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

OCT 17 2005

Federal Communications Commission
Office of Secretary

In the Matters of)
JAMES A. KAY, JR.)
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 COMMUNICATIONS)
Licensee of Certain Part 90 Licenses)
in the Los Angeles, California Area)

WT Docket No. 94-147

WT Docket No. 97-56

MOTION FOR EXTENSION OF OPERATING AUTHORITY

James A. Kay, Jr. ("Kay")¹ and Marc D. Sobel ("Sobel") (jointly, "Petitioners"), pursuant to Sections 301 and 308(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 301 & 308(a), Section 9(b) of the Administrative Procedure Act, 5 U.S.C. § 558(c)(2), and Section 1.41 of the Commission's Rules and Regulations, 47 C.F.R. § 1.41,² hereby respectfully move the Commission to extend, for ninety (90) additional days, the operating authority pursuant to the licenses listed in Attachment A hereto, in support whereof the following is respectfully shown:

1. In the above-captioned proceedings, the Commission has ordered the revocation of the authorizations listed in Attachment A, hereto. The licensees are nonetheless "authorized to operate the stations until final disposition of all administrative and/or judicial appeals." *James A. Kay, Jr., Decision* (FCC 01-341), 17 FCC Rcd 1834, 1866 (2002), as modified in *Memorandum Opinion and Order* (FCC 02-137), 17 FCC Rcd 8554, 8560 (2002); and *Marc Sobel, Decision* (FCC 01-342), 17 FCC Rcd 1872, 1894-1895 (2002). The Commission's decision has been affirmed on appeal, *Kay v. FCC*, 396 F.3d 1188 (D.C. Cir. 2005), and on October 3, 2005, the

¹ As to Call Sign WNXW487 this filing is also presented on behalf of Buddy Corp., and entity wholly owned and controlled by Kay. See Attachment A at n.2.
² A separate application by each of the licensees is being filed concurrently herewith.

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List A B C D E **ORIGINAL**

United States Supreme Court denied certiorari, 74 U.S.L.W. 3206. Petitioners are currently evaluating whether to seek rehearing from the Supreme Court, and any such request is due within 25 days of the denial of certiorari, SUP. CT. R. 44.2, i.e., on or before October 28, 2005.

2. If Petitioners do not seek rehearing, however, the revocation orders, unless stayed by the Commission,³ will become effective on either October 28, 2005, or on the date the Court of Appeals issues its mandate,⁴ whichever comes later, *see, e.g., Contemporary Media, Inc.*, 13 FCC Rcd 14437, 14461 (1998). By this filing Petitioners respectfully apply for a continuation of the operating authority for ninety (90) days, i.e., until January 28, 2006.

3. The requested extension of operating authority will afford the Commission adequate time to complete consideration of Petitioners' *Motion to Modify Sanction*, filed on August 3, 2005.⁵ Kay and Sobel therein proposed an alternative sanction package consisting of: (a) the contribution by Petitioners (free of any compensation) of a block of clear UHF (470-512 MHz) channels for use by public safety entities in the Los Angeles area; and (b) a monetary

³ On August 23, 2005, Petitioners filed with the Commission a *Motion for Stay Pending Action on Motion to Modify*, in which they ask the Commission to stay effectiveness of the revocation sanction ordered in the above-captioned proceedings pending consideration of and action on their August 3, 2005, *Motion to Modify Sanction*, wherein Petitioners propose an alternative sanction package. The Commission has not yet acted on the stay request.

⁴ On October 4, 2005, Petitioners filed with the United States Court of Appeals for the District of Columbia Circuit a *Motion for Further Stay of Mandate* asking the court to stay issuance of its mandate pending Commission action on the *Motion to Modify Sanction*. To date, neither the Court nor the Commission has acted on the respective stay requests. The Court has not yet acted on the stay request.

⁵ It is possible that the applicable statutes and regulations could be interpreted in such a way that, were the revocation sanction to become effective, the Commission would be deprived of the legal authority to pursue the options presented in the *Motion to Modify Sanction*. While Petitioners do not concede that this is the case, they nonetheless request this extension of operating authority out of an abundance of caution to avoid that possibility.

forfeiture in the aggregate amount of \$150,000, plus an additional voluntary contribution of \$600,000 to the U.S. treasury.⁶

4. Petitioners' alternative sanction proposal raises important public interest considerations, including: (a) the importance of public safety communications services, (b) the short supply of spectrum available 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.

5. If the Commission ultimately denies the *Motion to Modify Sanction*, it should do so 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. Even the Commission's own Enforcement Bureau has candidly acknowledged that the alternative sanction proposal "presents complex policy issues."⁷ Whether it is ultimately granted in its current or a modified form, or denied altogether, the *Motion to Modify Sanction* is certainly not a matter that should simply lapse by fiat. A brief extension of the operating authority under the subject licenses will ensure an adequate opportunity for the careful consideration demanded by the Commission's statutory public interest obligations.

⁶ On September 12, 2005, Petitioners tendered a proposed consent decree in which the proposed number of UHF channels was set at twelve. Petitioners have nevertheless repeatedly made clear that they are willing to negotiate as to both the number of UHF channels and the amount of the monetary contribution.

⁷ *Enforcement Bureau's Request for an Extension of Time* at ¶ 4 (filed August 17, 2005).

6. Petitioners also seek additional time to allow for the orderly transition and termination of operations under the licenses. Allowing licensees brief additional periods of time to wind down operations after appeals from a revocation or non-renewal have become effective is a common practice. *E.g., Pass Word, Inc.*, 76 FCC 2d 465, 521 (1980); *Trinity Broadcasting of Florida, Inc., Order* (FCC 99I-13), 1999 FCC Lexis 2374 at ¶ 4 (1999).⁸

WHEREFORE, it is respectfully requested that the operating authority under the licenses listed in Attachment A hereto be extended an additional 90 days to and including January 28, 2006, or in the event that Kay and Sobel seek rehearing of the Supreme Court's denial of certiorari, until 90 days after final conclusion of all appeals.

Respectfully submitted:

By:



Robert J. Keller
Counsel for James A. Kay, Jr., and
Marc Sobel d/b/a Air Wave Communications
Law Offices of Robert J. Keller, P.C.
PO Box 33428 – Farragut Station
Washington, D.C. 20033-0428
202-223-2100

Aaron P. Shainis
Counsel for James A. Kay, Jr.
Shainis and Peltzman, Chartered
1850 M Street, N.W. – Suite 240
Washington, D.C. 20036-5803
202-293-0011

Dated: September 17, 2005

⁸ Among the various “winding down” considerations, some of the licenses are subject to a Commission-approved spectrum lease agreements with Nextel. See FCC File Nos. 0001718896, 0001719211, 0001719224, 0001719245, 0001719254, and 0001719291. In the event the Commission does not grant the relief requested herein, it should notify Nextel that it must immediately terminate all operations pursuant to these spectrum lease agreements.

ATTACHMENT A
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JAMES A. KAY, JR.

<u>Calls Sign</u>	<u>Svc</u>	<u>Exp. Date</u> ⁹
WNIZ676	GX	01/21/1998
WNJA910	YX	06/22/1998
WNJL306	YX	12/22/1997
WNKV762	YX	03/21/1999
WNMT755	GX	05/11/1998
WNMY402	YX	10/31/2000
WNMY773	GX	01/06/1999
WNPJ874	YX	06/07/1998
WNSK552	YX	08/10/1998
WNVL794	GX	02/18/1998
WNVW779	GX	05/11/1998
WNWB268	GX	05/17/1998
WNWB332	GX	05/11/1998
WNWK982	GX	05/11/1998
WNWN703	GX	03/30/1998
WNWQ651	GX	05/11/1998
WNXB280	GX	04/16/1998
WNXG372	GX	05/17/1998
WNXQ353	GX	05/11/1998
WNXQ911	GX	01/27/1998
WNXS450	GX	05/11/1998
WNXS753	GX	01/29/1997
WNXW280	GX	05/11/1998
WNXW327	YX	06/01/1998
WNXW487 ¹⁰	GB	11/23/1997
WNXW549	GX	05/11/1998
WNYQ437	GX	05/11/1998
WNYR747	GX	05/11/1998
WNZY505	GX	05/11/1998
WNZZ731	GX	09/24/1997
WPAP683	GX	10/05/1997
WPAZ639	GX	06/02/1998
WPBW517	GX	04/08/1998
WPBZ518	GX	08/10/1998

⁹ Timely-filed renewal applications are pending.

¹⁰ The ordering clause in the Decision identifies this as license of James A. Kay, Jr., but it is actually held by Buddy Corp., and entity wholly owned by James A. Kay, Jr.

ATTACHMENT A
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MS AIRWAVES, INC.¹¹

<u>Calls Sign</u>	<u>Svc</u>	<u>Exp. Date</u> ¹²
KNBT299	GX	04/22/1999
KRU576	GX	04/22/1999
WNPY680	GX	02/24/1999
WNWB334	GX	04/20/1998
WNXL471	GX	07/05/1999
WNYR424	GX	04/22/1998
WPAD685	GX	04/22/1998
WPCA891	GX	04/26/1998
WPCG780	GX	03/01/1999
WPCZ354	GX	06/30/1999
WPDB603	GX	02/04/1999
WPF529	GX	07/05/1999
WPFH460	GX	07/13/1999
WNZC764 ¹³		

¹¹ At the time of the decision these authorizations were held by Marc D. Sobel, and individual. Pursuant to pro forma assignment of licenses they are now held by MS Airwaves, Inc., a corporation controlled by Sobel.

¹² Timely-filed renewal applications are pending.

¹³ This call sign is listed in the ordering clause of the revocation order. Sobel believes that it is no longer an active authorization, but has not yet been able to confirm this, and so he has included it here out of an abundance of caution.

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 17th day of October, 2005, I caused copies of the foregoing *Motion for Leave to Submit Reply* to be served, by electronic mail on the following:

Kris Monteith, Acting Bureau Chief
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

William Davenport, Chief
William D. Freedman, Deputy Chief
Gary P. Schonman, Esquire
Investigations & Hearings Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Sam Feder, Acting General Counsel
Daniel M. Armstrong, Associate General Counsel
Federal Communications Commission
445 12th Street, S.W. – Room 8-B724
Washington, D.C. 20554

John J. Schauble, Esquire
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

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Robert J. Keller