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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

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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
OPPOSITION TO FURTHER APPEAL

1. The Chief, Wireless Telecommunications Bureau, by his attorneys, now opposes the "Further Appeal" filed by James A. Kay, Jr. (Kay) on August 18, 1998. Kay appeals the Presiding Judge's Memorandum Opinion and Order, FCC 98M-105 (released August 11, 1998), in which the Presiding Judge again refused to disqualify himself from further participation in this proceeding. Kay's "Further Appeal" is yet another specious attempt to delay the hearing in this proceeding and should be expeditiously denied.

2. The Further Appeal is a third attempt by Kay to create some showing of bias on the part of the Presiding Judge. In denying Kay's first disqualification motion, which was filed in April 1997, the Commission 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). Kay's second attempt to disqualify the Presiding Judge was filed on July 22, 1998, and denied by Memorandum Opinion and Order, FCC 98M-101 (released July 30, 1998). That ruling is the subject of Kay's "Appeal" filed August 4, 1998, which is pending before the Commission.

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3. The Further Appeal arose out of the Presiding Judge's *sua sponte* attempt to avoid any conflict with the observance of Rosh Hashanah by Aaron Shainis, one of Kay's counsel. 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. The Presiding Judge first attempted to raise the issue at an informal conference held on June 30, 1998. Memorandum Opinion and Order, FCC 98M-105, supra at ¶¶ 3-4. After Kay accused the Presiding Judge of "ridicule of his religious beliefs," the Presiding Judge scheduled a prehearing conference on July 23, 1998. Order, FCC 98M-98 (released July 22, 1998). 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 counsel's "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.

4. Notwithstanding those facts, Kay continues to accuse the Presiding Judge of "obvious Anti-Semitic feelings toward counsel" and of an attempt "to further ridicule and demean counsel." Kay Further Appeal, p. 1. Kay's counsel took offense from the Presiding

Judge's inquiry regarding whether he considered himself a Reform, Conservative or an Orthodox Jew. Tr. 425. While the question arguably could be construed as inappropriate, and the Presiding Judge has admitted that he was ignorant concerning the observance of Rosh Hashanah (Tr. 431), Kay's wild accusations that the Presiding Judge is "Anti-Semitic" or was "ridiculing" counsel are baseless and wholly uncalled for. Kay's argument ignores several elementary facts. First, the clear purpose of the Presiding Judge's inquiry was to accommodate counsel's religious beliefs while allowing the hearing to go forward during the scheduled time period. Second, the Presiding Judge ultimately granted Kay and his counsel the relief requested. Third, Kay does not even address the Presiding Judge's and the Bureau's citation of Baldwin Hardware Corp. v. Franksu Enterprise Corp., 78 F.3d 550, 557 (D.C. Cir. 1996) for the holding that "[t]o 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."

5. Kay's instant appeal substitutes *ad hominem* attacks and circular reasoning for a reasoned analysis of the facts and law. First, Kay finds something significant in the fact that counsel for Kay is mentioned by name throughout the opinion. Kay Further Appeal, p. 1. In light of the fact that the counsel in question signed the affidavit supporting the motion and that it was that counsel who was purportedly offended, the references to counsel were perfectly natural. Second, Kay's claims that the Presiding Judge supposedly engaged in an improper consultation with a former Administrative Law Judge (Kay Further Appeal, pp. 2-3) has nothing to do with whether the Presiding Judge was biased against Kay. Stated another

way, it is totally immaterial to Kay's bias argument whether the Presiding Judge consulted with a current or former ALJ. Third, Kay's argument that "it is doubtful that the Judge would accept any argument advanced by counsel on behalf of Kay" (Kay Further Appeal, p. 5) is absurd speculation. Under that reasoning, every time a judge refused to accept an argument of counsel, the judge would necessarily be biased because "it is doubtful that the Judge would accept any argument offered by counsel . . ."

6. Kay's Further Appeal offers no new substance and wholly fails to rebut the reasoning contained in the Presiding Judge's Memorandum Opinion and Order, FCC 98M-105, supra. The Bureau continues to believe that disqualification of the Presiding Judge would be wholly inappropriate. Indeed, Kay's crude name-calling appears to be little more than another attempt to delay the hearing in this proceeding. The Commission should move with all possible dispatch to deny Kay's appeal and order that the hearing shall take place with all possible expedition.

7. Accordingly, the Bureau urges the Commission to expeditiously deny Kay's "Further Appeal."

Respectfully submitted,
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August 25, 1998

CERTIFICATE OF SERVICE

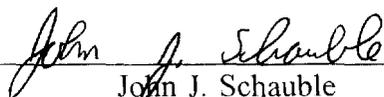
I, John J. Schauble, an attorney in the Enforcement and Consumer Information Division, Wireless Telecommunications Bureau, certify that I have, on this 25th day of August, 1998, sent by hand delivery (unless otherwise indicated), copies of the foregoing "Wireless Telecommunications Bureau's Opposition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

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