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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

SEP - 1 2005

Federal Communications Commission  
Office of the Secretary

In the Matters of	)	
	)	
<b>JAMES A. KAY, JR.</b>	)	WT Docket No. 94-147
	)	
Licensee of One Hundred Fifty Two Part 90	)	
Licenses in the Los Angeles, California Area	)	
	)	
<b>MARC SOBEL AND MARC SOBEL D/B/A</b>	)	WT Docket No. 97-56
<b>AIR WAVE COMMUNICATIONS</b>	)	
	)	
Licensee of Certain Part 90 Licenses in the	)	
Los Angeles, California Area	)	
To: The Commission		

**ENFORCEMENT BUREAU'S OPPOSITION  
TO MOTION FOR STAY**

1. On August 23, 2005, James A. Kay, Jr. and Marc Sobel (collectively, "Movants") filed a pleading styled "Motion to Stay Pending Action on Motion to Modify" (the "Motion for Stay") in connection with the above-captioned proceedings. Pursuant to section 1.294(b) of the Commission's rules, 47 C.F.R. §1.294(b), the Enforcement Bureau (the "Bureau") hereby submits its Opposition to the Motion to Stay. For the following reasons, because Movants have failed to make the requisite showing warranting the extraordinary remedy of a stay, the Motion for Stay should be denied.

2. On December 13, 1994, the Commission issued an Order designating all of Kay's licenses and then-pending applications for hearing,<sup>1</sup> and, on February 12, 1997, the Commission

<sup>1</sup> James A Kay, Jr., Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing on Forfeiture, 10 FCC Red 2062 (1994).

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designated Sobel's license and then-pending applications for hearing.<sup>2</sup> A hearing was held in the Sobel proceeding on July 29 and 30, 1997, and Administrative Law Judge John Frysiak issued his Initial Decision on November 28, 1997.<sup>3</sup> Thereafter, a hearing was held in the Kay proceeding from December 21, 1998, through January 20, 1999, and Administrative Law Judge Joseph Chachkin issued his Initial Decision on September 10, 1999.<sup>4</sup> The Commission subsequently reviewed both matters, and in two companion decisions released on January 20, 2002, ordered that Kay's and Sobel's 800 MHz private land mobile licenses be revoked.<sup>5</sup> The Commission affirmed these orders revoking Movants' licenses on reconsideration on May 8, 2002.<sup>6</sup> Since then, the United States Court of Appeals for the D.C. Circuit has twice denied Movants' appeals,<sup>7</sup> and, on July 5, 2005, Movants filed with the United States Supreme Court a Petition for Writ of *Certiorari*.<sup>8</sup> Faced with the likely and imminent denial of that Petition and the Commission's imposition of the revocation sanction, Movants have made an eleventh-hour request to stay the revocation of their licenses.

3. Thus, on August 3, 2005, Movants filed a "Motion to Modify Sanctions" that requests the Commission to establish a panel that would negotiate a modification of the sanctions

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<sup>2</sup> *Marc Sobel and Marc Sobel d/b/a Air Wave Communications*, Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing on Forfeiture, 12 FCC Rcd 3298 (1997).

<sup>3</sup> *Marc Sobel and Marc Sobel d/b/a Air Wave Communications*, Initial Decision, 12 FCC Rcd 22879 (ALJ 1997).

<sup>4</sup> *James A. Kay, Jr.*, Initial Decision, FCC 99D-04 (ALJ Sept. 10, 1999).

<sup>5</sup> *James A. Kay, Jr.*, Decision, 17 FCC Rcd 1834 (2002) and *Marc Sobel and Marc Sobel d/b/a Air Wave Communications*, Decision, 17 FCC Rcd 1872 (2002).

<sup>6</sup> *James A. Kay, Jr.*, Memorandum Opinion and Order, 17 FCC Rcd 8554 (2002) and *Marc Sobel and Marc Sobel d/b/a Air Wave Communications*, Memorandum Opinion and Order, 17 FCC Rcd 8562 (2002).

<sup>7</sup> *Kay v FCC*, 396 F.3d 1184 (2005) request for rehearing en banc denied (Order released May 3, 2005).

<sup>8</sup> *Kay v. FCC*, 74 USLW 3042, No. 05-46 (July 5, 2005).

previously ordered by the Commission and affirmed by the court.<sup>9</sup> Among other things, Movants propose to retain the 800 MHz licenses that the Commission ordered revoked, and, in lieu thereof, to donate an unspecified number of unidentified other licenses that they hold in the 470-512 MHz portion of the UHF band to public safety agencies in the Los Angeles area and pay an increased forfeiture amount. By their subject Motion for Stay, they now seek a stay of the revocation of their licenses until the Commission's disposition of their Motion to Modify Sanctions becomes final.

4. While Movants accurately state the required showings for obtaining a stay, they fail to demonstrate that they are entitled to such relief here. A stay is justified only if a movant can demonstrate that: (1) it is likely to prevail on the merits of its appeal of the order for which stay is sought; (2) it will suffer irreparable harm in the absence of a stay; (3) a stay will not injure other parties; and (4) a stay is in the public interest.<sup>10</sup> For the following reasons, Movants have failed to make such a showing here.

**5. Movants Have Not Demonstrated that They Will Likely Prevail on the Merits.**

With respect to the first criterion, as Movants note, the Commission order revoking their 800 MHz authorizations has consistently withstood appeal -- before the Commission on reconsideration and twice before the United States Court of Appeals for the D.C. Circuit. Movants advise that their Petition for Writ for *Certiorari* is pending before the United States Supreme Court and that they anticipate its consideration at the Court's September 26, 2005,

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<sup>9</sup> *James A. Kay Jr.*, Decision, 17 FCC Rcd 1834 (ALJ 2002), *recon. denied.*, Memorandum Opinion and Order, 17 FCC Rcd 8554 (2002); *Marc Sobel and Marc Sobel d/b/a Air Wave Communications*, Decision, 17 FCC Rcd 1834 (2002), *recon. denied.*, Memorandum Opinion and Order, 17 FCC Rcd 8562 (2002), *further recon. denied.*, Memorandum Opinion and Order, 19 FCC Rcd 801 (2004).

<sup>10</sup> *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958) ("*Petroleum Jobbers*")

conference, with a decision announced as early as October 3, 2005. In the event that the Supreme Court denies *certiorari*, Movants will have no further appeal rights, and the revocation order will become final.

6. The Bureau submits that Movants have failed to satisfy the first criterion for a stay required under *Petroleum Jobbers*, *i.e.*, a likelihood of prevailing on the merits. Indeed, it is impossible for them to make such a showing. As a threshold matter, there is no appropriate reason for requesting a stay in this instance because the Commission, in its order revoking Movants' 800 MHz licenses, specifically authorized Movants to continue operating their stations "until final disposition or all administrative and/or judicial appeals."<sup>11</sup> In effect, the Commission, more than two years ago, granted a stay of the revocation of Movant's authorizations until final disposition of their appeals. As a consequence, Movants' only reason for seeking a stay of the Commission's order revoking their licenses is to extend the stay if they do not prevail at the Supreme Court. However, in that event, Movants will have exhausted their appeal rights and will no longer have any pending appeal upon which they could claim a likelihood of prevailing. For this reason, they cannot satisfy this threshold criterion.<sup>12</sup>

7. Movants also appear to suggest, relying on *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977) and *Cuomo v. United States*

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<sup>11</sup> *James A. Kay Jr.*, Decision, 17 FCC Rcd 1834 (ALJ 2002) at ¶ 109.

<sup>12</sup> Apparently recognizing this defect, Movants speculate as to the success before the Commission of their Motion to Modify Sanctions, rather than a likelihood of prevailing on their merits of their appeal of the underlying revocation order. This, however, is a "red herring" because the four-part test announced in *Petroleum Jobbers* relates to a stay of an order pending disposition of an appeal, not the disposition of an ancillary request to negotiate new sanctions. Were the Commission to conclude that Movants have demonstrated good cause for stay here, virtually any party that has unsuccessfully appealed an adverse ruling imposing sanctions against it could forestall, perhaps indefinitely, the imposition of such sanctions against it, notwithstanding the finality of the ruling, by proposing at the eleventh hour, as Movants have done here, some alternative to those sanctions. Such a result would not be in the public interest.

*Regulatory Commission*, 772 F.2d 972 (D.C. Cir. 1985), that they may virtually disregard the first criterion for a stay if they satisfy the remaining three. To the contrary, these cases collectively require a balancing of all four criteria, not the elimination of any one.

8. Movants, in the final analysis, fail to satisfy the first criterion because they are unable to demonstrate virtually *any* likelihood of prevailing in their judicial appeal. On this basis alone, their Motion for Stay must be summarily denied.

9. **Movants Have Not Demonstrated Irreparable Harm.** Similarly, Movants' showing with respect to the second factor falls short of that required to justify a stay. While they may suffer some economic harm if stay is not granted of the license revocation order, the harm would not be "irreparable," as the term is used in *Petroleum Jobbers*. "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough."<sup>13</sup> "Recoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movants' business."<sup>14</sup> While Movants may understandably prefer to negotiate a less onerous sanction than that directed against them by the Commission and repeatedly affirmed, they have failed to demonstrate that the revocation of their 800 MHz licenses meets the high threshold of irreparable harm necessary for stay.<sup>15</sup>

10. **Movants Have Not Demonstrated That The Proposed Stay Will Not Injure Any Other Party.** With respect to the third factor, Movants have not addressed the possible harm to

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<sup>13</sup> *Petroleum Jobbers*, 259 F.2d at 925.

<sup>14</sup> *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d at 843 n. 2.

<sup>15</sup> See e.g. *Implementation of Video Description Programming*, 17 FCC Rcd 6175, 6176-78 (2002) (Commission denied stay despite allegations of potential losses possibly amounting to millions of dollars where movants did not show that loss would be "clear and great" or threaten the existence of their business).

others if a stay is granted. In fact, by operation of section 90.683(b) of the Commission's rules,<sup>16</sup> upon revocation of Movants' 800 MHz licenses, the spectrum rights granted under those authorizations will revert to Nextel, which holds the such rights in the Los Angeles area as a result of its purchase of the 25 Los Angeles-Riverside-Orange County Economic Area licenses for the 800 MHz band in FCC Auction Nos. 16, 34 and 36. Under these circumstances, if a stay is granted, Nextel will likely be harmed because it will be denied those valuable spectrum rights which it would otherwise enjoy if the Movants' authorizations are revoked.

**11. Movants Have Not Demonstrated A Public Interest Benefit.** Finally, with respect to the fourth factor, although Movants claim significant public interest benefits arising from their requested stay, in fact, at this late date, they have failed to propose a specific settlement offer that can be meaningfully evaluated, much less found to be in the public interest. Their mere offer to negotiate and vague promises of public safety spectrum availability does not warrant a stay in this proceeding. Significantly, the Bureau notes that Movants' past record and the nature and timing of their Motion for Stay strongly suggest that the net effect of granting a stay would merely be to facilitate the further delay by the Movants of the final resolution of this matter. Their requested stay will not end when the Commission rules on their last-minute Motion to Modify Sanctions, but will continue until that ruling becomes final, opening the door to additional years of delay through more appeals. Movants' instant Motion for Stay and related Motion to Modify Sanctions are nothing but a desperate, last-minute attempt to further delay the inevitable and fully warranted revocation of their authorizations. Their transparent attempt at such gamesmanship should be summarily rejected.

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<sup>16</sup> 47 C.F.R. § 90.683(b).

12. For the foregoing reasons, because Movants have failed to establish the presence of the established factors required for a stay, the Motion for Stay should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "William D. Freedman". The signature is written in a cursive style with a long horizontal flourish at the end.

William D. Freedman, Deputy Chief  
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September 1, 2005

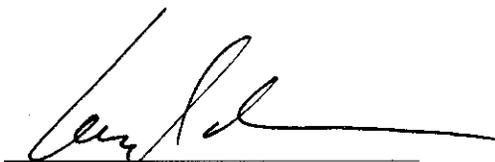
**CERTIFICATE OF SERVICE**

I, Gary Schonman, Special Counsel in the Enforcement Bureau's Investigations and Hearings Division, certify that I have, on this 1<sup>st</sup> day of September 2005, sent by e-mail or by hand delivery, copies of the foregoing "Enforcement Bureau's Opposition to Motion for Stay" to:

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