

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

FILE STAMP
AND RETURN

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)
)
Applicant for Certain Part 90 Authorizations)
in the Los Angeles Area and Requestor of)
Certain Finder's Preferences)
)
MARC SOBEL AND MARC SOBEL)
D/B/A AIR WAVE COMMUNICATIONS)
Licensee of Certain Part 90 Stations in the)
Los Angeles Area)

WT Docket No. 94-147

WT Docket No. 97-56

FILED/ACCEPTED

APR 21 2010

Federal Communications Commission
Office of the Secretary

MOTION FOR STAY

Russell H. Fox
Stefanie Z. Desai
Darren J. Abernethy
Mintz, Levin, Cohn, Ferris
Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300

*Counsel to James A. Kay, Jr. and
Marc D. Sobel*

April 21, 2010

TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY	2
II.	PROCEDURAL HISTORY.....	3
III.	ARGUMENT	5
	A. The Public Interest Would Be Served By Staying the <i>Order</i> So the Commission Can Revisit the Sanctions Proposal	6
	B. Licensees Will Incur Irreparable Harm Absent A Stay	7
	C. A Stay Will Not Harm Any Other Parties or the Commission.....	8
	D. Licensees Will Likely Prevail on the Merits.....	9
	1. The Mandate is Not an impediment To Amending the Sanctions	9
	2. The FCC Did Not Review Licensees’ Arguments On The Merits Or Engage In A Substantive Analysis Of The Alternative Proposal	11
IV.	CONCLUSION.....	17

**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)	WT Docket No. 97-56
)	
Applicant for Certain Part 90 Authorizations)	
in the Los Angeles Area and Requestor of)	
Certain Finder's Preferences)	
)	
MARC SOBEL AND MARC SOBEL)	
D/B/A AIR WAVE COMMUNICATIONS)	
Licensee of Certain Part 90 Stations in the)	
Los Angeles Area)	

MOTION FOR STAY

James A. Kay, Jr. ("Kay") and Marc D. Sobel ("Sobel") (collectively, "Licensees"), pursuant to Section 416(b) of the Communications Act of 1934, as amended, 5 U.S.C. § 705, and 47 C.F.R. §§ 1.43, 1.747, by their undersigned counsel, hereby file this Motion for Stay of the Memorandum Opinion and Order issued by the Federal Communications Commission ("FCC" or "Commission") on April 12, 2010,^{1/} pending the Commission's consideration of the Petition for Reconsideration ("Petition") of the *Order* that the Licensees have also filed today.

^{1/} *James A. Kay Jr, Licensee of One Hundred Fifty Two Party 90 Licenses in the Los Angeles, California Area; Marc Sobel, Applicant for Certain Part 90 Authorizations in the Los Angeles Area and Requestor of Certain Finder's Preferences; Marc Sobel and Marc Sobel D/B/A Air Wave Communications Licensee of Certain Part 90 Licenses in the Los Angeles Area, Memorandum Opinion and Order, FCC 10-55 (rel. April 12, 2010) ("Order").*

I. INTRODUCTION AND SUMMARY

On April 12, 2010, the Commission issued an *Order* requiring the Licensees to cease operating facilities authorized by certain 800 MHz band licenses (the “Licenses”) and dismissing Licensees’ proposal for an alternative set of sanctions as provided in the Licensees’ August 2005 *Motion to Modify Sanction* (“*Modification Motion*”).^{2/} The Licensees submitted the *Modification Motion* in response to the FCC’s decision to revoke the Licenses as a sanction for violation of the Commission’s rules. Under the proposed alternative sanctions, Licensees would have assigned UHF spectrum licensed to them in the Southern California area for use in satisfying critical public communications requirements and would have made a voluntary payment to the United States Treasury. The *Order* summarily dismissed the Licensees’ *Modification Motion* without any discussion of its merits or analysis of the public interest benefits it would have conveyed.

Licensees do not seek to disturb the FCC’s judgment on the merits, nor the mandate issued by the United States Court of Appeals for the D.C. Circuit (the “D.C. Circuit” or “Court”) in the instant case. This Motion merely seeks to stay the *Order*’s requirement that Licensees discontinue operations by 12:01 am on Friday, April 23, 2010, in order to give the Commission time to reconsider the *Order*.

As discussed below, the Commission should grant this Motion because the public interest supports a stay, and because the Licensees are likely to prevail under their Petition for Reconsideration. Adoption of a stay would also protect Licensees from irreparable harm and would not adversely affect any other entities or the public interest.

^{2/} *Order* ¶ 7.

II. PROCEDURAL HISTORY

In 1997 and 1999, the Commission conducted two license revocation proceedings, one involving Kay^{3/} and the other involving Sobel.^{4/} On January 25, 2002, the Commission ultimately found that Kay and Sobel had engaged in an unauthorized transfer of control by virtue of a 1994 management agreement that was disclosed to the Commission during the enforcement proceeding. The Commission also found that the Licensees lacked candor in connection with supporting affidavits in a 1995 pleading because the Licensees' record statements mistakenly failed to reflect that the terms of the 1994 management agreement could be construed as an "interest" or "ownership" interest in the Licenses.^{5/} The Commission revoked the Licenses as a sanction for the Licensees' violation of Commission rules, although the Commission did not find that the Licensees were unqualified to hold FCC authorizations.^{6/}

^{3/} *James A. Kay, Jr., Order to Show Cause, Hearing Designation Order, Notice of Opportunity for Hearing for Forfeiture*, 10 FCC Rcd 2062 (1994); *Order*, 11 FCC Rcd 5324 (1996) (modifying hearing designation order); *Summary Decision of Administrative Law Judge Richard L. Sippel*, 11 FCC Rcd 6585 (ALJ 1996); *Memorandum Opinion and Order*, 12 FCC Rcd 2898 (1997) (reversing summary decision); *Memorandum Opinion and Order*, 13 FCC Rcd 16369 (1998) (denying pre-trial request extraordinary relief); *Order*, 13 FCC Rcd 23780 (1998) (removing ALJ Sippel as presiding officer); *Initial Decision of Chief Administrative Law Judge Joseph Chachkin*, 1999 FCC Lexis 4387 (ALJ 1999) (resolving all issues in Kay's favor); *Decision*, 17 FCC Rcd 1834 (2002) (reversing initial decision in part); *Memorandum Opinion and Order* (2002) (denying reconsideration).

^{4/} *Marc Sobel and Marc Sobel d/b/a Air Wave Communications*, WT Docket No. 97-56: *Order to Show Cause, Hearing Designation Order, Notice of Opportunity for Hearing for Forfeiture*, 12 FCC Rcd 3298 (1997); *Initial Decision of Administrative Law John M. Frysiak*, 12 FCC Rcd 22879 (1999) (resolving all issues against Sobel); *Decision*, 17 FCC Rcd 1834 (2002) (affirming initial decision in part); *Memorandum Opinion and Order*, 17 FCC Rcd 8562 (2002) (denying reconsideration); *Memorandum Opinion and Order*, 19 FCC Rcd 801 (1994) (denying further reconsideration).

^{5/} *James A. Kay, Jr.*, 17 FCC Rcd 1834 (2002) ("*Kay Decision*"), *recon. denied*, 17 FCC Rcd 8554 (2002) and *Marc Sobel*, 17 FCC Rcd 1872 (2002) ("*Sobel Decision*"), *recon. denied*, 17 FCC Rcd 8562 (2002), *further recon. denied*, 19 FCC Rcd 801 (2004), *consolidated on appeal and aff'd sub nom. Kay v. FCC*, 396 F.3d 1184 (D.C. Cir. 2005), *cert. denied*, 546 U.S. 871 (2005).

^{6/} *See Sobel Decision* ¶¶ 79-80; *Kay Decision* ¶ 100.

On February 1, 2005, the Court upheld the Commission's findings. However, the Court did not address the Commission's license revocation sanction.^{7/} The United States Supreme Court denied certiorari^{8/} and the D.C. Circuit denied a motion for further stay and issued its mandate in the case. At no time did the D.C. Circuit or any other court address the sanctions at issue.^{9/}

On August 3, 2005, the Licensees filed a *Motion to Modify Sanction* in which they asked the Commission to "rescind the license revocations, substituting for them a modified sanction package"^{10/} The Licensees proposed that instead of license revocation, the Licensees would contribute spectrum for which they are licensed for public safety use and would also make payments to the Treasury. The Licensees urged the Commission to review this proposal, as it would serve the public interest by providing "additional spectrum for public safety" and "advanc[ing] and enhanc[ing] public safety communications in the Los Angeles area."^{11/}

The Licensees have continued to operate their 800 MHz facilities based on numerous requests for extension that were granted in the *Order*.^{12/} On April 12, 2010, the FCC issued the

^{7/} *Kay v. FCC*, 396 F.3d 1184 (D.C. Cir. 2005).

^{8/} *Kay v. FCC*, 546 U.S. 871 (2005).

^{9/} *Kay v. FCC*, No. 02-1175 (D.C. Cir. Dec. 5, 2005).

^{10/} *James A. Kay Jr, Licensee of One Hundred Fifty Two Party 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, Motion to Modify Sanction*, WT Docket Nos. 94-147, 97-56, at 7 (filed Aug. 3, 2005).

^{11/} *Id.* at 10.

^{12/} These Motions are: Motion for Stay Pending Action on Motion to Modify, filed August 23, 2005, and a Motion for Extension of Operating Authority, filed October 17, 2005, and Motions for Further Extension of Operating Authority, filed January 17, 2006; April 12, 2006; July 19, 2006; October 12, 2006; January 9, 2007; April 11, 2007; July 10, 2007; October 9, 2007; January 18, 2008; April 17, 2008; July 11, 2008; September 15, 2008; December 11, 2008; March 12, 2009; June 8, 2009; September 15, 2009; December 9, 2009; and March 1, 2010.

Order denying Licensees' *Modification Motion* and authorizing them to continue operations for only eleven more days, until 12:01 a.m. on Friday, April 23, 2010.

III. ARGUMENT

The Commission should stay the *Order* pending Commission consideration of the Petition for Reconsideration. Licensees' stay request satisfies the traditional four-pronged test for granting such relief established in *Virginia Petroleum Jobber Association v. Federal Power Commission*.^{13/} Under this standard the Commission will grant a motion to stay execution of an agency order if the movant can show: (1) it is likely to succeed on the merits of its appeal, (2) it will suffer irreparable harm if the Commission does not grant the stay, (3) a stay will not result in substantial harm to a third party, and (4) the public interest will be served by a stay.^{14/} Complete satisfaction of all four prongs is not always necessary; a stay may be granted if the movant demonstrates either "a combination of probable success and the possibility of irreparable harm, or that serious questions are raised and the balance of hardships tips sharply in his favor."^{15/} The Commission has granted stays without assessing the likelihood of success at all if the petitioner satisfies the other factors for granting a stay.^{16/}

Here, the balance of harms strongly favors a stay because the public interest will be served by providing the Commission with an opportunity to adopt the alternative sanctions proposal and assign the Licensees' UHF spectrum for public safety communications use in the

^{13/} *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921 (D.C. Cir. 1958) ("*Virginia Petroleum*").

^{14/} *Id.* at 925.

^{15/} *Washington Metro. Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841, 843 (D.C. Cir. 1977) ("*Holiday Tours*").

^{16/} *Hickory Tech. Corp. and Heartland Telecomms. Co. of Iowa*, 13 FCC Rcd 22085, ¶ 3 (1998).

Southern California area. Licensees will suffer immediate and irreparable harm if the Licenses are revoked. In contrast, no other parties will suffer any injury or harm by granting a stay pending the petition for reconsideration because no other parties would be able to utilize the licenses at issue in any case. Further, a stay should be granted because the Licensees are likely to succeed on the merits.^{17/}

A. The Public Interest Would be Served by Staying the *Order* so that the Commission can Revisit the Sanctions Proposal

Absent a stay, the Licenses would be revoked pursuant to the FCC's originally imposed sanctions and the opportunity to explore alternative sanctions directly benefiting public safety communications and the public interest would be lost. Accordingly, the public interest would be served by granting a stay of the *Order* so that the Commission can more fully consider the Licensees' proposed alternative sanctions as the Petition for Reconsideration requests. Commission grant of a stay would provide the FCC a unique opportunity to both adhere to its enforcement decision and advance the important goal of enhancing interoperable public safety communications in one of our nation's most populous and sensitive areas. On the other hand, denying the stay and rendering moot the relief sought by the Petition would disserve the public interest. The current sanction only punishes the Licensee, and does nothing to assist public safety communications. As discussed further below, the *Order* should be reversed because the Commission failed to address both the general public interest benefits and the specific positive impacts upon first responders and public safety entities of the alternative proposal. Grant of the requested stay will permit the Commission an opportunity to revisit this aspect of its *Order*.

^{17/} A court does not judge the "likelihood of success" question to a point of mathematical precision. *See Holiday Tours*, 559 F.2d at 843-44. In determining whether a stay is appropriate, the court will consider the strength of a movant's proffer with respect to the other elements of a stay (*i.e.*, irreparable harm, harm to others, and the public interest). A strong showing of, for instance, public interest, will reduce the showing that a court will require with respect to the movant's merits case. *Id.*

B. Licensees Will Incur Irreparable Harm Absent a Stay

The Licensees will suffer irreparable harm absent a stay because they will, for all practical purposes, lose their businesses. Shutting off service on the licensed channels as the *Order* requires would cause Licensees to incur unrecoverable losses of goodwill and would result in contractual breach and substantial economic harm, none of which could be remedied at a later date. Such losses are imminent and irreparable. This is precisely the sort of irreparable harm that the FCC and federal courts have found to justify a stay.^{18/}

Licensees will lose significant revenue, which will jeopardize their operations and cause permanent and irreparable harm. For example, a contract with Sprint Nextel Corporation (“Nextel”) for use of the spectrum at issue represents approximately ninety percent (90%) of the Kay’s revenues. Indeed, the revenue he receives from Nextel serves to support Kay’s operations in general. Those operations support, among others, the following:

- Fourteen employees which are on the payroll of Kay’s companies in Los Angeles.
- Part time employment to approximately ten people in Rushford and Caneadea, NY, where Kay has operations.
- Approximately thirty small businesses and professional companies in Los Angeles, another dozen in the Las Vegas area and approximately twenty in New York that provide services to Kay’s companies. Kay would be required to terminate his relationship with all of those entities if the Licenses were revoked, producing a material negative impact on those companies.

^{18/} *Centennial Wireless PCS License Corp.*, 13 FCC Rcd 4471, ¶ 19 (1998) (stating that unrecoverable economic loss, loss of reputation, and cessation of business constitute irreparable harm); *Holiday Tours*, 559 F.2d at 843 (holding that unrecoverable economic harm, such as that which would cause business operations to cease, constitutes irreparable harm); *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (1985) (“[T]he injury must be both certain and great; it must be actual and not theoretical . . . [and] the party seeking injunctive relief must show that [t]he injury complained of [is] of such *imminence* that there is a ‘clear and present’ need for equitable relief to prevent irreparable harm”) (emphasis in original, internal citations omitted); *Federal-State Joint Board on Universal Service*, 20 FCC Rcd 5167, ¶ 4 (2005) (“In order to demonstrate irreparable harm, the harm must be certain and immediate.”) (subsequent history omitted); *Improving Public Safety Communications in the 800 MHz Band*, 21 FCC Rcd 678, ¶ 6 (2006) (“party seeking a stay must show that ‘the injury complained of [is] of such *imminence* that there is a ‘clear and present’ need for equitable relief to prevent irreparable harm”) (internal citations omitted).

Furthermore, if the Licensees lose their right to operate the affected frequencies, the Licensees will be unable to recover those revenues, the customer losses, or their professional reputations. The harm Licensees will suffer is the exact type of harm that the FCC has recognized constitutes a stay.^{19/} Indeed, the Commission has found irreparable harm based on financial hardship significantly less severe than that facing the Licensees.^{20/} The permanent and significant financial harm that Licensees will incur weighs in favor of granting a stay until the Commission can review and render a decision on Licensees' petition for reconsideration.

C. A Stay Will not Harm any Other Parties or the Commission

Staying the *Order* will not harm anyone in any way. The revoked licenses at issue cover spectrum in the 800 MHz frequency band. Because of the freeze on the use of 800 MHz spectrum in Southern California, even if the Licenses were revoked, no other party would be eligible to apply to use the spectrum.^{21/} Conversely, if the FCC granted the Motion for Stay and adopted the alternative sanction, public safety entities would have immediate access to spectrum they currently need and employ.

A stay would not interfere with the FCC's determination or authority to impose sanctions on the Licensees. The alternative sanctions proposal would still result in a significant punishment of the Licensees. Nothing about permitting the Licensees to retain the Licenses is

^{19/} See *supra* note 18.

^{20/} See *Hickory Tech Corp.* ¶ 3 (where the FCC stayed an order so that the movant would not have to spend more than \$80,000 to conduct cost studies).

^{21/} See *County of Los Angeles, California, Request for Waiver of the Commission's Rules to Authorize Public Safety Communications in the 476-482 MHz Band*, File No. 0002981309 *et al.*, 23 FCC Rcd 18389 (2008). If the Licenses that cover channels in the spectrum that will ultimately be dedicated for public safety entities will not have any earlier access to that spectrum. Nextel will still be required to reband the entire public safety band before the spectrum covered by the Licenses are of any utility to public safety licensees. Similarly, the so-called "interleaved" 800 MHz channels for which the Licensees are authorized will also still be subject to the licensing freeze in Southern California. Even when that freeze is lifted, the channels will not be immediately available to others until it is cleared by Nextel.

inconsistent with the 2002 Order. The Commission has recognized that Licensees are qualified to be FCC licensees.^{22/} The FCC has held that it will “revoke[] a license not to punish a licensee for its conduct, but because that conduct indicates to the Commission that the licensee is no longer qualified to hold it.”^{23/} Here, the Commission has not found Licensees to be disqualified. Moreover, the Licensees have demonstrated during the pending proceeding – over 10 years – that they are capable of holding the licenses and complying with the FCC’s rules.

D. Licensees Will Likely Prevail on the Merits

Grant of a stay is appropriate because Licensees’ Petition for Reconsideration is likely to succeed on the merits. The findings of fact and conclusions of law in the *Order* are flawed. First, the Commission erroneously concluded that the mandate impedes it from exercising its jurisdiction over an ancillary issue not addressed by the Court’s mandate or accompanying opinion. Second, the *Order* incorrectly failed to substantively address or analyze the benefits of Licensees’ proposed alternative sanctions.

1. The Mandate is Not an impediment to Amending the Sanctions

The *Order* is based on the erroneous assertion that the mandate issued by the Court prohibits the Commission from accepting the Licensees’ alternative sanction proposal. The mandate does not, in fact, prevent the Commission from addressing a related ancillary matter not addressed by the Court. The Commission thus incorrectly asserts that it may not act because “judicial review has been completed; and the mandate of the appellate court has issued.”^{24/} As a threshold matter, a “mandate” is merely a procedural device -- it is simply a “copy of the

^{22/} *Sobel Decision* ¶¶ 79-80; *Kay Decision* ¶ 100.

^{23/} *Contemporary Media, Inc. v. FCC*, 214 F.3d 187, 199 (D.C. Cir. 2000).

^{24/} *Order* ¶ 5.

judgment, a copy of the court's opinion, if any, and [if applicable] any direction"^{25/} It "formally marks the end of appellate jurisdiction."^{26/} Here, the mandate simply stated that the "orders appealed . . . in these cases are affirmed in accordance with the opinion of the court"^{27/} The mandate does not direct the FCC to take or forbear from taking any specific actions.

The Court's opinion, in turn, simply affirmed the FCC's rationale and reasoning with respect to the legal and factual issues before it.^{28/} Neither the opinion nor the mandate addressed the sanctions, much less affirmatively directed the FCC to impose such sanctions. Accordingly, there is no directive from the Court that would render the Commission without jurisdiction in the instant matter. To the contrary, the mandate affirmatively ended the D.C. Circuit's jurisdiction over the matter and returned it to the Commission's jurisdiction. Shifting the focus of the sanctions from devastating Licensees' businesses to assisting public safety and making a significant contribution to the United States Treasury would leave the mandate in full effect, the legal judgment untouched and better serve the public interest.

In its *Order*, the Commission asserts that Licensees have not shown good cause for it to request that the D.C. Circuit recall its mandate and cites the D.C. Circuit which has stated that: "A mandate once issued will not be recalled except by order of the court for good cause shown. The good cause requisite for recall of mandate is the showing of need to avoid injustice."^{29/} The Licensees agree with the statement of law but disagree that it is at all applicable here. The

^{25/} FED. RULE APP. P. 41(a).

^{26/} *Johnson v. Bechtel Associates*, 801 F.2d 412, at 415 (D.C. Cir. 1986).

^{27/} *James A. Kay, Jr. v. FCC*, Case No. 02-1175 (Feb. 1, 2005).

^{28/} *Kay v. FCC*, 396 F.3d 1184, 1188-89, 1190 (D.C. Cir. 2005).

^{29/} *Order* ¶ 6 (quoting *Great Boston Television Corp. v. FCC*, 463 F.2d 268, 281-82 (D.C. Cir. 1971)).

Licensees have not asked for, and do not seek, a recall of the D.C. Circuit's mandate, as such a recall is not necessary for the Commission to grant Licensees' request.

Similarly, the *Order* asserts that Licensees "fail to demonstrate factors sufficiently extraordinary to upset the principles of administrative and judicial finality and for the Commission to seek recall of the Court's mandate."^{30/} The Commission's assertion misses the point. The Licensees recognize that the Commission's decision is final and the Court's decision, albeit limited, is also final. It does not seek to challenge either. Instead, it asks the Commission to exercise its authority and discretion to modify a prior decision in a manner that better promotes the public interest and does not conflict with the Court's mandate.

Nor is the *Order* correct when it asserts that Licensees were required to demonstrate that the Commission's existing decisions "constitute an injustice."^{31/} While Licensees continue to believe that any rational review of the sanctions imposed on Licensees would reveal that they dramatically depart from any relevant Commission precedent, the Commission's assertion that a demonstration of injustice is required to grant Licensees the relief requested is not correct in this instance. A demonstration of injustice may be applicable if Licensees asked the Commission to reconsider its decision or to recall the Court's mandate. Licensees do neither. Accordingly, the Commission's asserted requirement rests on an inapplicable premise.

2. The FCC did not Review Licensees' Arguments on the Merits or Engage in a Substantive Analysis of the Alternative Proposal

The *Order* should be reconsidered during the stay because it incorrectly failed to discuss or analyze the Licensee's demonstration that alternative sanctions would promote the public interest by improving, expanding, and enhancing the capacity, coverage, and interoperability of

^{30/} *Id.*

^{31/} *Order* ¶ 6.

public safety communications. As the Commission has recognized, reconsideration is “appropriate” where the “petitioner shows either a material error or *omission* in the original order.”^{32/}

The *Order* overlooked the Licensees’ argument that the Commission may adopt the proposed sanctions pursuant to the “broad” and “expansive” powers conferred to it by Congress to regulate based on and according to its reasoned assessment of the “public interest, convenience and necessity.”^{33/} The public interest directive provides the Commission wide authority to further its legislative policy.^{34/} This power means that a Commission decision or judgment “regarding how the public interest is best served is entitled to substantial judicial deference,” and “is not to be set aside” as long as its implementation of the public interest standard is “based on a rational weighing of competing policies.”^{35/} Indeed, a federal appellate court’s supervisory authority over administrative agency actions is considerably restricted compared to their plenary authority over lower courts. As the Supreme Court has observed, a

^{32/} *Fireside Media*, FCC 10-34, ¶ 7 (rel. Feb. 24, 2010) (emphasis added); *The Helpline, New NCE (FM), Athens, Ohio, Facility ID No. 175139, File No. BNPED-20071019BCG*, Petition for Reconsideration, DA No. 10-444 (rel. Mar. 16, 2010) (noting that because the petitioner’s “arguments were not considered prior to dismissal” [of its application] the Commission would treat the petition as a request for reconsideration).

^{33/} See *March 2010 Legal Memorandum* at 2-4; see also *FCC v. WNCN Listeners’ Guild*, 450 U.S. 582, 594 (1981); *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978); *FCC v. NBC (KOA)*, 319 U.S. 190, 219 (1943).

^{34/} *WNCN*, 450 U.S. at 593 (1981) (The public interest standard is “a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy.”) (quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940)). The standard “leaves wide discretion and calls for imaginative interpretation.” *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 90 (1953).

^{35/} *WNCN*, 450 U.S. at 596.

“much deeper issue” arises when an appellate court judgment is “not a mandate from court to court but from a court to an administrative agency.”^{36/}

The *Order* is also flawed because it failed to recognize that the alternative sanctions would promote one of its principal obligations – improving public safety communications. Improving public safety communications has long been one of the Commission’s strategic goals.^{37/} The Commission has emphasized that “Communications during emergencies and crises must be available for public safety, health, defense, and emergency personnel, as well as all consumers in need. The Nation’s critical communications infrastructure must be reliable, interoperable, redundant, and rapidly restorable.”^{38/} Moreover, Congress has given the Commission a broader mandate to act in the best interest of the public.^{39/}

Failing to consider seriously a solution that would both promote public safety and serve the public interest conflicts with the numerous Congressional directives that instruct the Commission to make decisions that reflect public safety interests and, in particular which

^{36/} See *Pottsville Broadcasting Co.*, 309 U.S. at 141 (noting “[o]n review the court may thus correct errors of law and on remand the Commission is bound to act upon the correction. But an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge.”) *Id.* at 145.

^{37/} FCC Public Safety Website, <http://www.fcc.gov/homeland/>.

^{38/} *Id.*

^{39/} *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services; 2000 Biennial Regulatory Review Spectrum Aggregation Limits For Commercial Mobile Radio Services; Increasing Flexibility To Promote Access to and the Efficient and Intensive Use of Spectrum and the Widespread Deployment of Wireless Services, and To Facilitate Capital Formation, Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 19078, ¶ 130 (2004) (“Congress directed the Commission to pursue other broader public interest goals. Specifically, Section 309(j)(3) requires the Commission to promote efficient and intensive use of the spectrum, encourage economic opportunity and competition, and recover for the public a portion of the value of the public spectrum. Given these statutory obligations, the Commission’s spectrum policy goals include facilitating the efficient use of spectrum, as well as fostering competition, and rapid, widespread service consistent with the goals of the Communications Act.”).

promote the use of spectrum for public safety communications. For example, Congress directed that TV broadcasters transition to digital broadcast technology in order to vacate the 700 MHz band spectrum and facilitate the establishment of a nationwide, interoperable broadband communications network for use by public safety responders.

Members of Congress have also encouraged the Commission to make public safety a priority. In 2008, Rep. Jane Harman (D-CA), a Member of the Energy and Commerce Telecommunications and Internet Subcommittee and of the Homeland Security Committee, introduced legislation to authorize a nationwide, public safety broadband licensee and to fund the administrative and management costs of establishing an interoperable, public safety broadband network using 700 MHz spectrum.^{40/} Just a few weeks ago, Rep. Boucher (D-VA), Chair of the House Telecommunications Subcommittee, noted that the “Commission’s proposal for auctioning to commercial bidders the D Block of the 700 MHz spectrum without onerous conditions is commendable. The proceeds from the auction should be applied to helping first responders purchase and install the equipment needed to bring to fire, police and rescue agencies nationwide a truly interoperable communications capability.”^{41/}

Similarly, Senator John McCain (R-AZ), former Chair of the Senate Commerce, Science and Transportation Committee, has said, “[t]he Federal government needs to (1) develop a comprehensive interoperable communications plan and set equipment standards, (2) fund the purchase of interoperable communications equipment and (3) provide public safety with

^{40/} Harman Introduces Legislation to Promote Interoperable Public Safety Network, Press Release, May 14, 2008, *available at* <http://harman.house.gov/2008/05/5-14-08.shtml>.

^{41/} Statement of Congressman Rick Boucher, Subcommittee on Communications, Technology and the Internet Hearing, Oversight of the Federal Communications Commission: The National Broadband Plan, March 25, 2010, *available at* http://energycommerce.house.gov/Press_111/20100325/Boucher.Statement.03.25.2010.pdf.

additional spectrum so first responders can communicate using the same radio frequencies and equipment in the event of an emergency.”^{42/} Congressman Joe Barton (R-TX), former chair of the House Energy and Commerce Committee, noted in 2005 that even “[f]our years after Sept. 11 and we still have a problem with interoperability.”^{43/} U.S. Rep. Fred Upton (R-MI), former chair of the Telecommunications Subcommittee, also commented on the need to “free up part of that spectrum” so that “we will be able give it to our first responders.”^{44/} As Congress has advocated, the Commission should honor its commitment to improving the communication system used by police, firefighters and other public safety agencies by revisiting the *Order* and adopting the proposed sanctions.

The *Order* also failed to consider that the spectrum the Licensees propose to contribute is useful to and needed for public safety communications capabilities in the Southern California area — which contains America’s second largest city, a major international port, and the site of more natural disasters than most United States cities (*e.g.*, wild fires, mudslides, and earthquakes). Public safety agencies in Southern California already rely heavily on UHF band spectrum to meet critical interoperable communications requirements. However, there is virtually no UHF spectrum available to expand those capabilities. There remains a shortage of adequate UHF spectrum for public safety needs in the Los Angeles area. The additional capacity afforded by this action would have a direct and immediate impact on the ability of public safety agencies to serve and protect the public by providing a robust, broadly available platform for

^{42/} 151 CONG. REC. S.9973 (2005).

^{43/} House Energy and Commerce Committee, Press Release, “Katrina Exposes Problems in First Responder Communication,” September 29, 2005, *available at* <http://republicans.energycommerce.house.gov/News/PRArticle.aspx?NewsID=6284>.

^{44/} *Id.*

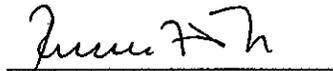
interoperable communications between public safety agencies during both routine and emergency situations. The alternative proposal addresses the spectrum needs of, and has received support from, numerous public safety agencies in the Southern California area, which currently use the spectrum, as well as representatives of jurisdictions who currently cannot avail themselves of certain UHF-based public safety platforms due to a lack of available spectrum.

The Commission erred in not taking these needs, evidenced by the communications from public safety officials, into consideration in the *Order*. Public safety officials have already begun to consider the potential disposition of the UHF channels, and the specific benefits they can bring to the protection of the safety of life and property in southern California. Failing to address the potential use of this spectrum for public safety purposes would now frustrate the needs of public safety officers and organizations in southern California, along with the State and Federal elected officials who share considerable interest in the potential benefits the alternative proposal offers to the functionality and interoperability of public safety and municipal communications throughout Southern California.

IV. CONCLUSION

For the foregoing reasons, Licensees respectfully requests that the Commission stay the *Order* that requires them to forfeit their licenses effective April 23, 2010, pending review of the Licensees' petition for reconsideration.

Respectfully submitted,



Russell H. Fox
Stefanie Z. Desai
Darren J. Abernethy
Mintz, Levin, Cohn, Ferris
Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300

*Counsel to James A. Kay, Jr. and
Marc D. Sobel*

April 21, 2010

DECLARATION OF JAMES A. KAY, JR.

I solemnly affirm under penalty of perjury that the foregoing Petition for Reconsideration is true and correct to the best of my knowledge, information and belief.^{1/}

Date: 9/21/2010


James A. Kay, Jr.

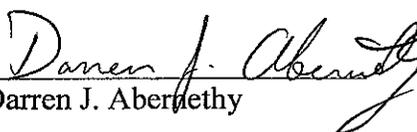
^{1/} Mr. Kay provides this Declaration in support of the assertions contained in Section IIIB of this Petition for Reconsideration.

CERTIFICATE OF SERVICE

I, Darren Abernethy, do hereby certify that on this 21st day of April, 2010, a true and correct copy of the foregoing was served on the following via E-mail:

William Davenport, Associate Chief
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W. – Room 7-C723
Washington, D.C. 20554

Austin Schlick, General Counsel
Federal Communications Commission
445 12th Street, S.W. – Room 8-B724
Washington, D.C. 20554


Darren J. Abernethy