

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY  
WT Docket No.

In the matter of )  
)  
JAMES A. KAY, JR. )  
)  
Licensee of One Hundred Fifty Two Part 90 )  
Licenses in the Los Angeles, California Area )

To: The Commission

**SUPPLEMENT TO REPLY EXCEPTIONS**

James A. Kay, Jr. ("Kay"), by his attorneys, hereby supplements his reply exceptions in this proceeding, in support whereof the following is respectfully shown:

The Wireless Telecommunications Bureau ("Bureau") recently rendered a letter ruling in a proceeding in a contested application proceeding. See the November 18, 1999, letter from Terry L. Fishel, , Deputy Chief, Licensing and Technical Analysis Branch, Commercial Wireless Division, Wireless Telecommunications Bureau to Robert J. Keller, Esquire, *et al.* ("*Bureau Letter*"). A copy of the *Bureau Letter* is appended hereto as Attachment A for convenient reference. The Bureau, in ruling on that matter, took a position that is inconsistent with the position it has advanced in this proceeding with regard to the loading issue. Accordingly, the Commission must take into account this newly issued Bureau ruling in its deliberations and consideration of the loading issue.

The question addressed in the *Bureau Letter* was whether Harry A. Thompson III d/b/a 1st Communications ("Thompson"), the licensee of Conventional SMR (GX) Station WPAH737, operated any mobile units on the station as of April 21, 1993, the then-applicable construction deadline. The license was initially granted on August 21, 1992. Thompson was required to complete construction of the facility and place it "in operation within eight (8) months from the date of grant or the authorization cancels automatically and must be returned to the

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Commission.” 47 C.F.R. § 90.155(a). Section 90.155(c) further provides that “a base station is not considered to be placed in operation unless at least one associated mobile station is also placed in operation.” 47 C.F.R. § 90.155(c). Thus, Thompson was required to be providing service to validly licensed mobile units by April 21, 1993.

Kay protested applications filed by Thompson seeking to reinstate, modify, and assign the authorization. Kay argued that the license had automatically canceled by operation law because Thompson had not, as of the requisite construction deadline, added authority to serve mobile units to the license. Kay argued, relying on *Abraham Communications, Inc.*, 11 FCC Rcd 11273 (1996), that Section 90.155 required that validly licensed units be placed into operation, and that Thompson therefore could not have satisfied the regulation since there are and never were any mobile units authorized for the station.

Confronted with the Commission’s ruling in *Abraham Communications, Inc.*, the Bureau grudgingly agreed with Kay’s interpretation of the regulation’s requirements. But the Bureau nonetheless went out of its way to manufacture a way to rule against Kay, reasoning as follows:

[T]he Commission permits end users operating on other stations to roam between stations without separate authorizations. ... Because roaming units may be served without separate designation on a license, however, and Kay’s arguments ... are based exclusively on licensed mobile loading, Kay has not demonstrated that Thompson’s license ... canceled automatically due to Thompson’s failure to license mobiles on the authorization.

*Bureau Letter* at 2. Significantly, Thompson never claimed to have served any roamer units, nor did he advance any argument remotely similar to the above-quoted rationale. This theory was developed, *sua sponte*, by the Bureau as a way to rule against Kay at all costs.

Kay obviously disagrees with the Bureau’s ruling, but the purpose of this pleading is not to question the merits of the decision; rather, it is to demonstrate that the stated rationale in the Thompson case can not be squared with the Bureau’s position on the roaming issue in this case. Even though Thompson never claimed to have served any roamer units—much less that he had

served them as of the applicable construction deadline—and even though there was absolutely no evidence or indication that Thompson had ever served any roamer units,<sup>1</sup> the Bureau nonetheless gave him full credit for having done so for purposes of Section 90.155(c) of the Rules. The Bureau stated: “The pleadings in this matter do not indicate to whom Thompson provides service and ***do not rule out the possibility*** that service is in fact provided to roamers.” *Bureau Letter* at p. 2 (emphasis added).

At issue under the straw man issue set up by the Bureau in Thompson was whether Thompson had served roamer units. At issue under the loading issue in this case is whether Kay provided service to a sufficient number of mobile units on various of his stations. Thus, both cases present the factual question of whether mobile units were in fact in service at various times. The standard applied by the Bureau for resolving this factual question in the Thompson case is that the licensee should be credited with service to mobile units if the record “do[es] not rule out the possibility that service is in fact provided” to mobiles.

Thompson did not even claim to have served roamers, and he certainly never offered any evidence that he had done so. In this proceeding, however, Kay claimed and provided evidence of service not only to his contracted subscribers, but also to numerous rental, loaner, and demonstration units. Thus, not only did the record “not rule out the possibility that service [was] in fact provided” to rentals, loaners, and demos, there is affirmative evidence that Kay did so.<sup>2</sup>

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<sup>1</sup> The Bureau apparently attempts to make this ruling turn on the alleged failure of Kay to have come forward with evidence that Thompson did not serve roamers, stating: “Kay has therefore not provided sufficient evidence that WPAH737 canceled automatically.” *Bureau Letter* at p. 2. But this is to ignore the plain language of Section 90.155 of the Rules. Section 90.155(a) states, unequivocally, that the license cancels if not constructed and “in operation” by the applicable date. Nothing in the regulation makes the automatic cancellation contingent upon proof of non-operation by a third party. By contrast, in *this* proceeding, Section 212(c) of the Communications Act places the Bureau of proof on the Bureau.

<sup>2</sup> See *Kay’s Proposed Findings of Fact and Conclusions of Law* at pp. 39-44 & 86-92; and *Kay’s Reply to the Wireless Telecommunications Bureau’s Proposed Findings of Fact and Conclusions of Law* at pp. 7-14.

The Bureau's refusal to give Kay credit for these units can not be reconciled with its willingness to give Thompson credit for roamer units (a) that he did not claim, and (b) for which there was no evidence in the record whatsoever. If the Bureau is willing to credit Thompson for the mere "possibility" that he may, theoretically, have served unclaimed units, then Kay should certainly be credited for serving rental, loaner, and demo units which he both claims and for which he has provided evidence.

Respectfully submitted this 30th day of December, 1999

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## CERTIFICATE OF SERVICE

I, Robert J. Keller, counsel for James A. Kay, Jr., hereby certify that on this 30th day of December, 1999, I caused copies of the foregoing pleading to be sent via facsimile and by first class United States mail, postage pre-paid, to the officials and parties in WT Docket No. 94-147, as follows:

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Robert J. Keller