

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of October, 1997, I have caused copies of the foregoing *Petition to Dismiss or Deny* to be sent by first class United States mail, postage prepaid, except as otherwise indicated below, to the following:

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DEC 1 - 1997

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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the matter of]	
]	
NEXTEL COMMUNICATIONS,]	FCC File No. 9301618165
SMART SMR OF CALIFORNIA, INC., D/B/A]	
]	
Conventional SMR (GX) Station WPCM497]	
851.2375 and 854.1625 MHz at Mount]	
Adalaide near Bakersfield (Kern) CA]	
]	
CARRIER COMMUNICATIONS]	FCC File No. 9301618165
]	
Conventional SMR (GX) Station WPCM497]	
851.2375 and 854.1625 MHz at Mount]	
Adalaide near Bakersfield (Kern) CA]	
]	
DEBORAH KILLIAN]	FCC File No. 9301617966
]	
Conventional SMR (GX) Station WPCE285]	
851.6125 MHz at Mount Adalaide near]	
Bakersfield (Kern) CA]	
]	
CHRIS KILLIAN, DEBORAH KILLIAN, CARRIER]	
COMMUNICATIONS, AND/OR CARRIER]	
COMMUNICATIONS AND ELECTRONICS]	
]	
Licensee of and/or Applicant for various]	
facilities pursuant to Part 90 of the FCC Rules]	
and Regulations, 47 C.F.R. § 90.1 <i>et seq.</i>]	

To: Chief, Wireless Telecommunications Bureau

REPLY TO OPPOSITION

James A. Kay, Jr. ("Kay"), by his attorney, hereby replies to the *Opposition to Petition for License Revocation Proceedings* ("Opposition") filed by Smart SMR of California, Inc., a subsidiary of Nextel Communications, Inc. ("Nextel"), in support whereof, the following is respectfully shown:

A. **Kay's Request is Not Untimely.**

1. Nextel asserts that Kay's 22 October 1997 *Petition for Institution of License Revocation Proceedings* is untimely because Kay neither timely protested nor timely sought reconsideration of the grant of (a) the initial application by Chris Killian d/b/a Carrier Communications ("Killian") for the facility in 1993 or (b) Nextel's early 1997 application for

assignment of the authorization. *Opposition* at 2-3. But in attempting to mischaracterize Kay's pleading as an untimely protest or reconsideration, Nextel conveniently ignores that what Kay seeks is the institution of license revocation proceedings pursuant to Section 312 of the Communications Act, based on a compelling showing Killian obtained the authorization for Station WPCM497 by means of fraudulent misrepresentation to the Commission. Revocation proceedings may be instituted at any time during the course of a license term, even after the action issuing the license has become final.

2. Nextel further asserts that Kay's request is untimely because it relies, in part, on a finder's preference request that was dismissed by the Bureau in 1996. Nextel complains that "Kay fails to explain why he didn't participate in that finder's preference proceeding or seek reconsideration of the decision in a timely manner" and that "Kay's reliance on a dismissed SMR finder's preference claim comes nearly two years after the SMR finder's preference program has been abolished. *Opposition* at 3. As explained more fully in the following section of this reply, Kay does he seek reconsideration of or in any way challenge the dismissal of the finder's preference request. Nextel's timeliness objection is therefore misplaced.¹

B. Kay Is Not Seeking to Take Assignment of a Finder's Preference Request.

3. Nextel erroneously accuses Kay of attempting to take assignment of the Applied Technology Group, Inc. ("ATG") 1996 finder's preference request without demonstration of ATG's consent and without showing that ATG's rights in the finder's preference request have been assigned to Kay. These arguments totally misconstrue the significance of the finder's preference documents and the purpose for which they were offered. Kay does not seek or claim any rights under the finder's preference request, nor does he seek reconsideration of or in any way challenge the dismissal of the finder's preference. Rather, Kay points to the finder's preference request as support for certain factual allegations that were presented to the Commission. Those allegations, namely, that Killian did not timely construct and placed into

¹ Kay alternatively requested that his pleading be treated as an informal request for Commission action pursuant to Section 1.41 of the Commission's Rules, 47 C.F.R. § 1.41. As an informal request, the pleading would not be defective even assuming Nextel's untimeliness arguments were correct.

operation Station WPCM497, although previously offered in support of ATG's finder's preference request, are equally pertinent to Kay's instant request for license revocation proceedings. The Commission never passed on the factual allegations, having dismissed the finder's preference request on purely procedural grounds, and it is therefore entirely appropriate for the allegations to be re-presented in other contexts where they have relevance.²

C. Nextel Dissembles Rather Than Answer the Applicable Allegations.

4. Throughout its opposition, Nextel does not once refute the factual allegation, documented in the ATG finder's preference request, that Killian did not meet the initial construction deadline. Nextel repeatedly states that the facilities were constructed and operational in 1996 when it filed its assignment application, *Opposition* at 6-9, but that is not the issue. The question is whether the station had been constructed and placed into operation within eight months of grant, *i.e.*, in April of 1994. Because the station was not timely constructed, the authorization automatically canceled by operation of law, and Killian had nothing to assign to Nextel. That the station may have been later constructed in order to accomplish a profitable sale to Nextel does not change the legal consequences of a failure to timely construct in 1994. It is disingenuous for Nextel to respond to the serious allegation of nonconstruction in 1994 by repeatedly asserting that the station was constructed in 1996. Kay would not be surprised to learn that Killian untimely completed construction of his fallow authorization, possibly even using Nextel funds to do so, in order to be able to sell the dead license to Nextel for great financial gain. What is disturbing is the Bureau's abdication of its duty to guard against such unjust enrichment by the fraudulent sale of a public resource held in trust.³

² In view of the foregoing, Nextel's objection that Kay has not complied with the procedural requirements applicable to finder's preference requests, *Opposition* at 4-5, is inapposite. Kay is not requesting a finder's preference, nor is he seeking rights in ATG's dismissed finder's preference request. The procedural requirements of Section 90.173(k)(3), the Finder's Preference Checklist, therefore have no applicability.

³ It is common Commission practice in Part 90 assignment of license applications to require both the assignor and the assignee to sign certifications of timely initial construction. For some unknown reason, the Bureau processed the captioned assignment to Nextel without requiring such a showing.

D. Killian Obtained the Captioned Licenses by Fraud and Misrepresentation.

5. Kay demonstrated that the above-captioned applications were obtained by Killian and his wife by means of fraudulent misrepresentations to the Commission. Killian himself has not come forward to deny this claim, nor does Nextel offer any declaration of Killian in response. Nextel does not refute the plain facts supporting this conclusion, and offers instead only weak and feeble excuses and objections. Specifically, Nextel demurs that Kay has not demonstrated that Killian lacked sufficient loading to qualify for two SMR stations within the same area or that he was the real party-in-interest behind his wife's co-located, simultaneous, single-channel application. *Opposition* at 10-12.

6. Nextel is once again disingenuously playing games. The issue is not whether Killian qualified for two channels⁴ but, rather, whether he qualified for three: the two he filed for in his own name, plus the one he applied for using his wife as a shell. Moreover, the demonstration offered by Kay is much more substantial than anything pointed to by the Commission when it made similar accusations against Kay. See *Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture* (FCC 94-315; PR Docket No. 94-147), 10 FCC Rcd 2062 76 Rad. Reg. 2d (P&F) 1393 (1994). The Commission there designated, inter alia, an issue whether Kay had violated Section 90.263, but there is no factual statement, much less documentation or support, in the designation order or in any discovery produced to Kay, that Kay lacked sufficient loading or was otherwise not qualified for any applications at issue. Indeed, it has not even been disclosed to Kay what particular applications are at issue. There can be no double standard--if the designation order in Kay's proceeding makes a sufficient prima facie case, then Kay's pleading against Killian constitutes an overwhelming showing.

7. Nextel next asserts the following defense: "In any event, now that the SMR 40-Mile Rule has been repealed, the issue is moot." *Opposition* at 10. Kay will not even respond to this ludicrous suggestion except to say this. If the Bureau adopts Nextel's position that a licensee

⁴ As it happens, however, Killian apparently was not even qualified for two channels. In his certification to Nextel as part of the sale transaction, Killian admits to having only ten units on Station WPCM497. See *Opposition* at Exhibit 3.

can not be called to account for past violations of rules that have since been repealed or modified, the Kay expects the Bureau to promptly join him in a motion for summary decision on many of the issues designated in Kay's own proceeding, including, but not limited to, allegations that Kay has violated channel loading requirements.

8. The suggestion that Kay has not demonstrated that Killian was the real party-in-interest behind his wife's sham application is absurd on its face. Mrs. Killian has established this fact, beyond any possible dispute, by her own sworn testimony. She knows nothing about the license, she simply has her name on the license, something she did for her husband's business. *Killian Deposition Transcript*⁵ at p. 11. She has no idea what the license is or was used for, *id.* at 21, nor does she know anything about the station's construction, operation, or management. *Id.* at 26-27. These are matters known only to her husband. *Id.*

9. Apparently realizing how laughable its position on this point is, Nextel attempts to invoke a legal technicality, by grossly misapplying the Commission's 1992 modification of its spousal attribution policy. *Opposition* at 10-11. In making this futile attempt, however, Nextel resembles a 300 pound man trying to hide behind a sapling. In *Clarification of Commission Policies Regarding Spousal Attribution*, 7 FCC Rcd 1920, 70 Rad. Reg. (P&F) 768 (1992), the Commission stated that "the media interests of one spouse will not be *presumptively* attributed to the other *solely* on the basis of marital status." *Id.* at ¶ 1 (emphasis added). But Kay does not ask the Commission to "presume" an attribution from Mrs. Killian to her husband, nor does Kay base his charge "solely" on the basis of her marital status. Here, Mrs. Killian herself has testified, under oath and subject to penalty of perjury, that she had no interest whatsoever in the application or the resulting license; that it was all her husband's doing.

⁵ Attachment No. 3 to Kay's 22 October 1997 *Petition for Institution of License Revocation Proceedings*.

10. Although it relaxed the spousal attribution policy, the Commission nonetheless stated that it will

review the relationship between the spouses and their respective media interests to determine whether attribution of their media interests is necessary to preserve the objectives of economic competition and diversity. As with all family relationships, spouses' media interests will not be attributed where the spouses' disclosures confirm that such media interests are independently held and are not subject to common influence or control.

Id. Moreover, it was explained that:

Under our adopted approach, the Commission must be satisfied in each case that the spouses' media interests are independent, and that a marital relationship is not being used to evade the ownership rules. To that end, all family relationships must be disclosed and described in full, and we retain the option of requiring submission of further information and explanation if necessary. This process will enable us to evaluate carefully whether the spouses in fact will act independently of each other, and at the same time will avoid imposing burdensome and potentially misplaced presumptions on married individuals.

Id. at ¶ 12. Finally the Commission cautioned: "[I]f it appears that spouses (or other family members) have misrepresented the nature or extent of their media interests in order to evade the ownership rules, we will apply the full weight of available sanctions." *Id.* at ¶ 18. Thus, there is no protection for the Killian's under the Commission's spousal attribution policy; to the contrary, that policy requires immediate sanctions against Killian on the basis of the showing made by Kay.

E. Kay's Exercise of His Constitutional Rights is Not an Abuse of Process.

11. In an attempt to avoid the required and inevitable Commission response to Kay's substantial showing of disqualifying conduct on the part of Killian, Nextel desperately accuses Kay of abusing the Commission's processes by filing his petition. *Opposition* at 12-17. There is absolutely not foundation in fact or law for this accusation. It is clear beyond dispute that the well-supported allegations in the petition raise substantial and material questions within the purview of the Commission. And it has long been settled Title III licensee has standing to challenge the applications or licenses of a competitor. *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940). In fact, the presentation of violations by competitors is to be encouraged, not discouraged, on the theory that competitors are, because of their private interest, likely to

bring to the attention of the Commission matters that might otherwise go undiscovered by the Commission's own enforcement activities, *i.e.*, the competitor serves as a kind of "private attorney general." *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940); *Scripps-Howard Radio Inc. v. FCC*, 316 U.S. 4 (1942).

12. Moreover, Kay has a First Amendment right to petition the government, and he has exercised that right by filing his petition in the captioned matter. The concoction of an "abuse of process" theory to avoid reaching the merits of Kay's pleading would be Unconstitutional. See *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965). Out of these two cases grew the so-called *Noerr-Pennington* doctrine which essentially states that The essence of the doctrine is that parties who petition for governmental action favorable to them cannot be prosecuted under the antitrust laws even if their petitions are motivated by anticompetitive intent. The point is to protect private parties when they petition the government for laws or interpretations of its existing laws even if those private parties are pursuing their goals with anticompetitive intent.

13. The *Noerr-Pennington* doctrine initially arose in the antitrust field, but it has been expanded to protect first amendment petitioning of the government from claims brought under various federal and state laws. See, e.g., *Video International Production, Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075 (5th Cir. 1988), *Evers v. County of Custer*, 745 F.2d 1196, 1204 (9th Cir.1984); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 614 (8th Cir.1980), and cases cited therein. The Constitutional right to petition extends also to a Title III licensee filing pleadings with the FCC seeking denial of applications or other appropriate sanctions against competitors. See, generally, *Faulkner Radio, Inc. v. FCC*, 577 F. 2d 866 (D.C. Cir. 1977) and *Radio Carrollton*, 69 FCC 2d 1139, 1151 (1978); *Gill Industries*, 56 FCC 2d 765, 768 (1975), quoted in *WGMS Radio, Inc.*, 2 FCC Rcd 4565 (1987) ("The right of any person, licensee or otherwise, to file pleadings with the Commission is protected by the Constitution 'as an exercise of free speech and of the right to petition the government'").

14. One alleging that a pleading is abusive, or what the Commission sometimes calls a "strike petition," is obliged to "make a strong showing that delay [or some other illegitimate objective] is the primary and substantial purpose behind" the filing. *Radio Carrollton*, 69 FCC 2d at 1151. "Where a petition raises legitimate public interest questions concerning an applicant's fitness to become or remain a Commission licensee ... the Commission will not impute to the petitioner a subjective [improper] intent ... based on the speculative or coincidental existence of a possible [improper] motivation." *WGMS Radio, Inc.*, 2 FCC Rcd at ¶ 9. Kay has presented legitimate public interest questions concerning Killian's qualifications and the propriety of his sale to Nextel. The meager objections interposed by Nextel are woefully inadequate to eradicate Kay's Constitutional rights.

WHEREFORE, good cause having been shown herein, it is respectfully requested that the relief prayed for in Section D of the *Petition for Institution of License Revocation Proceedings* be granted forthwith.

Respectfully submitted,

James A. Kay, Jr.



By: Robert J. Keller
His Attorney

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Dated: 1 December 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 1ST day of December, 1997, I have caused copies of the foregoing *Reply to Opposition* to be sent by facsimile and regular mail to the following:

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EXHIBIT HP-1

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MAY 30 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

In the matter of

HAROLD PICK

Reinstatement of Canceled License for Business
Radio Service (Conventional) Station WNZB262

FCC File No. _____

Reinstatement of Canceled License for Business
Radio Service (Conventional) Station WNZB276

FCC File No. _____

To: The Commission

APPLICATION FOR REVIEW

James A. Kay, Jr. ("Kay"), by his attorney and pursuant to Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, and Section 1.115(a) of the Commission's Rules and Regulations, 47 C.F.R. § 1.115(a), hereby seeks Commission review of the Wireless Telecommunications Bureau's inaction on and, hence, effective denial of, Kay's petitions for reconsideration in the captioned matters, in support whereof the following is respectfully shown:

A. Questions Presented for Review

- (a) May the Wireless Telecommunications Bureau effectively deny a valid and timely petition for reconsideration by simply refusing to take action on it?
- (b) Did staff of the Wireless Telecommunications Bureau violate Section 1.113(a) of the Commission's Rules and Regulations¹ when, more than four months after having canceled the above-captioned authorizations, and with no timely petitions for reconsideration or applications for review of such cancellations having been filed, the Bureau set aside the actions on its own motion and reinstated the authorizations?

¹ 47 C.F.R. § 1.113(a) provides: "Within 30 days after public notice has been given of any action taken pursuant to delegated authority, the person, panel, or board taking the action may modify or set it aside on its own motion."

- (c) Does the Wireless Telecommunications Bureau and its staff have the delegated authority to interfere with rights mandated by a lawful order from a court of competent jurisdiction in a bankruptcy proceeding, when such order has not been stayed and is in full force and effect?

B. Factors Warranting Commission Review

- (a) The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy.
- (b) The action taken pursuant to delegated authority involves a question of law or policy which has not previously been resolved by the Commission.
- (c) The action taken pursuant to delegated authority causes prejudicial procedural error.

C. Discussion

James Kay has pending before the Wireless Telecommunications Bureau ("Bureau") two petitions for reconsideration in the above referenced matters. The petition in the case of Call Sign WNZB276 was filed on 11 March 1996 (Attachment No. 1, hereto),² and the petition in the case of Call Sign WNZB262 was filed on 20 March 1996 (Attachment No. 2, hereto).³ No responsive pleadings have been filed,⁴ and the issues presented are extremely simple. Nonetheless, the Bureau has not acted on the petitions for well over a year. This inaction by the Bureau is tantamount to a denial of Kay's requests for reconsideration, and Commission review of that denial is therefore appropriate.⁵

In connection with proceedings arising out of a petition for bankruptcy filed by Harold Pick, on May 12, 1995, the United States Bankruptcy Court for the Central District of California issued an *Order Authorizing Chapter 7 Trustee to Sell Assets of the Estate* in Case No. LA93-38738LF ("*Bankruptcy Order*"). The *Bankruptcy Order* authorized Trustee to sell the assets, including WNZB276 and WNZB262,

² This Petition for Reconsideration was jointly filed by Kay and Duke Salisbury, Chapter 7 Trustee for Harold Pick d/b/a Communications Consultants Systems ("Trustee").

³ This Petition for Reconsideration was jointly filed by Kay, the Trustee, and Viking Freight Systems, Inc.

⁴ Although none of the petitioners has been served with any responsive pleadings in these matters, Kay has reasons to suspect that there have nonetheless been ex parte communications to Bureau staff by Harold Pick.

⁵ See *MCI Telecommunications Corp. v. FCC*, 627 F.2d 322 (D.C. Cir. 1980) ("[D]elay in the resolution of administrative proceedings can ... deprive regulated entities, their competitors or the public of rights and economic opportunities without the due process the Constitution requires."); *Telecommunications Research and Action Center v. FCC*, 750 F. 2d 70 (D.C. Cir. 1984).

to Kay or his assignee. For consideration received.⁶ Trustee executed and caused to be filed with the Commission, on or about FCC Forms 405A requesting cancellation of the captioned authorization.⁷

According to FCC records, of which official notice may be taken, the captioned authorizations were in fact canceled and the call signs purged from the FCC's license database. This occurred no later than 21 September 1995 for WNZB276 and no later than 17 October 1995 in the case of WNZB262. In February of 1995, however, more than four months after the Bureau action canceling the licenses and purging them from the database, the Bureau inexplicably reinstated the authorization. There was no public notice of this action, no actual notice to Trustee, and attempts to obtain an explanation from Bureau staff proved unfruitful. Accordingly, petitions for reconsideration were presented to the Bureau.

Pursuant to the *Bankruptcy Order*, Trustee had the legal and judicially conferred right to cause the captioned license to be canceled or assigned to its designee. Prior to submitting the FCC Form 405A, bankruptcy counsel for Trustee contacted Bureau staff to inquire about appropriate procedure and provided Bureau staff with a copy of the Order. Bureau staff provided Trustee with the requisite FCC Forms 405A and with a certified list of the licenses held by Harold Pick. Trustee followed the procedures suggested by Bureau staff. Thus, the cancellations were within the rights of Trustee, in full accordance with Commission procedure, and were pursued in good faith.

The Bureau's inexplicable reinstatement of the authorizations was clearly unlawful. Assuming for the sake of argument the Bureau had some basis for the action, it was without power to reinstate the authorization. Section 1.113(a) of the Commission's Rules provides that an action taken under delegated authority may be set aside *sue sponte* by such designated authority only within thirty days of the action. 47 C.F.R. § 1.113(a). The reinstatements in this case came more than four months after the actions canceling the licenses. Moreover, there was no notice to Trustee. There is no evidence in the public record that any party timely submitted a petition for reconsideration or an application for review within 30 days of the cancellations,⁸ and if any such petition was filed, it was not served on Trustee as required by Commission Rule.⁹ The only possible explanation, therefore, is that there were informal communications

⁶ Kay successfully bid for the rights to direct the assignment and/or cancellation of the authorizations.

⁷ The cancellations were filed on or about 11 July 1995 for WNZB276 and on or about 26 September 1995 in the case of WNZB262.

⁸ See 47 C.F.R. § 1.106(f) & 1.115(d).

⁹ See 47 C.F.R. § 1.47(g).

between Mr. Pick and Bureau staff leading to the reinstatement. If this is the case, then both Pick and Bureau staff have engaged in a blatant violation of the Commission's ex parte rules¹⁰ as well as an unlawful interference with Mr. Kay's and Trustee's rights under the *Bankruptcy Order*.

The apparent theory for the Bureau's unexplained and unlawful actions was a then-pending appeal of the *Bankruptcy Order* by Pick.¹¹ This did not justify the actions however. The *Bankruptcy Order* was then, is now, and at all relevant times has remained, in full force and effect and has been neither stayed nor set aside by any judicial authority. Section 405(a) of the Communications Act, 47 U.S.C. § 405(a),¹² and Section 1.106(n) of the Commission's Rules, 47 C.F.R. § 1.106(f), provide that a Commission or staff action remains in full force and effect pending any reconsideration or review absent a specific order of stay. If a petition for reconsideration within the Commission does not automatically stay a staff action, it would be ironic indeed if an appeal in a judicial matter entirely unrelated to the Commission were deemed to do so. In any event, Pick's appeal of the *Bankruptcy Order* is no longer pending. On 14 April 1997 the United States Court of Appeals for the Ninth Circuit issued an *Order* in Case No. 96-56777 (Attachment No. 3, hereto) dismissing Pick's appeal for failure to prosecute. The appeal thus no longer provides even an inadequate and unlawful excuse for continued Bureau inaction.

¹⁰ By separate letter Kay asks the Commission's Managing Director to investigate these apparent violations of the ex parte rules.

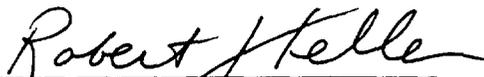
¹¹ Of course, Pick could have presented this information to the Bureau and sought the relief requested only in blatant violation of the ex parte rules with the complicity of Bureau staff.

¹² "No [application for review or petition for reconsideration] shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission." 47 U.S.C. § 405(a). "Without special order of the Commission, the filing of a petition for reconsideration shall not excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof." 47 C.F.R. § 1.106(f).

WHEREFORE, the Bureau's initial action having been taken in violation of Commission rule, and the Bureau's continued inaction on Kay's petitions for reconsideration being unlawful and unconscionable, it is requested that the Commission direct the Bureau immediately to cancel the captioned authorizations and purge them from the license data base.

Respectfully submitted,

James A. Kay, Jr.



By: Robert J. Keller
Its Attorney

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Dated: 30 May 1997

ATTACHMENT NO. 1

RECEIVED

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

MAR 11 '96

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE
SECRETARY

In the Matter of)
)
HAROLD PICK)
)
Reinstatement of Canceled License for)
Business Radio Service - Conventional)
Station WNZB276)

FCC File No. _____

To: Chief, Wireless Telecommunications Bureau

PETITION FOR RECONSIDERATION

James A. Kay, Jr. ("Kay") and Duke Salisbury, Chapter 7 Trustee for Harold Pick d/b/a Communications Consultants Systems ("Trustee"), by their attorneys and pursuant to Section 1.106(b) of the Commission's Rules and Regulations, 47 C.F.R. § 1.106(b), hereby seeks reconsideration of the Wireless Telecommunications Bureau action reinstating the captioned authorization of Harold Pick ("Pick"), in support whereof the following is respectfully shown:

1. In connection with proceedings arising out of a petition for bankruptcy filed by Harold Pick, on May 12, 1995, the United States Bankruptcy Court for the Central District of California issued an *Order Authorizing Chapter 7 Trustee to Sell Assets of the Estate* in Case No. LA93-38738LF ("Order").¹ The Order authorized Trustee to sell the assets, including WNZB276, to Kay or his

¹ A copy of the *Order* is attached hereto.

assignee. The *Order* is now, and at all relevant times has remained, in full force and effect and has been neither stayed nor set aside by any judicial authority. For consideration received,² Trustee executed and caused to be filed with the Commission, on or about July 11, 1995, an FCC Form 405A requesting cancellation of the captioned authorization.

2. According to FCC records, of which official notice may be taken, the captioned authorization was in fact canceled and the call sign purged from the FCC's license database no later than September 21, 1995. It appears, however, that the authorization was reinstated on or about February 8, 1996, more than four months after it was canceled. There was no public notice of this action, no actual notice to Trustee, and attempts to obtain an explanation from Bureau staff have been thus far unfruitful.

3. Pursuant to the *Order*, Trustee had the legal and judicially conferred right to cause the captioned license to be canceled for assigned to its designee. Prior to submitting the FCC Form 405A, bankruptcy counsel for Trustee contacted Bureau staff to inquire about appropriate procedure and provided Bureau staff with a copy of the *Order*. Bureau staff provided Trustee with the requisite FCC Forms 405A and with a certified list of the licenses held by Harold Pick. Trustee followed the procedures suggested by Bureau staff. Thus, the

² Kay successfully bid for the rights to direct the assignment and/or cancellation of the authorization.

cancellation was within the rights of the Trustee, in full accordance with Commission procedure, and was pursued in good faith.

4. The Bureau's inexplicable reinstatement of the authorization is clearly unlawful. Assuming for the sake of argument the Bureau had some basis for the action, it was without power to reinstate the authorization. Section 1.113(a) of the Commission's Rules provides that an action taken under delegated authority may be set aside *sua sponte* by such designated authority only within thirty days of the action. 47 C.F.R. § 1.113(a). The reinstatement in this case came more than four months after the action canceling the license. Moreover, it was done without notice to Trustee.

5. There is no evidence in the public record that any party timely submitted a petition for reconsideration or an application for review within 30 days of the cancellation,³ and if any such petition was filed, it was not served on Trustee as required by Section 1.47(g) of the Rules.⁴ The only possible explanation, therefore, is that there were informal communications between Mr. Pick and Bureau staff leading to the reinstatement. If this is the case, then both Pick and Bureau staff have engaged in a blatant violation of the Commission's *ex parte* rules as well as an unlawful interference with Mr. Kay's and Trustee's rights under the Order.

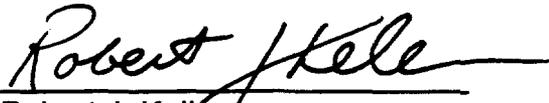
³ See 47 C.F.R. §§ 1.106(f) & 1.115(d).

⁴ See 47 C.F.R. § 1.47(g).

WHEREFORE, it is requested that the February 8, 1996, action by the Bureau reinstating the captioned authorization be reconsidered and promptly set aside.

Respectfully submitted,

James A. Kay, Jr.

By: 
Robert J. Keller
His Attorney

Law Office of Robert J. Keller, P.C.
2000 L Street, N.W. - Suite 200
Washington, D.C. 20036
202-416-1670

Duke Salisbury, Chapter 7
Trustee for Harold Pick

By: 
Annie Verdries
His Attorney 

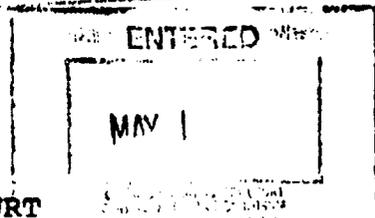
Lewis, D'Amato, Brisbois & Bisgaard
Center Town Building - Suite 1400
650 Town Center Drive
Costa Mesa, California 92626
714-545-9200

Dated: 11 March 1996

1 LEWIS, D'AMATO, BRISBOIS, & BISGAARD
2 ANNIE VERDRIES, ESQ. - ATTORNEY BAR NO. 91049
3 650 Town Center Drive, Suite 1400
4 Costa Mesa, California 92626-1970
5 (714) 545-9200

MAY 12 1995

5 Attorneys for Chapter 7 Trustee
6 DUKE SALISBURY



8 UNITED STATES BANKRUPTCY COURT
9 CENTRAL DISTRICT OF CALIFORNIA

11 In re:)	Case No.:	LA93-38738LF
)	Chapter	7
12 HAROLD RUDOLPH PICK)	ORDER AUTHORIZING CHAPTER 7	
13 COMMUNICATIONS CONSULTANTS)	TRUSTEE TO SELL ASSETS OF THE	
14 SYSTEMS, COMPUTER CONSULTANTS)	ESTATE	
)	DATE: March 8, 1995	
)	TIME: 10:00 a.m.	
Debtor.)	CTRM: 1675	

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The continued hearing on Trustee's Motion for Order Approving Sale of Property of the Estate was held on March 8, 1995 at 10:00 a.m. in courtroom 1675 before the Honorable Lisa Hill Fenning, United States Bankruptcy Judge. Annie Verdries of Lewis, D'Amato, Brisbois & Bisgaard appeared on behalf of Duke Salisbury, Chapter 7 Trustee; Jeffrey Cohen of Mickelson & Pavone appeared on behalf of James Kay, a creditor and prospective purchaser; Joe Bogden of Manatt, Phelps & Phillips appeared on behalf of Motorola, Inc., a creditor; Harold Pick appeared in pro se and Gerard Pick was present in court.

The court having reviewed the pleadings and records on file

LEWIS, D'AMATO, BRISBOIS & BISGAARD
Lawyers
650 Town Center Drive
Suite 1400
Costa Mesa, CA 92626
(714) 545-9200

1 herein, and having heard argument of counsel and the Debtor, and
2 good cause appearing therefor, orders:

3 IT IS ORDERED the Motion to Sell Assets of the Estate to
4 James A. Kay or his assignee for the sum of \$35,500.00 is approved
5 effective May 15, 1995.

6 IT IS FURTHER ORDERED that the Trustee is authorized to sell
7 the licenses and call signs issued by the Federal Communications
8 Commission, listed in Exhibit "A" attached hereto and the pending
9 applications for call signs and licenses with the Federal
10 Communications Commission listed in Exhibit "B" attached hereto.

11 The trustee is further authorized to sell the estate's
12 interest in the repeater tone panels, micro systems, power supply
13 systems, amplifiers, splitters, dispatch trunking logic systems,
14 antennas, cables, idolaters and transmit combiner system located at
15 Mt. Lukens, Saddle Peak and Oat Mountain as listed in Exhibit "C"
16 attached hereto.

17 The purchase price for all the above identified items is
18 \$35,500.00 cash, all due and payable immediately.

19 James A. Kay or his assignee is a good faith purchaser for
20 value.

21
22 Dated: _____

LISA HILL FENNING
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT A

FEDERAL COMMUNICATIONS COMMISSION

GETTYSBURG, PA U.S.A.

STATEMENT OF RECORD

I, Gary L. Stanford, state that I am duly appointed and authorized Associate Bureau Chief, Office of Operations, Wireless Telecommunications Bureau of the Federal Communications Commission and that as part of my duties as delegated official, I have the care, custody and control of all official records pertaining to the business of the said Commission's Gettysburg office.

I further state that, in my official capacity, I have caused a search to be made of the records of said Commission to verify the call signs:

WPCB783 was issued to Harold Pick dba Communications Consultants & Systems on April 21, 1993.

WPFJ421 was issued to Harold Pick on July 21, 1994.

WNZB276 was issued to Harold Pick dba Computer Consultant & Systems on March 1, 1994.

WPEF931 was issued to Harold Pick on February 24, 1994.

WNPP680 was issued to Harold Pick dba Communications Consultants & Systems on June 9, 1993.

WNYR742 was issued to Harold Pick dba Computer Consultants & Systems on March 23, 1992.

WPBB920 was issued to Harold Pick dba Computer Consultants & Systems on November 20, 1992.

WNWB345 was issued to Harold Pick dba Computer Consultant & Systems on September 1, 1992.

WNZB262 was issued to Harold Pick dba Communications Consultants & Systems on April 13, 1992.

WNZG388 was issued to Harold Pick dba Computer Consultant & Systems on May 5, 1992.

WIK855 was issued to Harold Pick dba CCS Communications on April 3, 1991.

WNUR393 was issued to Computer Consultants & Systems on October 26, 1990.