovery in this case.

June 12, 1998: The Bureau exchanged its direct case exhibits and witness list.

June 15, 1998: Kay filed a "Petition for Extraordinary Relief" with the Commission asking, inter alia, that the Commission stay the hearing, reconsider

the designation order, and institute an investigation into the Bureau's investigation of Kay. That pleading was denied by Memorandum Opinion and Order, FCC 98-207 (released August 24, 1998).

June 29, 1998: Kay exchanged his direct case exhibits.

July 22, 1998: Kay filed a second "Motion to Recuse Presiding Judge."

July 28, 1998: Kay filed a "Supplement to Motion to Recuse Presiding Judge" accusing the Presiding Judge of "Jew Baiting" and "anti-Semitism."

July 30, 1998: The Presiding Judge denied Kay's recusal motion, as originally filed. Memorandum Opinion and Order, FCC 98M-101 (released July 30, 1998). In that order, the Presiding Judge made a finding "that Kay is utilizing all remedies available in order to further delay a hearing." (¶5).

August 4, 1998: Kay filed his appeal of the Presiding Judge's first ruling, thus staying the proceeding.

August 11, 1998: The Presiding Judge denied Kay's supplemental filing. Memorandum Opinion and Order, FCC 98M-105 (released August 11, 1998).

August 18, 1998: Kay filed his further appeal to the Presiding Judge's ruling, and the Presiding Judge then certified the matter to the Commission pursuant to Section 1.245(b)(4) of the Commission's Rules. Order, FCC 98M-108 (released August 20, 1998).

4. Kay filed his exceptions minutes prior to the admissions session, which was scheduled to start on August 4, 1998. Order, FCC 98M-40 (released April 2, 1998). The portion of the hearing in which testimony was to have been taken was scheduled to commence on September 2, 1998. Id. Hearing sessions were scheduled to take place on September 2-11, 1998 in Washington and September 14-25, 1998 in Los Angeles.

5. For the reasons stated in its "Opposition to Appeal" and "Opposition to Further Appeal," the Bureau believes Kay's attempts to disqualify the Presiding Judge are frivolous and that his pleadings were filed for the purpose of delaying the hearing. The Commission has already rejected Kay's arguments of bias directed against the Presiding Judge and assured Kay that it will make sure "justice is done." James A. Kay, Jr., supra, 12 FCC Rcd at 15667. The disqualification procedures established in Section 1.245 of the Commission's Rules must not be used for the purpose of delaying a proceeding ad infinitum. In order to protect the integrity of the hearing process, the Commission should either rule on Kay's filing as soon as possible or vacate the automatic stay provided for in Section 1.245 of the Commission's Rules in order to allow the hearing to take place as close as possible to the currently established schedule.

6. Moreover, apart from Kay's motives in filing the motion, the fact that this proceeding has been pending for almost four years without having advanced to the hearing stage also supports immediate action on Kay's appeal. The Bureau believes there is a very strong public interest in resolving the issues designated by the Commission as soon as possible. If Kay is not qualified to remain a Commission licensee, there is a strong public interest in reallocating that spectrum into the hands of a qualified licensee as soon as possible. If, on the other hand, Kay is qualified to remain a Commission licensee, it would presumably be in Kay's interest to have that determination made as promptly as possible so that he can go forward with his business. Even if the Commission saw some merit in Kay's motion, the sooner a ruling is obtained, the sooner this much-delayed case can move forward. The Commission could expedite its ruling on this matter by issuing a brief order ruling on Kay's request and then follow later with a detailed statement of its reasons for its action.

7. In Black Television Workshop of Los Angeles, Inc., 7 FCC Rcd 2716, 2717 (1992), the Commission wrote:

In light of these circumstances, the public interest demands that this proceeding be conducted henceforth with dispatch. Four years of procedural wrangling, while a television assignment made nearly a decade ago remains unused, are enough. We therefore direct that the presiding judge expedite these proceedings to the greatest extent possible consistent with due process.

Similarly, in this case, enough is enough. It is past time to conduct a hearing on the very serious issues designated in this proceeding. The Commission should make clear that the

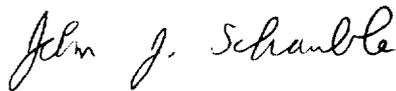
hearing in this proceeding shall be conducted with dispatch and shall not be delayed.

8. Accordingly, the Bureau asks the Commission to rule on Kay's appeal as expeditiously as possible or to otherwise vacate the automatic stay of this proceeding so that the hearing in this proceeding may move forward.

Respectfully submitted,
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August 25, 1998

CERTIFICATE OF SERVICE

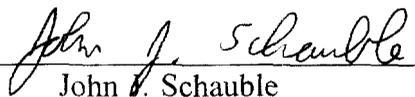
I, John J. Schauble, an attorney in the Enforcement and Consumer Information Division, Wireless Telecommunications Bureau, certify that I have, on this 25th day of August, 1998, sent by hand delivery (unless otherwise indicated), copies of the foregoing "Wireless Telecommunications Bureau's Emergency Motion for Expedited Action" to:

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