EXHIBIT LP-1

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10 January 1997

Mr. Terry L. Fishel, Chief
Land Mobile Branch, Licensing Division
Wireless Telecommunications Bureau
Federal Communications Commission
1270 Fairfield Road
Getteysburg, Pennsylvania 17325-7245

In re: Liberty Paving Company, Inc.
Conventional Business Radio Service Station WRG921
808/853.5875 MHz—Corona/Santiago Peak (Riverside) CA

Dear Mr. Fishel:

On behalf of Marc D. Sobel d/b/a Air Wave Communications,[1] we respectfully request that the above referenced authorization be canceled and purged from the Commission's license database.

Mr. Charles F. Barnett, President of Liberty Paving Company, Inc. ("Liberty"), recently gave a deposition in a civil proceeding pending in a California superior court.[2] During the course of his sworn testimony, Mr. Barnett unequivocally stated that the radios his company had been using pursuant to the above-referenced license were taken out of service in the fall of 1994. In August of 1994 Liberty contracted for service on Nextel's new 800 MHz digital system. Liberty traded the old radios in for a credit of $100 each. The old radios were taken away by the technicians who installed the new Nextel radios in Liberty's vehicles. Mr. Barnett further testified that his company has not used the old radios or any radio system other than Nextel's since that time. Mr. Barnett's service with Nextel began sometime in August-September of 1994. An excerpt of the relevant parts of the deposition transcript is attached for your reference.

Section 90.157 of the Commission's Rules and Regulations provides, in pertinent part:

> The license for a station shall cancel automatically upon permanent discontinuance of operations and the licensee shall forward the station license to the Commission. . . . For the purposes of this section, any station which has not operated for 1 year or more is considered to have been permanently discontinued.

47 C.F.R. § 90.157(a-b). In at least one case the Commission has held that a license had automatically

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[1] Mr. Sobel is the licensee of Conventional SMR Station WPCG780. The stations are cochannel and both are located at Santiago Peak. Mr. Sobel therefore has standing to lodge this request.

[2] Mr. Barnett's deposition was given at Beverly Hills, California, on November 15, 1996, in *Lucky's Two-Way Radios v. Liberty Paving Co.*, Case No. BC 142387 (Superior Court of California for the County of Los Angeles).

canceled when a station was off the air for more than a year after its tower burned down. *Procell Communications, Inc.*, 11 FCC Rcd 5806, 5808 (1996). The above-referenced station has been off the air for more than two years, and the discontinuance of operation was a voluntary action on Liberty's part.

The license for Station WRG921 clearly has automatically canceled by operation of law. We therefore ask that the Commission formally delcare the authorization void and purge it from the license database.

Kindly direct any questions or correspondence concerning this matter to the undersigned.

Sincerely,

Robert J. Keller

Robert J. Keller
Counsel for Marc D. Sobel
d/b/a Air Wave Communications

cc: David P. Christianson, Esquire
Law Offices of David P. Christianson
Centrium South, Suite 310
725 Town & Country Road
Orange, California 92668
Counsel for Liberty Paving Company, Inc.

EXHIBIT LP-2

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2 September 1997

Mr. Terry L. Fishel, Chief
Land Mobile Branch, Licensing Division
Wireless Telecommunications Bureau
Federal Communications Commission
1270 Fairfield Road
Getteysburg, Pennsylvania 17325-7245

In re: Liberty Paving Company, Inc.
Conventional Business Radio Service Station WRG921
808/853.5875 MHz—Corona/Santiago Peak (Riverside) CA

Dear Mr. Fishel:

Nearly nine months ago I sent you a letter containing uncontradicted and irrefutable evidence[1] that the captioned authorization cancelled by operation of law pursuant to Section 90.157 of the Commission's Rules and Regulations. A copy of that letter is attached. We asked that you declare this to be the fact and purge the authorization from the Commission's license database.

To date you have not responded to or acted upon the previous request. If you do not intend to act on this matter immediately, I respectfully ask that you promptly advise me of the reason for such failure to act. If I do not hear from you shortly, I have been instructed by my client to seek redress t the Commission level and/or in Court.

Kindly direct any questions or correspondence concerning this matter to the undersigned.

Sincerely,

Robert J. Keller
Counsel for Marc D. Sobel
d/b/a Air Wave Communications

cc: David P. Christianson, Esquire
Centrium South, Suite 310
725 Town & Country Road
Orange, California 92668
Counsel for Liberty Paving Company, Inc.

[1] The evidence is in the form of sworn testimony, given under oath, by the licensee himself, that the station was off the air for more than one year.

EXHIBIT LP-3

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

JAMES A. KAY, JR., Plaintiff, vs. HAROLD PICK, GERARD PICK, individually, and doing business as COMPUTER CONSULTANT AND SYSTEMS, and doing business as COMMUNICATION CONSULTANT AND SYSTEMS, and doing business as CCS, and doing business as LANCE HARDY BEST ADVERTISING, and DOES 1 through 25, inclusive, Defendants.	Case No. LC 023366

DEPOSITION OF CHARLES BARNETT

FRIDAY, JANUARY 30, 1998

ENCINO, CALIFORNIA

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

JAMES A. KAY, JR., Plaintiff, vs. HAROLD PICK, GERARD PICK, individually, and doing business as COMPUTER CONSULTANT AND SYSTEMS, and doing business as COMMUNICATION CONSULTANT AND SYSTEMS, and doing business as CCS, and doing business as LANCE HARDY BEST ADVERTISING, and DOES 1 through 25, inclusive, Defendants.	Case No. LC 023366

DEPOSITION OF CHARLES BARNETT,

taken on behalf of the Plaintiff, commencing at 9:40 a.m., at 18075 Ventura Boulevard, Encino, California, on Friday, January 30, 1998, before MARCHELLE HARTWIG, CSR No. 9347, within and for the County of Los Angeles, State of California, pursuant to Subpoena.

APPEARANCES OF COUNSEL:

For the Plaintiff:

LAW OFFICES OF JOEL S. SEIDEL
BY: JOEL S. SEIDEL, ESQ.
18075 Ventura Boulevard
Suite 213
Encino, California 91316

For the Plaintiff:

THOMPSON HINE & FLORY P.L.L.
BY: SCOTT A. FENSKE, ESQ.
1920 N Street N.W.
Washington, D.C. 20036-1601

For the Defendant FCC, Wireless Telecommunications Bureau:

WILLIAM H. KNOWLES-KELLETT
ATTORNEY AT LAW
1270 Fairfield Road
Gettysburg, Pennsylvania 17325-7245

For the Defendant Enforcement and Consumer Information Division Wireless Telecommunications Bureau:

JOHN J. SCHAUBLE
ATTORNEY AT LAW
2025 M Street, N.W.
Room 8308
Washington, D.C. 20554

Also Present: James A. Kay, Jr.

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B -	Document entitled "Repeater Agreement"	17
C -	Document entitled "Request For Admission'"	20
D -	Document entitled "Preliminary Statement"	20
E -	Document entitled "Private Radio Application For Renewal, Reinstatement And/Or Notification Of Change To License Renewal"	24
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1 ENCINO, CALIFORNIA - FRIDAY, JANUARY 30, 1998
2 9:40 a.m.
3
4 CHARLES BARNETT,
5 having been first duly sworn, was
6 examined and testified as follows:
7
8 EXAMINATION
9 BY MR. SEIDEL:
10 Q Good morning, Mr. Barnett. My name is Joel
11 Seidel, and to my immediate left is Mr. Scott Fenske. We
12 are counsel for Mr. James Kay.
13 Would the bureau make their appearance for
14 the record?
15 MR. SCHAUBLE: Present for Chief Wireless
16 Telecommunications Bureau are John J. Schauble and
17 William H. Knowles-Kellett.
18 BY MR. SEIDEL:
19 Q I assume you've had your deposition taken
20 before; correct?
21 A Yes.
22 Q I'm going to give you some very brief
23 admonitions. You know the seriousness of what you are
24 doing today; correct?
25 A Correct.

1 Q And you realize that you've taken an oath to
2 tell the truth under penalty of perjury; is that correct?
3 A Correct.
4 Q During this deposition I'm going to be
5 asking you a number of questions. If at any point you
6 don't understand a question, please let me know and I
7 will rephrase it. If you don't let me know that you do
8 not understand the question, the record will reflect that
9 you did.
10 I'm going to be asking you for estimates of
11 dates and times and lengths of conversations perhaps.
12 I'm entitled to your best estimate, but what I don't want
13 is a guess. I'm going to give you the standard
14 definition of a guess as opposed to an estimate. If I
15 asked you to estimate the length of this table, you could
16 look at it and say, well, it looks like it's about ten
17 feet or so. You would probably be fairly close. If I
18 asked you to estimate the length of my desk, you would
19 have no clue because as far as I know you've never been
20 in my office. Do you understand the difference between
21 an estimate and a guess?
22 A Yes.
23 Q If at any point during this deposition you
24 need to take a break or you want to talk to someone about
25 your testimony, you may do so. Just let me know and I'll

1 let you go off the record. If at any point during the
2 deposition you wish to correct something you've stated
3 earlier, just let me know and we'll go back on the record
4 and we'll do that. I want your best testimony today. I
5 don't want to intimidate you or get anything from you
6 other than the truth.
7 Have you taken any medication within the
8 last 24 hours?
9 A No.
10 Q Have you had any drugs or alcohol within the
11 last 24 hours?
12 A No.
13 Q Are you capable of giving your best
14 testimony today?
15 A Yes.
16 Q Have you spoken to anyone about your
17 testimony today?
18 A No.
19 Q That was not a great question, so I will
20 rephrase it. Prior to this morning, has anyone discussed
21 with you what was going to go on here today?
22 A I received a notice that I would be here for
23 a deposition. I had a few questions that I had clarified
24 on the order from the court. That's all. My wife knows
25 I'm here.

1 Q But you've not discussed with anyone what
2 you are going to be saying today?
3 A No.
4 Q I'm handing you a document entitled Notice
5 of Deposition Duces Tecum. Have you ever seen this
6 document before? Take your time to look through it.
7 A Okay. I've seen it.
8 Q Is that a yes?
9 A Yes.
10 Q If you look on the third page of this
11 document there is a list of documents that we requested
12 that you bring today. Do you see that?
13 A Yes.
14 Q Did you bring any documents responsive to
15 those requests?
16 A Yes.
17 Q May I see those, please.
18 A Yes.
19 MR. SEIDEL: Off the record.
20 (Discussion held off the record.)
21 BY MR. SEIDEL:
22 Q These documents that you brought today, are
23 these copies for me, or do I need to make copies and
24 return them to you?
25 A They're copies for you.

Q Thank you.

I have a letter that I would like to mark as Exhibit A.

(Plaintiff's Exhibit A was marked for identification and is attached hereto.)

BY MR. SEIDEL:

Q Do you recognize this letter, Mr. Barnett?

A Yes, I do.

Q Did you write this letter?

A Yes, I did.

Q Did you type this letter?

A Yes, I did.

Q The signature at the bottom, is that your signature?

A Yes, it is.

Q I would like to refer you to a sentence approximately seven lines down from the top of the first paragraph. I'll read a portion of the sentence. "I have in my possession a taped phone conversation between Mr. Kay and myself when I first was made aware that my current carrier 'Fleetcall' had not assigned my radio service to Mr. Kay's company." You drafted that sentence; correct?

A Yes, I did.

Q Do you have possession of a taped phone

conversation between Mr. Kay and yourself?

A No, I don't.

Q Have you ever taped a phone conversation between yourself and Mr. Kay?

A No, I haven't.

Q Then it's not unfair for me to state that this statement is untrue?

A That statement is untrue.

Q Why did you make that statement knowing that it was untrue?

A Well, prior to writing this letter I had received a letter from the FCC telling me that I was going to have my license reinstated. After I received that letter I received a copy of the petition that Mr. Kay's attorney sent to Washington or Gettysburg still fighting the issue, and I thought that if it was still in the balance whether I was going to get my license back or not and if a tape recording could make a difference that would be absolutely pivotal, I was willing to try to get a tape recording from Mr. Kay that he would repeat some of the things he had told me already on the phone.

Q When you drafted this sentence that I already read -- strike that.

This sentence I have read into the record was untrue when you wrote it; correct?

A That sentence was untrue when I wrote it.

Q So it's your testimony, if I understand it, that what you intended to do was attempt to get a taped phone conversation of Mr. Kay?

A That's correct.

Q When did you intend on doing that?

A If I had received an answer back from this letter requesting a tape or saying that that was a pivotal issue, I would have attempted to get a tape.

Q What if you -- well, strike that.

Did you ever attempt to get a tape of Mr. Kay speaking?

A No.

Q So you were only going to attempt to get a taped phone conversation with Mr. Kay if the FCC requested one; correct?

A That's correct.

Q Now, let me see if I understand your testimony. This statement was untrue when you made it; correct?

A That's true.

Q It's a correct statement that this was untrue?

A That's a correct statement that that statement is untrue.

Q That statement would remain untrue -- strike that question.

And you had no immediate plans at the time you drafted this statement to obtain a taped conversation of Mr. Kay?

A No.

Q You didn't have any plans; correct?

A Not unless I heard back from the response of this letter saying that they wanted to see a tape.

Q Are there any other statements in this letter that are untrue? Take all the time you like to review it.

A No, I don't think so.

Q I'm going to read the sentence right after the one I read into the record. "Among other interesting things he states that I was receiving service from both companies."

A That's a quote from Mr. Kay. He told me he was receiving service from both companies.

Q Was your intent in this letter to convey to the FCC that that statement was on the tape?

A No.

Q I'm going to read both statements together for the record. "I have in my possession a taped phone conversation between Mr. Kay and myself when I first was

1 made aware that my current carrier 'Fleetcall' had not
2 assigned my radio service to Mr. Kay's company. Among
3 other interesting things he states that I was receiving
4 services from both companies." To my reading,
5 Mr. Barnett, it sounds to me that you've stated in this
6 letter that you have a tape of Mr. Kay speaking, and
7 among the things he says is that you were receiving
8 service from both companies.
9 A Well, that's not how I meant it to sound.
10 He told me this during the phone conversation, and my
11 plan was to get him to repeat it.
12 Q But you were only going to attempt to get
13 him to repeat it if the FCC asked for a tape?
14 A That's true.
15 Q You mailed this letter approximately June
16 27, 1994?
17 A Yes.
18 Q Have you at any other time shown this letter
19 to anyone from the FCC?
20 A I don't think so.
21 Q Have you ever given this letter to any
22 attorney for the Federal Communications Commission?
23 A Not that I can recall.
24 Q Has the FCC or anyone from the FCC ever
25 asked you for a copy of this letter?

1 A Not that I can recall.
2 Q So to the best of your knowledge you sent
3 this letter on or about June 27, 1994 and never showed
4 this letter to anyone else connected with the FCC?
5 A That's true.
6 Q And just for the record, tell me if this is
7 your understanding, when I say FCC I mean Federal
8 Communications Commission?
9 A Yes, that's true, I haven't. I can't recall
10 sending this letter to anyone else. I think this was the
11 last letter that I wrote.
12 Q My last question to you, sir, was simply a
13 foundational question. So that I have it on the record,
14 when I said to you FCC you understood that I meant
15 Federal Communications Commission. Has that been your
16 understanding?
17 A Yes.
18 Q Okay. Thank you. When was the last time
19 you spoke with anyone from the FCC, if you recall?
20 A I believe I talked to Knowles-Kellett, one
21 of them yesterday just for clarification on the order
22 that had been faxed to me, the judge's order.
23 Q And prior to that?
24 A One of these gentlemen called to let me know
25 there would be a deposition and the date, and that there

1 would be an order being faxed over.
2 Q And prior to that?
3 A I can't recall. It seems like it had to
4 have been a period of around February of '94 maybe.
5 Maybe February, but definitely of '94.
6 Q Do you recall who you spoke with?
7 A I spoke to a San Diego office. Maybe her
8 name was June. I spoke to Gettysburg, I believe her name
9 was Sharon.
10 Q Do you remember her last name?
11 A No.
12 Q Have you ever spoken to someone by the name
13 of Riley Hollingsworth?
14 A The name is really familiar. It seems I
15 have. Just the name is familiar. I don't know whether
16 it's because it's been bantered about or not. I don't
17 know.
18 Q Have you ever spoken to anyone with the
19 first name of -- strike the question.
20 Have you ever spoken to anyone from the
21 Federal Communications Commission who has a first name of
22 Ann Marie?
23 A It doesn't sound familiar.
24 MR. SEIDEL: I would like to go off the record for
25 a few minutes to copy some documents.

1 (Recess was taken.)
2 MR. SEIDEL: Back on the record.
3 Q I have only one more question with respect
4 to the letter marked as Exhibit A. Have you ever
5 informed anyone from the Federal Communications
6 Commission that the statements you made in that letter
7 were false?
8 A No.
9 Q This may refresh your recollection or it
10 certainly may get it started, but sometime in December of
11 1993 you met an individual named Mr. Berman; is that
12 correct?
13 A There is a Mr. Berman.
14 Q Please explain to me the first time you
15 heard from anyone from Lucky's Two-Way Radios.
16 A December 9, 1993.
17 Q Do you recall what happened on that day?
18 A Mr. Berman called my office wanting an
19 appointment to come in to discuss my change in radio
20 services. Actually, I would reword that. He started the
21 conversation something like that. It was -- I told him,
22 no, I wasn't interested in changing radio services.
23 And he said, no, he said, "You have been
24 assigned to my company and you have some papers to fill
25 out and it won't take long," or something to that effect.

EXHIBIT MDS-1

Draft
14:59 9/15/94

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

JAMES A. KAY, JR.

Order to Show Cause
why more than one
hundred sixty four Part 90
licenses should not
be revoked or cancelled.

Order to Show Cause
why Kay should not be
ordered to cease and
desist from certain
violations of Commission
rules.

ORDER TO SHOW CAUSE AND
HEARING DESIGNATION ORDER

Adopted: **Released:**

By the Commission:

1. The Commission has before it for consideration more than one hundred sixty four land mobile licenses[1] authorized under Part 90 of the Commission's Rules. 47 C.F.R. § 90.1 et seq. The licensee, James A. Kay, Jr., has failed to respond to Commission requests for written statements of fact. In addition, we have reason to believe he has failed to comply with the Commission's Rules, and may not possess the character qualifications necessary to be a Commission licensee. For the reasons that follow, we will order Kay to show cause why his licenses should not be revoked or cancelled, and designate the matter for a hearing before an administrative law judge.

2. In response to complaints regarding the construction and operational status of a number of Kay's licensed facilities, on January 31, 1994, Commission staff requested additional information to determine whether Kay had committed rule violations by operating systems in the trunked mode that were licensed for conventional use and by not meeting the construction and placed-in-operation requirements of the Commission's Rules. 47 C.F.R. §§ 90.155, 90.631 and 90.633. This letter also requested information to enable the staff to determine if stations licensed to Kay have permanently discontinued operation in violation of our rules. 47 C.F.R. § 90.157. The letter also directed Kay to provide information detailing the loading of end users on Kay's base stations in order to assess Kay's compliance with our "forty mile" rule, which prohibits licensees from obtaining additional license grants within forty miles of an existing station until the existing station is loaded

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[1] See Appendix A.

to 70 mobile units per channel, and to apply our channel sharing and recovery provisions. 47 C.F.R. §§ 90.623, 90.627, 90.631 and 90.633.

3. We have received complaints that some of Kay's stations are not constructed. Because many of the stations are licensed to operate from mountain peaks managed by the U.S. Forest Service in the Los Angeles area, U.S. Forest Service permits are required to construct and operate on the peaks. In order to assess compliance with our construction and operation requirement, the staff requested that Kay identify the stations for which he holds FCC licenses as well as those he manages. The staff directed Kay to note those that are on U.S. Forest Service land.

4. Information available to the Commission also includes that James A. Kay, Jr. has done business under a number of assumed names. We believe these names include some or all of the following: Air Wave Communications, John C. Allen dba Buddy Sales, Buddy Corp., Buddy Sales, Buddys Sales, Buddy Corp. dba Buddy Sales, Buddy Corp. dba Southland Communications, Consolidated Financial Holdings, Hessman Security, Roy Jensen, James Kay, James A. Kay, Jr., Lucky's Two Way Radio, Luckys Two Way Radio, Luckys Two Way Radios, MetroComm, Multiple M Enterprises, Inc., Oat Trunking Group, Oat Trunking Group, Inc., Marc Sobel dba Airwave Communications, Southland Communications, Southland Communications, Inc., Steve Turelak, Triple M Enterprises, Inc., V&L Enterprises, and VSC Enterprises. The inquiry letter sent to Kay directed that he identify all station licenses he holds under all names under which he does business.

5. The letter also requested that Kay substantiate the loading of his stations by providing customer lists and telephone numbers. Such business records are the Commission's generally acceptable proof of loading. Kay was assured that proprietary information would be considered confidential.

6. Kay filed a response that provided none of the requested information. He simply referenced some dissimilar information provided to the Commission staff at other times. Kay failed to provide the requested information after numerous extensions of time, responding at one point that "there is no date...for which submission of the requested information would be convenient". Accordingly, we will designate this matter for hearing to determine Kay's fitness to remain a Commission licensee, in light of his conduct and his refusal to respond to the Commission inquiry.

7. We have also received complaints from various parties that James A. Kay, Jr. misused the Commission's processes. For example, licensees have complained that Kay has fraudulently induced them to sign blank Commission forms seeking modification of license. Kay allegedly then uses the form to cancel the licenses.

8. Accordingly, IT IS ORDERED that pursuant to Section 312(a) of the Communications Act of 1934, as amended, James A. Kay, Jr. is directed to show cause why his licenses should not be revoked or cancelled[2] at a hearing before an Administrative Law Judge, at a time and place to be designated in a subsequent Order, upon the following issues:

a) To determine whether James A. Kay, Jr. has abused the Commission's processes by failing to respond to a Commission inquiry;

b) To determine whether James A. Kay, Jr. has violated Section 1.17 of the Commission's Rules, 47 C.F.R. § 1.17, by failing to respond to a Commission inquiry;

---

[2] Several of the rule violations discussed above are subject to an automatic cancellation condition: if the licensee does not meet his or her construction deadline, or if the licensee permanently discontinues operation, the license cancels automatically. See e.g., 47 C.F.R. §§ 90.157, 90.631 and 90.633.

c) To determine whether James A. Kay, Jr. has exceeded his license authority by operating systems in the trunked mode that were authorized for conventional use and to determine if he has violated any of the following: Sections 90.155, 90.157, 90.623, 90.627, 90.631, and 90.633 of the Commission's Rules, 47 C.F.R. §§ 90.155, 90.157, 90.623, 90.627, 90.631, and 90.633;

d) To determine if any of James A. Kay, Jr.'s licenses have automatically cancelled as a result of violations listed in subparagraph (c);

e) To determine whether James A. Kay, Jr. has misused the Commission's processes in order to defraud other licensees;

f) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether James A. Kay, Jr. is qualified to remain a Commission licensee; and

g) To determine whether Kay should be ordered, pursuant to Section 312(b) of the Communications Act of 1934, as amended, to cease and desist from violation of Commission Rules 1.17, 90.155, 90.157, 90.623, 90.627, 90.631, 90.633, 47 C.F.R. §§ 1.17, 90.155, 90.157, 90.623, 90.627, 90.631, 90.633.

9. IT IS FURTHER ORDERED that the above issues be consolidated for hearing pursuant to Section 1.227(a)2) of the Commission's Rules.

10. IT IS FURTHER ORDERED that the Chief, Private Radio Bureau SHALL BE a party to the proceeding.

11. IT IS FURTHER ORDERED, that to avail themselves of the opportunity to be heard, the parties, pursuant to Section 1.91(c) of the Commission's rules, in person or by attorney, shall file with the Commission within thirty (30) days of the receipt of the Order to Show Cause and Hearing Designation Order a written appearance stating that they will appear at the hearing and present evidence on the matters specified in the Order. If a party fails to file an appearance within the time specified, the right of that party to a hearing shall be deemed to have been waived. See Section 1.92(a) of the Commission's rules. Where a hearing is waived, a written statement in mitigation or justification may be submitted within thirty (30) days of the receipt of the Order to Show Cause and Hearing Designation Order. See Section 1.92(a) of the Commission's rules. In the event the right to a hearing is waived by all the parties to this proceeding, the presiding Officer, or the Chief Administrative Law Judge if no presiding officer has been designated, will terminate the hearing proceeding and certify the case to the Commission in the regular course of business and an appropriate order will be entered. See Section 1.92(c) of the Commission's rules.

12. IT IS FURTHER ORDERED that the burden of proceeding with the introduction of evidence and the burden of proof shall be on the Private Radio Bureau.

13. IT IS FURTHER ORDERED that the Secretary send a copy of this order via certified mail-return receipt requested to Dennis K. Brown, Esquire, Brown and Schwaninger, P.C., 1835 K Street N.W., Suite 650, Washington, D.C. 20006, and have this order or a summary thereof published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

kayosc2

EXHIBIT MDS-2

Air Wave Communications

Federal Communications Commissions
1270 Fairfield Road
Gettysburg, PA 17325

Attn.: Gary Stanford

Dear Mr. Stanford, 12-6-94

It has come to my attention that several of my FCC radio station license applications, FCC radio station license application which I have prepared for my customer, and several finder's preference requests I have filed have all been placed on hold by Mr. W. Riley Hollingsworth due to an investigation that is being conducted into licenses held by Mr. James A. Kay, Jr.

I have been informed that Mr. Hollingsworth has recently stated his intent to dismiss one my radio station license applications, file #415367, if Mr. Kay fails to respond to the Commissions inquiry. See attached copy of letter dated 10/28/94 addressed to Mr. Kay. This letter to Mr. Kay improperly included the file number of my application.

Mr. Hollingsworth has also delayed or intervened with an application for the American Red Cross, Los Angeles Chapter file #129176. His request for additional information, sent to me through the processor, for a separate letter restating the number of mobiles .o be placed in operation on a Business radio Service 460 MHz frequency channel seems quite unusual considering the mobile loading on these frequencies is not limited. It appears that this special handling has occurred solely due to my name appearing on the application as preparer.

I also have applied for a "finders preference" under the following file numbers:

File #	Date filed	Target Licensee	Call Sign	Status
93F600	08/09/93	Lance Hardy	WNYQ465	Recon - opposition filed
93F622	10/04/93	Western Waste	WNPP641	Pending - no opposition filed
93F683	11/05/93	Fleet Disposal	WNGH521	Pending - no opposition filed
93F758	02/01/94	LVJ Leasing	WNKR724	Pending - no opposition filed
94F323	07/29/94	Wilcox	WNXG598	Pending - no opposition filed

I can only assume that I have been "black listed" by Mr. Hollingsworth and am having my applications held, my customer's applications held, and my finder's preference requests ignored due to my association with Mr. Kay. Contrary to whatever beliefs that may be held by Mr. Hollingsworth, which have resulted in his taking unwarranted actions against me, I would like to assure you that I am an Independent Two Way Radio Dealer. I am not an employee of Mr. Kay's or of any of Mr. Kay's companies. I am not related to Mr. Kay in any way. I have my own office and business telephone numbers. I advertise under my own company name in the Yellow Pages. My business tax registration and resale tax permits go back to 1978 - long before I began conducting any business whatsoever with Mr. Kay - the apparent target of Mr. Hollingsworth.

15705 Superior Street ☐ North Hills, CA 91343 ☐ (818) 894-6950

I feel it is very unfair that I be punished for whatever Mr. Kay may have or may not have done, solely due to accusations against Mr. Kay.

I would be most appreciative if you investigate the mistreatment to which I am being subjected and get my applications, my customer's application and my finder's preference requests processed in a timely fashion. Should you need further assistance to assist you in this matter, please call me at your earliest convenience.

Sincerely,

Marc Sobel

EXHIBIT MDS-3

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
RECEIVED
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CLERK

BEFORE THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Marc D. Sobel d/b/a Air Wave Communications, Petitioner	]	96-1051
versus	]	Case No. 96-_____
Federal Communications Commission,	]	
Respondent.	]	

PETITION FOR WRIT OF MANDAMUS

Marc D. Sobel d/b/a Air Wave Communications ("Sobel"), through his attorney and pursuant to the All Writs Act,[1] Rule 21 of the Circuit Rules for this Court,[2] and Rule 21 of the Federal Rules of Appellate Procedure,[3] hereby respectfully petitions this honorable Court for issuance of a writ of mandamus to remedy the unreasonable agency delay on matters pending before the Federal Communications Commission ("Commission" or "FCC"), in support whereof the following is respectfully shown:

A. Statement of the Case

Sobel holds various mobile telecommunications authorizations issued pursuant to Title III of the Communications Act[4] and Part 90 of the FCC Rules and Regulations.[5] Attachment No. 1 hereto is a list of the FCC licenses held by Sobel, issued either in his name or in some variation of his trade name, Air Wave Communications.[6] In most instances these licenses are for Specialized Mobile Radio Systems ("SMRS")[7] or are otherwise used by Sobel to provide mobile

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[1] 28 U.S.C. § 1651(a).
[2] D.C. Cir. Rule 21.
[3] Fed. R. App. P. 21.
[4] 47 U.S.C. § 301 *et seq.*
[5] 47 C.F.R. § 90.1 *et seq.*
[6] Notwithstanding the use of the trade name, Sobel's business operations are conducted as a sole proprietorship, and the licenses are issued to and held by him as an individual.
[7] An SMRS is "[a] radio system in which licensees provide land mobile communications services (other than radiolocation services) in the 800 MHz and 900 MHz bands on a commercial basis to entities eligible to be licensed under this part, federal government entities and individuals." 47 C.F.R. § 90.7.

radio services to third parties in exchange for compensation for service, equipment, and/or maintenance. These licenses and the operations conducted pursuant to them represent a substantial part of Sobel's assets and livelihood.

In the development, maintenance, and improvement of mobile radio facilities such as those licensed to Sobel, various FCC applications are from time to time necessary. These may include applications to renew or modify existing licenses, applications for new facilities or for additional channels, finder's preference requests[8], and other miscellaneous applications and requests. Timely processing of such filings is extremely important to the technical, financial, and competitive viability of the licensee's operations.

Attachment No. 2 hereto is a list of finder's preference requests and applications (hereinafter sometimes referred to as the "Sobel Filings") filed by Sobel and still currently pending before the FCC. Each listed item has been pending long beyond the typical time for FCC disposition of such matters. Sobel has repeatedly asked the Commission, both formally and informally, to either process these filings or to provide a clear and detailed statement of any problems or impediments so he can address them. These entreaties have been to no avail. The FCC has effectively placed a freeze on all matters before it relating to Sobel. For more than two years Sobel has been unsuccessfully trying to break this logjam. In the past year alone, counsel for Sobel has repeatedly (in letters, telephone calls, and at least one personal meeting) sought either action on the pending matters or a full explanation of the reasons why action is being withheld. Commission staff has offered only one very general explanation (discussed more fully

[8] The FCC administers a "finder's preference program," whereby one who submits information leading to the "recovery" of a licensed but unused mobile radio channel in certain bands can receive a dispositive preference to obtain a license for that channel. *See* 47 C.F.R. § 90.173(k). The target of such requests are typically licensed facilities that were never timely constructed, have been abandoned by the licensee, or are otherwise subject to cancellation. The discovery of potential targets and the submission of finder's preference requests are an important mechanism whereby active mobile radio licensees seek to improve the quality, reliability, and capacity of their systems through the addition of channels and/or coverage area. Indeed, the underlying rationale of the program is to give bona fide licensees have an economic incentive to discover, recover, and place into public service otherwise unused licensed channels, thereby enhancing the FCC's enforcement activities and increasing efficient use of the spectrum. *See* PR Docket No. 90-481, *Report and Order* (FCC 91-339), 6 FCC Rcd 7297 (1991), *Memorandum Opinion and Order* (FCC 93-411), 8 FCC Rcd 6690 (1993).

below), but has refused to communicate the details of or the basis for its concerns. The Commission is withholding action on the Sobel Filings, but will neither tell Sobel the reasons, nor afford him an opportunity to address them.

Commission staff has expressed concern about the relationship between Sobel and Mr. James A. Kay, Jr. ("Kay"), another Part 90 licensee who is currently the target of FCC license revocations proceedings.[9] Kay and Sobel are friends and have a business relationship, the nature and full details of which have been provided to the FCC. Kay manages the day-to-day operations of a number of mobile radio systems in the Los Angeles, California area. Many of these are systems licensed to Kay, but some are licensed to other persons or entities and are managed by Kay pursuant to management agreements. Some, but not all,[10] of the stations licensed to Sobel are managed by Kay pursuant to such an arrangement.[11] Sobel, acting as an independent contractor, provides installation and maintenance services to the Los Angeles land mobile radio community. Some of the stations serviced by Mr. Sobel in this regard are owned and/or managed by Mr. Kay. Commission staff apparently relies on its ostensible concern about

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[9] In the interest of full disclosure, the Court is advised that ndersigned counsel for Sobel also represents Kay on some licensing matters before the FCC, but does not represent Kay in connection with the revocation proceedings. (Undersigned counsel briefly represented Kay during a pre-hearing phase of the proceeding while the parties were attempting to settle the case but was replaced by special litigation counsel when settlement efforts failed and the discovery and trial aspects of the proceedings once again became active.) There are no matters currently before the FCC in which Kay and Sobel have adverse interests. Nonetheless, Kay and Sobel are fully informed of and have expressly consented to the dual representation, and each understands that he is free to seek separate counsel at any time.

[10] The management agreement applies only to Sobel's 800 MHz facilities—he also owns and operates various other stations that have no relationship whatsoever to Kay, with the possible exception that Sobel may lease or sublease site facilities from Kay as to some of these stations. Moreover, the Kay-managed stations represent only approximately 10% of Sobel's gross revenues. The vast majority of his income is derived from services provided to stations unaffiliated with Kay.

[11] The management between arrangement Sobel and Kay is typical for the industry and comports with applicable FCC policies requiring the licensee to retain control of its stations. Indeed, because Sobel installs and maintains his own stations, visits the transmitter sites on a regular basis, and lives and works in the Los Angeles area, thereby keeping in regular contact with Kay, Sobel has retained many more indicia of control than other licensees whose third-party management arrangements have been blessed by the Commission. *E.g. In the Matter of Authorization of Motorola, Inc., Memorandum Opinion and Order* (FCC 86-104), 59 Rad. Reg. 2d (P & F) 1333 (1986). *See also Public Notice: Private Radio Bureau Reminds Licensees of Guidelines Concerning Operation of SMR Stations Under Management Contracts*, (Release No. 1932), 64 Rad. Reg. 2d (P & F) 840 (1988).

the Kay-Sobel relationship to justify holding all of the Sobel Filings in abeyance. But the Commission refuses to advise Sobel of the precise nature of these concerns, how the relationship impacts Sobel's qualifications, or in what way it effects the propriety of any of Sobel's pending applications or requests. If the Commission would put these issues to Sobel, he would promptly and fully answer them.

In December of 1994 the Commission designated a hearing "[t]o determine, in light of the evidence adduced . . . whether James A. Kay, Jr. is qualified to remain a Commission licensee."[12] The Commission's Wireless Telecommunications Bureau (hereinafter referred to as "Bureau" or "Wireless Bureau"),[13] was made a party to the proceeding and charged with prosecuting the case against Kay. The Commission stated in the designation order that Kay holds 164 licenses, and listed them in Attachment A to the designation order.[14] Item Nos. 158-164 on that list were licenses issued to Marc Sobel and/or Air Wave Communications, but the Commission did not name Sobel as a target of the revocation proceedings, did not specify any issues as to Sobel, and did not serve the hearing designation order on Sobel. This is not surprising, because in instituting license revocation proceedings against Kay, the Commission was under the belief that Sobel was a fictitious name used by Kay to circumvent FCC regulations. As the Commission then articulated it: "Information available to the Commission also indicates that James A. Kay, Jr. may have conducted business under a number of names. Kay could use multiple names to thwart our channel sharing and recovery provisions . . . . We believe these names include . . . Air Wave Communications [and] Marc Sobel dba Airwave Communications."[15] It was not until after the hearing was designated that Bureau staff acknowledged that the designation order was inaccurate on this score and that Sobel is not a fictitious Kay alias but a separate individual.

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[12] *Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture* ("*Hearing Designation Order*") (FCC 94-315; PR Docket No. 94-147), 76 Rad. Reg. 2d (P&F) 1393 (1994).

[13] At the time of the designation order this matter was before the Private Radio Bureau. In a reorganization of the Commission completed in early 1995, the functions of the Private Radio Bureau were transferred to a newly-formed Wireless Telecommunications Bureau.

[14] *Hearing Designation Order* at ¶ 1 & Attachment A.

[15] *Id.* at ¶ 3.

Prior to the hearing designation order, at some time in late 1993 or early 1994, Bureau staff apparently imposed a freeze on processing any and all applications or requests filed in the name of Marc Sobel. It was only when Sobel made status inquiries that he learned his applications were being held up in connection with an investigation of Kay. The processing delays were having an adverse effect on Sobel's business and technical operations, prompting Sobel to write to the Commission in an effort to correct any misunderstanding on the part of staff regarding his relationship with Kay and to request that processing of his applications be resumed. Attachment No. 3 hereto is a copy of Sobel's December 4, 1994, letter to the Commission. The Commission staff ignored this letter, and to this date there has been no response.

On January 19, 1996, more than a year after the as yet unacknowledged letter from Sobel to the Commission, the FCC issued to Sobel a request for information pursuant to Section 308(b) of the Communications Act.[16] Attachment No. 4 hereto is a copy of that request. The Commission sought information regarding the business relationship between Sobel and Kay. It was admitted on the face of the letter that such information was being sought in connection with Kay license revocation proceedings.[17] In a series of telephone consultations with various Wireless Bureau staff members and representatives, Sobel advised (through counsel) that he was prepared to answer the Section 308(b) inquiry, but that he also wanted discuss the status of his pending applications and the reasons for the FCC's refusal to take action thereon. Counsel for Sobel volunteered to meet with staff, and even offered to have Sobel fly from Los Angeles to the east coast to be present at such a meeting and to answer personally any questions staff

[16] Although the Commission had been advised in writing on December 6, 1995, that undersigned counsel was assuming legal representation of Sobel before the FCC, the letter was sent directly to Sobel and was not served on counsel. Section 1.12 of the FCC Rules and Regulations provides: "In any matter pending before the Commission in which an attorney has appeared for, submitted a document on behalf of or been otherwise designated by a person, any notice or other written communication pertaining to that matter issued by the Commission and which is required or permitted to be furnished to the person will be communicated to the attorney, or to one of such attorneys if more than one is designated. If direct communication with the party is appropriate, a copy of such communication will be mailed to the attorney." 47 C.F.R. § 1.12.

[17] Arguably, the letter constituted an abuse of Section 308(b) by the Bureau to coerce discovery in connection with the Kay license revocation proceeding, ignoring the discovery procedures and limits set by the presiding ALJ. Indeed, had the staff truly been interested in learning the truth about the relationship between Sobel and Kay, as opposed to engaging in a fishing expedition against Kay, it would have responded to the letter Sobel had submitted more than a year earlier.

might have. The Commission's curious response to these overtures was to unilaterally withdraw its Section 308(b) request. Attachment No. 5 hereto is a copy of the Commission's February 22, 1996 letter withdrawing the 309(b) request. The Wireless Bureau was apparently more interested in maintaining its freeze on Sobel applications than it was in obtaining information from him.

On March 18, 1996, counsel for Sobel wrote to the Commission, reiterating the requests that had been made orally. A copy of the letter is appended hereto as Attachment No. 6. Specifically, the letter stated:

> I am attaching to this letter a list of the pending matters Mr. Sobel still has open before the Bureau. Most if not all of these items would appear to be long overdue for action. We urge prompt and timely action on these matters. Otherwise, we respectfully request that you promptly advise us of the reasons for inaction on these matters so that we may address them.

To this date there still has been no response to this letter.

Meanwhile, the Kay revocation proceeding was well under way. As noted earlier, the revocation proceeding was directed solely at Kay, being premised on the theory that "Marc Sobel" was merely one of several fictitious names allegedly used by Kay.[18] At some point it became clear to the Bureau that Sobel was not a fictitious alter ego of Kay, but a real and separate individual. Whether this realization came about in the course of pre-trial discovery or as a result of Sobel's efforts to unfreeze his pending applications, it presented a problem for the Bureau. The Bureau was seeking a summary decision which it argued would allow the revocation of the Kay licenses without hearing.[19] The Bureau feared a fly in the ointment, namely, several licenses within the scope of the requested summary decision were actually held by Sobel, who

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[18] Unlike FCC applications for most other Title III services, applications filed pursuant to Part 90 of the FCC Rules provide only minimal information about the identity of the applicant (name, address, and type of entity), and that is rarely questioned absent some reason for doing so. The Commission apparently was under the impression at the time of the hearing designation order that Kay had somehow exploited these cryptic requirements to obtain licenses in the name of Sobel that he might otherwise have been precluded from obtaining in his own name. Whatever the basis for the Commission's initial belief, the Bureau eventually acknowledged that Kay and Sobel are two separate individuals.

[19] The ALJ eventually issued such a ruling, inexplicably making a summary ruling on even the ultimate issue of license revocation, even though no evidence has yet been taken and the Bureau's request was not factually supported by any sworn declarations. WT Docket No. 94-147, *Summary Decision of Administrative Law Judge Richard L. Sippel* (FCC 96-D-02; released May 31, 1996). The effectiveness of that decision has been stayed pursuant to 47 C.F.R. § 1.276(b), and the matter is currently under review by the full Commission.

was not even a party to the proceeding, much less a proper target of it. At best for the Bureau, potentially requiring further hearing proceedings. At worst, the ALJ might view this complication as a convenient reason to deny the Bureau's request for summary decision altogether.

Trial counsel for the Bureau contacted counsel for Sobel to discuss this "problem." In those discussions and in letters submitted to the ALJ (see Attachment No. 7 hereto), Sobel made clear his positions: (a) that he was not a proper target for revocation insofar as he was not named in or served with the designation order; (b) that he did not intend to intervene in the proceedings except insofar as necessary to advance the position stated in (a), above; (c) that whether or not Sobel were to intervene in the proceeding, it would still require a modification of the designation order by the full Commission (not by the ALJ or the Bureau) to specify Sobel as a target and to state issues against him; and (d) that it would be inequitable and unfair, if not arbitrary and capricious, for the Commission to proceed straight to revocation of Sobel's licenses, without first confronting Sobel (in a non-litigation context) with the alleged grounds therefor and giving him an opportunity to respond. In the course of these discussions, Sobel again repeatedly asked that the Bureau either resume processing of his pending applications or state its reasons for inaction so that Sobel might address them.

The Bureau asked the ALJ to certify to the Commission the question whether the hearing designation order should be modified to delete from its scope those licenses held by Sobel. In so doing the Bureau opined that the "nature and extent" of the relationship between Sobel and Kay "should be explored, at least initially, in the context of a non-adjudicatory investigation."[20] The ALJ agreed and, on March 15, 1996, so certified the matter to the Commission.[21]

While the request for certification was under consideration by the Commission, Sobel continued his efforts to have Commission staff resume processing his pending applications. Counsel for Sobel made telephone inquiries to follow up on his March 18, 1996 letter (Attachment No. 6 hereto). Bureau staff eventually advised that the posture of the Sobel licenses

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[20] *Wireless Telecommunications Bureau's Request for Certification*, at ¶ 4 (filed March 6, 1996, in WT Docket No. 94-147).
[21] Order (FCC 96M-35; released March 15, 1996; WT Docket No. 94-147).