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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of		
KEVIN DAVID MITNICK	)	
Licensee of Station N6NHG in the Amateur Radio Service for Renewal of Station License	)	WT DOCKET NO. 01-344
	)	File No. 00000-58498
KEVIN DAVID MITNICK	)	
for Renewal of Amateur Radio General Class Operator License	)	

HEARING DESIGNATION ORDER

Adopted: December 11, 2001 **Released:** December 21, 2001

By the Commission:

I. INTRODUCTION

1. By this *Order*, we commence a hearing proceeding before an FCC Administrative Law Judge to determine, ultimately, whether the application of Kevin David Mitnick for renewal of Amateur Radio Station and General Class Operator License N6NHG should be granted. As discussed below, Mr. Mitnick is a convicted felon whose illegal activities have included the interception of electronic communications, computer fraud, wire fraud, and causing damage to computers. Based on the information before us, we believe that Mr. Mitnick's criminal behavior raises a substantial and material question of fact as to whether he possesses the requisite character qualifications to be and remain a Commission licensee. Because we are unable to make a determination that grant of Mr. Mitnick's application would serve the public interest, convenience, and necessity, we hereby designate the application for hearing, as required by Section 309(e) of the Communications Act of 1934, as amended.[1]

II. BACKGROUND

2. Mr. Mitnick is the licensee of Amateur Radio Station N6NHG and holds a General Class Operator license. According to our licensing records, he has been an Amateur Radio Service licensee for approximately twenty-five years.

3. On August 9, 1999, following an earlier guilty plea, the United States District Court for the Central District of California convicted Mr. Mitnick of the following federal offenses related to computer hacking over a 2 ½-year period:

[1] 47 U.S.C. § 309(e).

Interception of electronic communications; computer fraud in violation of 18 USC 2511(1)(a); 18 USC 1030(a)(4) as charged in counts 1 and 2 of the Information in case CR 96-506-MRP; Wire fraud, aiding and abetting, causing an act to be done, and causing damage to computers in violation of 18 USC 1343, 2a, 2b, and 18 USC 1030(a)(5) as charged in counts 1, 5, 8, 10, and 16 of the Indictment in case CR 96-881-MRP.[2]

4. Mr. Mitnick has admitted that he broke into a number of computer systems and stole proprietary software belonging to Motorola, Novell, Fujitsu, Sun Microsystems and other companies. Mr. Mitnick also has admitted using a number of means to commit his crimes, including "social engineering,"[3] cloned cellular telephones,[4] "sniffer" programs[5] placed on victims' computer systems and hacker[6] software programs. Mr. Mitnick has acknowledged altering the programming of computer systems belonging to the University of Southern California and using these computers to store programs that he had misappropriated. He also admitted that he stole e-mails, monitored computer systems and impersonated employees of victim companies, including Nokia Mobile Phones, Ltd., in his attempt to secure software that was being developed by those companies. According to the United States Department of Justice, Mr. Mitnick's prolific and damaging hacking career made him the most wanted computer criminal in United States history.[7]

5. Mr. Mitnick was sentenced to forty-six months in federal prison as a result of his August 9, 1999 conviction. He had previously been sentenced to twenty-two months in prison for possessing cloned cellular phones after his arrest in North Carolina in 1995[8] and for violating terms of his supervised release imposed after his conviction for unrelated computer fraud in 1989. Further, he admitted to violating the terms of supervised release by hacking into PacBell voicemail and other systems and by associating with known computer hackers. Mr. Mitnick is currently on probation following his release from federal prison in January, 2001.

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[2] Judgment and Probation/Commitment Order, *U.S. vs. Kevin David Mitnick*, United States District Court, Central District of California, CR 96-506-MRP, CR 96-881-MRP.

[3] "Social engineering" is a euphemism for trickery used to gain access to a computer system, for example by posing as a network administrator and requesting users to disclose their passwords. *See* Keeping Hackers at Bay, Ashby Jones, The National Law Journal, April 16, 2001.

[4] Cellular phone cloning is the practice of obtaining the electronic serial number of a cellular phone and encoding one or more additional phones with the unique identifier. Calls made on the cloned phone are then billed to the account of the original user and the anonymous user of the cloned phone obtains "free" service.

[5] A "sniffer" program monitors networks and extracts proprietary information such as passwords.

[6] Originally, the term "hacker" referred to a person proficient in computer programming. Later it attained a pejorative meaning as a person who uses his or her programming skills to gain illegal access to a network or file. It is in the latter sense that it is used here. *See* American Heritage Dictionary of the English Language, Fourth Edition, 2000.

[7] Press Release, Alejandro N. Mayorkas, United States Attorney, Central District of California, August 9, 1999, Release No. 99-158.

[8] *U.S. vs. Kevin David Mitnick*, Case No. 595CR37BO, U.S. District Court for the Eastern District of North Carolina, July 5, 1995.

6. In December 1999, Mr. Mitnick applied for renewal of his Amateur Radio Station and General Class Operator License. That application is the subject of this Hearing Designation Order.

III. DISCUSSION

7. In the context of broadcast licensees, we have stated that "evidence of any conviction for misconduct constituting a felony will be relevant to our evaluation of an applicant's or licensee's character."[9] Such evidence is relevant because it aids the Commission in ascertaining whether a licensee will "deal truthfully with the Commission and . . . comply with our rules and policies."[10] Rather than establish a "hierarchy of felonies that might arise in individual cases," the Commission examines the impact of a conviction on a case-by-case basis.[11] The broadcast character qualification standards have been used as guidelines in the evaluation of applicant or licensee character in a non-broadcast context, including in the amateur radio service.[12]

8. The United States Court of Appeals for the D.C. Circuit, in the context of an amateur radio license, has stated that "a conviction for fraudulent conduct plainly calls into question a licensee's ability to act in a manner consonant with FCC regulations."[13] We have observed that fraud "is a subject area the Commission has traditionally considered to be pertinent to its evaluation of a licensee's character.[14]

9. Pursuant to Section 309(e) of the Communications Act of 1934, as amended,[15] if a substantial and material question of fact is presented or the Commission for any reason is unable to determine that grant of an application would serve the public interest, convenience, and necessity, the Commission is required to designate the application for an evidentiary hearing. In the instant case, Mr. Mitnick was convicted as recently as 1999 after pleading guilty to four counts of wire fraud, two counts of computer fraud, and one count of illegally intercepting a wire communication. The offenses for which he was convicted constitute felonies and involved fraudulent activities. In addition, the misconduct for which he was convicted involved, in part, the telecommunications

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[9] Policy Regarding Character Qualifications in Broadcast Licensing, *Policy Statement and Order,* 5 FCC Rcd. 3252, 3252 (1990) (footnote omitted) ("*Character Policy Statement*").

[10] *Character Policy Statement supra, quoting* Policy Regarding Character Qualifications in Broadcast Licensing, *Policy and Order* [modification], 102 FCC 2d 1179, 1190-91 (1986).

[11] *Id.*

[12] *See, e.g.* Applications of Herbert L .Schoenbohm – Kingshill, Virgin Islands, *Supplementary Initial Decision,* 13 FCC Rcd 1853 (ALJ 1997); *affd.* 13 FCC Rcd. 15,026 (1998); *appeal denied sub nom. Schoenbohm vs. FCC,* 204 F 3d 243 (D.C. Cir. 2000); *cert. denied* 121 S. Ct. 405 (2000); Leslie D. Brewer, Licensee of Amateur Radio Station and General Class Operator License KC4HAZ, Licensee of Station KAE1170 in the General Mobile Radio Service, *Order of Revocation and of Forfeiture,* EB Docket No. 01-61, DA 01-1489 (June 26, 2001) ¶ 19.

[13] *Schoenbohm v. FCC,* 204 F.3d 243, 247 (D.C. Cir. 2000); *cert. denied,* 121 S. Ct. 405 (2000).

[14] Applications of Herbert L. Schoenbohm – Kingshill, Virgin Islands, *Decision,* 13 FCC Rcd. 15,028, 15,038 (1998).

[15] 47 U.S.C. § 309(e).

industry over which the Commission has regulatory authority. Mr. Mitnick's criminal background raises a substantial and material question of fact as to whether he possesses the requisite character qualifications to be and remain a Commission licensee. Given his propensity to engage in criminal activities, particularly those involving fraud, we have serious reservations about Mr. Mitnick's ability to comply with our rules and regulations in the future. The fact of Mr. Mitnick's criminal convictions is *res judicata* and will not be retried in this hearing.

IV. ORDERING CLAUSES

10. **ACCORDINGLY, IT IS ORDERED** that, pursuant to Sections 4(i) and 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(e), the captioned application IS DESIGNATED FOR HEARING in a proceeding before an FCC Administrative Law Judge, at a time and place to be specified in a subsequent *Order*, upon the following issues:

(a) To determine the effect of the criminal convictions of Kevin David Mitnick on his qualifications to be and remain a Commission licensee.

(b) In light of the evidence adduced pursuant to the foregoing issues, to determine whether Kevin David Mitnick is qualified to be and remain a Commission licensee.

(c) In light of the evidence adduced pursuant to the foregoing issues, to determine whether the captioned application filed by Kevin David Mitnick should be granted.

11. **IT IS FURTHER ORDERED** that, pursuant to Section 4(i) and Section 1.221(c) of the Commission's Rules,[16] in order to avail himself of the opportunity to be heard, Mr. Mitnick, in person or by his attorney, **SHALL FILE** with the Commission, within twenty days of the mailing of this *Hearing Designation Order* to him, a written appearance stating that he will appear on the date fixed for hearing and present evidence on the issues specified herein.

12. **IT IS FURTHER ORDERED** that, pursuant to Section 1.221(c) of the Commission's Rules,[17] if Mr. Mitnick fails to file a written appearance within the twenty-day period, or has not filed prior to the expiration of the twenty-day period a petition to dismiss without prejudice, or a petition to accept, for good cause shown, a written appearance beyond the expiration of the twenty-day period, the Presiding Administration Law Judge **SHALL DISMISS** the captioned application with prejudice for failure to prosecute.

13. **IT IS FURTHER ORDERED** that, pursuant to Sections 4(i) and 309(e) of the Communications Act of 1934, as amended,[18] the burden of proceeding with the introduction of evidence and the burden or proof with respect to all of the issues specified above **SHALL BE** on Mr. Mitnick.

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[16] 47 C.F.R. § 1.221(c).

[17] *Id.*

[18] 47 U.S.C. §§ 154(i); 309(e).

14. **IT IS FURTHER ORDERED** that this *Hearing Designation Order* contains the statements required by Sections 1.221(a)(1), 1.221(a)(2), 1.221(a)(3), and 1.221(a)(4) of the Commission's Rules.[19]

15. **IT IS FURTHER ORDERED** that the Commission's Reference Operations Division of the Consumer Information Bureau **SHALL SEND** a copy of this *Order*, via Certified Mail - Return Receipt Requested, to Kevin David Mitnick at the address specified by him in his captioned application: 7113 W. Gowan Road, Las Vegas, Nevada 89129.

16. **IT IS FURTHER ORDERED** that the Secretary of the Commission **SHALL CAUSE** to have this *Hearing Designation Order* or a summary thereof published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

[19] 47 C.F.R. §§ 1.221(a)(1), 1.221(a)(2), 1.221(a)(3), 1.221(a)(4).