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

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

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REPLY TO OPPOSITION TO MOTION FOR STAY

James A. Kay, Jr. ("Kay") and Marc D. Sobel ("Sobel) (jointly, "Petitioners"), by their attorneys, hereby reply to the *Enforcement Bureau's Opposition to Motion for Stay* ("*Opposition*") filed on September 1, 2005, in response to Petitioners' August 23, 2005, *Motion for Stay Pending Action on Motion to Modify* ("*Motion for Stay*").

I. INTRODUCTION

1. The Enforcement Bureau ("Bureau") objects that Petitioners have not satisfied the four elements for a stay enunciated in *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958), to wit: (1) likelihood of success on the merits; (2) irreparable harm; (3) no injury to other parties; and (4) public interest considerations. *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958). Petitioners address each of the Bureau's arguments on these elements below.

II. REPLY TO BUREAU'S ARGUMENTS

A. Likelihood of Success on the Merits

2. The Bureau argues that it is impossible for Petitioners to meet the "likelihood of success on the merits" element, because Kay and Sobel have already lost their administrative and

judicial appeals in the captioned proceedings.[1] *Opposition* at ¶¶ 5-6. The Bureau has either misunderstood or deliberately misconstrued the nature of the *Motion for Stay*. Petitioners do not request a stay pending appeal from the revocation proceedings. They rather seek stay pending consideration of and action on the August 3, 2005, *Motion to Modify Sanctions* ("*Motion to Modify*").[2] The "merits" at issue here are not whether the Commission properly found certain violations for which it imposed sanctions. The "merits" for purposes of the *Motion to Modify*—and, hence, for this element in considering the *Motion for Stay*—is whether the public interest will be better served by an alternative sanction that preserves valid enforcement objectives while, at the same time, providing a substantial benefit for public safety communications that is lacking in the current sanction.

3. Contrary to the Bureau's assertion, *Opposition* at ¶ 7, Petitioners recognize that likelihood of success is an important consideration, but it is one that must be balanced with other relevant factors. The elements enumerated in *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958), are not conjunctive, *i.e.*, it is not necessary for each and every element to be 100% satisfied to grant a stay. For example, a stay may be justified by a showing of high probability of success and some harm, or vice versa. *See*

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[1] *James A. Kay, Jr.*, WT Docket No. 94-147: *Decision*, 17 FCC Rcd 1834 (2002), on recon., *Memorandum Opinion and Order*, 17 FCC Rcd 8554 (2002); and *Marc Sobel and Marc Sobel d/b/a Air Wave Communications*, WT Docket No. 97-56: *Decision*, 17 FCC Rcd 1834 (2002), on recon., *Memorandum Opinion and Order*, 17 FCC Rcd 8562 (2002), on further recon., *Memorandum Opinion and Order*, 19 FCC Rcd 801 (1994); aff'd sub nom. *Kay v. FCC*, 396 F.3d 1188 (D.C. Cir. 2005), cert. pet. pending, 74 U.S.L.W. 3042 (Case No. 05-46, filed July 5, 2005).

[2] The Bureau objects that shifting the focus from the revocation ruling to the *Motion to Modify* would permit "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 ... some alternative to those sanctions." *Opposition* at p. 4, n.12. This concern is not well founded. The sanctions are not foreclosed by the mere filing of a request that their effectiveness be temporarily stayed, and the Commission is quite capable of summarily rejecting any request for stay that is found to be frivolous. Moreover, this case presents a unique combination of facts that is extremely unlikely ever to rise again, to wit: conduct occurring more than ten years ago; inconsistent conclusions by two different ALJs on the same facts and issues; a split decision on the Commission on how to resolve the conflicting ALJ rulings; a determination that the violations were not disqualifying and that only some of the licenses at issue should be revoked as a deterrent to future misconduct; and a bona fide proposal of an alternative sanction that would maintain the deterrent effect, still take authorizations away from the licensees, and provide a substantial benefit for public safety entities that the original sanction did not.

Cuomo v. United States Regulatory Commission, 772 F.2d 972, 974 (D.C. Cir. 1985). As the Court reasoned in *Cuomo v. United States Regulatory Commission*, the "likelihood of success" standard may be, in the discretion of the tribunal, lowered to a "substantial case on the merits," where the showing on other elements is sufficiently strong. 772 F.2d 972, 974 (D.C. Cir. 1985).

B. <u>Irreparable Harm</u>

4. The Bureau recites the standard principle that mere monetary loss does not constitute "irreparable harm" element. *Opposition* at ¶ 9. Petitioners claim something far less tangible than monetary loss. The 800 MHz authorizations they seek to retain are literally irreplaceable. Insofar as the Commission did not disqualify Petitioners as licensees, there is no inherent impediment to Kay and Sobel later reapplying for new 800 MHz facilities in the Los Angeles area. But due to intervening changes in the 800 MHz licensing rules and the ongoing reconfiguration of the 800 MHz band, Petitioners will likely be precluded, as a practical matter, from every reacquiring comparable 800 MHz facilities authorizations.

5. But the irreparable harm the Commission should focus on is not solely or even primarily Petitioners' loss of 800 MHz licenses. The loss to the Los Angeles public safety community must also be considered. It is impossible to overstate the importance, especially in these times, of improving the capacity and efficiency of public safety communications. If this opportunity to provide additional UHF spectrum to public safety in Los Angeles is not pursued, it should not happen by fiat, *i.e.*, merely because time ran out and the 800 MHz revocation sanction became effective. The Commission should consider and rule, one way or the other, on the merits of the *Motion to Modify*. The requested temporary stay will provide the Commission with adequate time to make that considered and reasoned determination.

C. Injury to Other Parties

6. The Bureau speculates that the stay could injure Nextel by depriving it of "valuable spectrum rights," and therefore concludes that Petitioners have not demonstrated that the stay would not injury any other party. Opposition at ¶ 10.[3] That aside, however, the Bureau's theory does not withstand scrutiny. The asserted theory is that, if the 800 MHz license revocations take effect, Nextel will succeed, by operation of Section 90.683(b) of the Commission's Rules,[4] to that portion of Petitioners' 800 MHz channels that are within the geographic licenses that Nextel obtained pursuant to auction.[5] If, on the other hand, the *Motion to Modify* is granted, Petitioners will retain their 800 MHz authorizations which will remain encumbrances on Nextel's geographic licenses.

7. Section 90.683(b) gives Nextel certain rights in the event of the termination of Petitioners' licenses, but it does not *entitle* Nextel to such terminations, and the non-revocation of Petitioners' 800 MHz licenses is therefore not a legally cognizable injury to Nextel. Indeed it may be more accurate to characterize the 800 MHz revocation sanction as a windfall for Nextel. The non-revocation of Petitioners' 800 MHz General Category channels will not deprive Nextel of operating authority on that spectrum.[6] Nextel has negotiated short spacing agreements that

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[3] Nextel is not a party to this proceeding, nor has it elected to intervene either in the original revocation proceedings, with respect to the *Motion to Modify*, nor in response to the *Motion for Stay*. It is curious that the Bureau elects to advocate rights on behalf of Nextel that Nextel itself has not asserted.

[4] "In the event that the authorization for a previously authorized co-channel station within the EA licensee's spectrum block is terminated or revoked, the EA licensee's co-channel obligations to such station will cease upon deletion of the facility from the Commission's official licensing records, and the EA licensee then will be able to construct and operate without regard to that previous authorization." 47 C.F.R. § 90.683(b).

[5] The Bureau erroneously cites FCC Auction No. 16, the 800 MHz Upper 200 Auction. Petitioners have no 800 MHz licenses that encumber the authorizations Nextel obtained in that auction. However, of the sixty nine 800 MHz channels licensed to Petitioners and subject to revocation, fifty two (more than 75%) are "incumbent" vis-à-vis the geographic licenses obtained by Nextel in FCC Auction No. 34, the 800 MHz General Category Auction.

[6] Ironically, however, the revocation of Petitioners' non-General Category 800 MHz channels will adversely affect Nextel. About a fourth of 800 MHz spectrum subject to revocation consists of Industrial/Business Land Transportation channels for which Petitioners have grandfathered commercial authority. These channels are not authorized by Nextel's geographic licenses, but Nextel has incorporated them into its iDen system pursuant to Commission-approved spectrum leases with Petitioners. If these licenses are revoked, the spectrum leases will no longer be valid, and Nextel will lose its operating authority on these channels.

allow Nextel unfettered use of its geographic licenses on Petitioners' General Category channels. Although Nextel pays for this right, it also paid less in the auction than it otherwise would have precisely because of Petitioners' incumbency. Nextel bid in the 800 MHz General Category auction with the full knowledge that the spectrum was encumbered by incumbent licensees, including Petitioners, whom it would be obliged to protect from interference.

8. Nextel was on both constructive and actual notice that such encumbrances would restrict the scope of operating authority under any geographic license it received, and that Nextel, not the Commission, was responsible for undertaking the necessary due diligence to factor this reality into its bid amounts.[7] If Nextel followed good business practice and the Commission's due diligence admonitions, it factored into its bid amount the encumbrance represented by Petitioners' 800 MHz licenses. If not, that was a business decision on Nextel's part, not something that affords it a "right" that the Commission must protect. Nextel's winning bid was less than it would have been in the absence of such encumbrances. If Petitioners' licenses are revoked, Nextel will gain the benefit of a license worth more than it paid in the auction.[8]

9. Petitioners offer an alternative sanction package whereby Nextel suffers nothing worse than the consequences of its own calculated business decisions, but additional spectrum is recovered for public safety use in the Los Angeles area. If, on the other hand, the sanction is not modified, the public will have lost the value of Petitioners' encumbrances that would otherwise have been included in Nextel's winning bid in the 800 MHz General Category Auction, and public safety will have gained nothing. But, again, the question here is not the effect of sanction modification, but rather the effect of stay. Even if there were something to the Bureau's

[7] See, e.g., *Auction Notice and Filing Requirements for 1,053 Licenses in the 800 MHz SMR Service for the General Category Auction*, Public Notice – Report No. AUC-00-34-B (DA 00-1100; released May 18, 2000) at §§ I.C.3 & I.C.4, pp. 9-11.

[8] An analogy to contract law may be helpful. If the Motion to Modify were viewed as a request to modify a contract between Petitioners and the Commission, Nextel would be, at best, an unintentional, incidental beneficiary with no legal standing to enforce the contract or challenge its modification. E.g., RESTATEMENT (SECOND) OF CONTRACTS § 302.

speculative theories regarding the effect on Nextel of permanent modification of the revocation sanction, it is absurd to suggest that a temporary stay will injure Nextel or any other party.

D. Public Interest Considerations

10. The Bureau asserts that Petitioners have not demonstrated a public interest benefit from the stay, *Opposition* at ¶ 11, but offers nothing to refute the substantial showing that was in fact offered. The Bureau's disclaimer of any possible public interest benefit is incredible. On August 17, 2005, the Bureau advised the Commission that the *Motion to Modify* "presents complex policy issues which require the Bureau to confer with ... officials in the Wireless Telecommunications Bureau [who] are presently on vacation or otherwise unavailable." *Enforcement Bureau's Request for an Extension of Time* (filed August 17, 2005). On that basis the Bureau sought a 40 day extension of time until September 26, 2005. But now, less than three weeks later, and well before the requested September 26 extension date, the Bureau categorically asserts that there is no public interest benefit to be gained from consideration of the *Motion to Modify*. How can the Bureau know that if, by its own admission, the proposal "presents complex policy issues" that the Bureau, again by its own admission, lacks sufficient expertise to evaluate on its own?[9]

11. In the *Motion to Modify*, Petitioners took great pains to demonstrate (a) the importance of public safety communications services, (b) the short supply of spectrum available

[9] Notwithstanding its lack of expertise on the purely wireless policy issues, the Bureau should consider the broader public interest ramifications from the standpoint of enforcement policy. The Bureau has repeatedly expressed concern that modification of the sanction may set a bad precedent or "send a wrong signal," thereby threatening the integrity of the Commission's enforcement program. Petitioners respectfully submit, however, that the concept presented in the *Motion to Modify* provides a positive opportunity for FCC enforcement policy. The Commission can fashion a sanction which not only redresses violations, encourages compliance, and deters future misconduct, but one which also furthers broader policy objectives of the agency—public safety communications and spectrum availability in this particular case. One of the FCC's sister regulators, the Environmental Protection Agency ("EPA"), has recognized the wisdom of this approach in its Supplemental Environmental Projects Policy, a program that provides for settlement agreements allowing a polluter to perform an environmentally beneficial project to mitigate civil penalties for violations. *Final EPA Supplemental Environmental Projects Policy*, Docket No. 98F-FRL-6008-8, 63 Fed. Reg. 24796 (May 5, 1998). A stay would afford the Commission the opportunity to at least consider whether such an approach is warranted here, and if so may create a positive precedent, creating a new and valuable enforcement tool.

for public safety in general, (c) the special and unique spectrum shortage concerns in Los Angeles in particular, (d) the extensive use of UHF spectrum by public safety entities in the Los Angeles area, (e) the insufficient supply of UHF spectrum for public safety spectrum in Southern California as evidenced, *inter alia*, by the Commission's repeated waiver of rules to make more such spectrum available, (f) the fact that the current sanction does not benefit public safety at all whereas the proposed modified sanction will make additional UHF spectrum available for public safety. Lacking any factual basis for refuting the substantial public interest showing set forth in Petitioners' filings, the Bureau offers two weak objections: (a) that the proposal set forth in the *Motion to Modify* lacks requisite specificity, and (b) that granting the *Motion for Stay* would unduly delay the final resolution of the above-captioned proceedings. Neither of these consideration warrants denial of the stay.

(1) Lack of Specificity

12. The Bureau complains that Petitioners "have failed to propose a specific settlement offer that can be meaningfully evaluated [but only a] mere offer to negotiate and vague promises of public safety spectrum availability." *Opposition* at ¶ 11. This is simply not the case. Petitioners have proposed a specific framework for an alternative sanction consisting of: (a) a monetary forfeiture in the maximum amount prescribed by statute; (b) a voluntary monetary contribution to the United States Treasury over and above the forfeiture amount; and (c) the contribution of UHF (470-512 MHz) spectrum for public safety use. Although Petitioners have suggested specific amounts for the monetary portion of the alternative sanction, they have repeatedly stated that this is negotiable. Similarly, Petitioners have made clear that the specific identity and number of UHF channels to be contributed is negotiable.

13. It is disingenuous for the Bureau to suggest that it might support a "turn-key" proposal, with nothing left to negotiation. In meetings with the Commissioners and their staffs,

the Bureau has repeatedly expressed the view that any proposal that leaves Petitioners better off financially than they would be if the 800 MHz revocation sanction stands is unacceptable. Petitioners, on the other hand, have suggested that the standard by which the alternative proposal should be judged—and the goal of the negotiations—is whether it (a) maintains the enforcement objective of the original sanction, *i.e.*, adequate deterrence to future misconduct, and (b) provides a substantial public interest benefit as compared with the original sanction.

14. Petitioners believe it would be presumptuous of them to unilaterally make those determinations and then present the Commission with a "take-it-or-leave-it" proposal. They therefore suggested that the Commission indicate agreement with these general principles—or different or modified principles of its own—and direct Petitioners and Commission staff to negotiate a definitive agreement consistent therewith. Perhaps this is not the best approach, but it is one that has been offered in good faith, and it is certainly not worthy of the contempt with which the Bureau has met it. Moreover, Petitioners have every incentive to negotiate in the utmost good faith, because unless the Commission finds the alternative sanction package to be in the public interest and approves it, the current sanction will remain.

(2) Undue Delay

15. The Bureau also worries that a stay will unduly delay the final resolution of the license revocation proceedings.[10] It speculates that Petitioners will appeal any adverse ruling on the *Motion to Modify*, thereby extending the stay for years to come. *Opposition* at ¶ 11. This

[10] The *Motion to Modify* itself contemplates (and requests) a stay of the effectiveness of the 800 MHz license revocations pending negotiation of the alternative sanction package, but Petitioners did not intend any unreasonable delay. Accordingly, in their "Suggested Negotiation Procedures," Petitioners proposed (a) that the stay would expire 30 days following a Commission order rejecting an alternative sanction package, (b) a 60 day time limit for negotiation of a joint proposal for a modified sanction, and (c) a provision that the negotiation period could be extended for only one additional 30 day period, and then only by the consent of all the parties. *Motion to Modify* at pp. 9-10. Petitioners are thus being extremely sensitive to the issue of timing by proposing specific mechanisms to ensure that any stay be no longer than absolutely necessary for consideration of the public interest ramifications of their proposal. It would be hoped that the Bureau would be equally sensitive to the timing issue on the other end of the burning candle, namely, that the Commission not be deprived of an opportunity even to consider the public interest ramifications merely because time ran out.

concern is not well founded. If the Commission were to rule adversely on the *Motion to Modify*, it would have the authority and discretion to lift the stay at that time, or at any time thereafter, if the public interest so requires. Indeed, the Commission can easily address this concern at the outset by providing an automatic "sunset" on the stay. For example, it could stay the effectiveness of the license revocation only until some brief time (*e.g.*, 30 days) after its initial ruling on the merits of the *Motion to Modify*. Assuming an adverse ruling on the merits, and assuming reconsideration or judicial review were sought, any further stay would have to be specifically requested and would be granted by the Commission or a court only if fully justified in the circumstances at that time.

16. On the issue of timing, the Bureau makes a vague reference, seemingly intended to be derogatory, about Petitioners' "past record and the nature and timing of their Motion for Stay." *Opposition* at ¶ 11. There is no explanation what "past record" is being referred to, but as for the timing of the *Motion for Stay*, it was the Bureau who delayed this matter by seeking a 40 day extension of time, very likely extending the pleading cycle beyond time when it would become moot. When Petitioners consented to the extension request, conditioned on a temporary stay to maintain the status quo, the Bureau withdrew its extension request and opposed Petitioners' stay request. The result is that nearly three weeks have been lost, and additional time is now being wasted arguing about the stay. This is time that could and should be spent evaluating the modification proposal on its merits.

III. CONCLUSION

17. The Commission may ultimately deny the *Motion to Modify*. But if it does so, it should be based on a careful consideration of its merits and a reasoned decision that the public interest benefits of the proposal are not adequate to overcome other valid considerations. The *Motion to Modify* presents, at a minimum, a *prima facie* case for a substantial public interest

benefit, and it should therefore be granted or denied on its own merits. It should not simply lapse by fiat.

WHEREFORE, it is requested that the *Motion for Stay* be granted.

Respectfully submitted:

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Dated: September 7, 2005

Certificate of Service

I, Robert J. Keller, counsel for James A. Kay. Jr., and Marc Sobel d/b/a Air Wave Communications, hereby certify that on this 7th day of September, 2005, I caused copies of the foregoing *Motion for Stay Pending Action on Motion to Modify* to be served, by email and/or by U.S. mail, first class postage prepaid, on the following:

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