

FCC MAIL SECTION

Federal Communications Commission

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

FCC 97M-82  
71212

In the Matter of	)	WT Docket No. 97-56
	)	
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	)	
	)	
Licensees of Certain Part 90 Stations in the	)	
Los Angeles Area	)	
	)	

**MEMORANDUM OPINION AND ORDER**

Issued: May 6, 1997 ; Released: May 8, 1997

1. Under consideration are:

Motion to Enlarge Issues, filed April 3, 1997, by the Wireless Telecommunications Bureau ("Bureau");

Opposition to Bureau's Motion to Enlarge Issues, filed April 21, 1997, by Marc D. Sobel d/b/a Air Wave Communications ("Sobel");

Letter dated April 22, 1997, Counsel for Sobel;

Errata to Opposition to Bureau's Motion to Enlarge Issues, filed April 23, 1997, by Sobel; and

Reply to Sobel's Opposition to Motion to Enlarge, filed May 1, 1997, by the Bureau;

2. The Bureau seeks a misrepresentation issue against Sobel. The Bureau states that in the January 24, 1995 affidavit executed under penalty of perjury and submitted to the Commission as a supporting affidavit to a Motion to Enlarge, Change or Delete Issues that was filed by James A. Kay, Jr., on January 25, 1995, in connection with WT Docket No.

## Federal Communications Commission

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94-147, Sobel declared that Kay had no interest in any radio station of which he (Sobel) was a licensee. However, Sobel and Kay entered into a Radio System Management and Marketing Agreement ("Management Agreement") on December 30, 1994 whereby substantial present and future interests in Sobel's stations and licenses were vested in Kay. The Bureau argues that Sobel's assertions to the Commission cannot be reconciled with the terms of the Management Agreement and a misrepresentation issue is warranted.

3. Sobel opposes on procedural grounds stating that although the basis of the Bureau's information was already known to the Commission during the investigation leading to the designation of this proceeding the Commission did not see fit to designate a misrepresentation issue and therefore it would be inappropriate for the presiding judge to do so now.

4. The argument is rejected. There is no indication in the hearing designation order that the Commission considered the matter of misrepresentation. When an issue is not considered in a hearing designation order the Administrative Law Judge is free to address the issue, even if the issue could have been addressed in the designation order. Tequesta Television, Inc., 2 FCC Rcd 41, 42 (1987).

5. Sobel also argues that the Bureau's motion should fail on the merits. He now avers that he believed each statement made in the declaration of January 24, 1995 to be true at the time he made them and that he believes them to be true today. Additionally, Sobel argues that the Bureau has presented no evidence to support its assertion that his statement regarding Kay not having an interest in any of his stations is false.

6. These arguments, too, are rejected. Sobel's present assertion that he believed that statements made in the January 24, 1995 affidavit were true when made is self serving and must be tested at hearing. The Bureau was not obligated to prove the misrepresentation in its motion. It is required only to make a prima facie case of misrepresentation. This it did by showing that the statement made in the January 24, 1995 affidavit is irreconcilable with the terms of the Management Agreement. Substantial and material questions of fact remain for resolution at the hearing. Astroline Communications Co. v. FCC, 857 F.2d 1556, 1561-1562 (D.C. Cir. 1988).

Accordingly, IT IS ORDERED that the Wireless Telecommunications Bureau's Motion to Enlarge Issues, filed April 3, 1997, IS GRANTED and the issues are enlarged as follows:

- (a) To determine whether March Sobel misrepresented material facts or lacked candor in his affidavit of January 24, 1995.

**Federal Communications Commission**

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- (b) To determine, based on the evidence adduced pursuant to the foregoing issues, whether Marc Sobel is basically qualified to be and remain a Commission licensee.

IT IS FURTHER ORDERED that the burdens of proceeding and proof under the foregoing issues SHALL BE on the Bureau.

FEDERAL COMMUNICATIONS COMMISSION

  
John M. Frysia  
Administrative Law Judge