

FCC MAIL SECTION

Federal Communications Commission

JUL 24 3 37 PM '97

Before the

DISPATCHED Federal Communications Commission  
Washington, D.C. 20554

FCC 97M-129  
71576

BT  
BY

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: July 23, 1997 ; Released: July 24, 1997

1. Under consideration is the Wireless Telecommunications Bureau's ("Bureau") Motion to Compel Testimony of James A. Kay, Jr. at the Hearing, filed July 22, 1997.
2. On July 18, 1997, the Bureau exchanged its direct case exhibits in this proceeding and called Marc D. Sobel ("Sobel") and James A. Kay, Jr. ("Kay") as adverse witnesses as part of the Bureau's direct case. The Bureau stated its belief that because Kay is a party to the proceeding, no subpoena is required to compel his appearance. By letter dated July 21, 1997 (but received by the Bureau on July 22, 1997), counsel for Kay disputed the Bureau's claim that no subpoena is necessary to secure Kay's attendance at the hearing. Kay's counsel stated he did not intend to have him testify and that Kay does not plan to attend the hearing. Citing McGill v. Duckworth, 944 F.2d 344, 353 (7th Cir. 1991), Kay's counsel argues that persons need not attend the proceedings just because they have been named as parties.
3. The Bureau argues that Kay's testimony at hearing is necessary to resolve the designated issue of whether Sobel improperly transferred control of the stations to Kay. The Bureau states that according to Sobel, Sobel has no personal knowledge of the identity of employees or agents Kay may have used in discharging duties relating to Sobel's stations and the nature of the duties performed by Kay's employees.

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4. The Bureau also argues that Kay's attendance is required because he is the sponsor of certain key exhibits, such as the pleadings by which Sobel's January 11, 1995 and January 24, 1995 affidavits were submitted to the Commission (WTB Proposed Exhibits 42 and 44). Those pleadings were verified by Kay and filed on his behalf.

5. Thirdly, the Bureau argues that Kay's testimony at the hearing is necessary to resolve the misrepresentation or lack of candor issue. The Bureau notes that Kay's deposition taken in discovery would be inadequate to be used as a substitute for Kay's live testimony.

6. The Bureau's motion will be granted. Kay's reliance on McGill v. Duckworth, *supra*, is misplaced. In McGill v. Duckworth, Duckworth and others were named as defendants in a lawsuit brought by McGill, the plaintiff. In the instant case, Kay voluntarily intervened in this proceeding. In his "Petition to Intervene," which was filed on March 6, 1997, Kay wrote:

The HDO, on its face, acknowledges Kay's interest in these proceedings. The Commission alleges that Kay, by virtue of the Agreement, exercised almost exclusive control over the stations owned by Sobel. Kay's participation in this proceeding will assist the Commission determine [sic] whether Sobel violated § 310(d) of the Communications Act of 1934, as amended, since Kay has first-hand knowledge of both his and Sobel's day-to-day operations under the Agreement and control of the affected stations. (See, e.g., West Jersey Broadcasting Co., 48 RR 2d 970, 974 (1980) ('[B]ecause Allen played a central role in the transactions made the subject of the payoff issue, we believe the ALJ should have the benefit of Allen's testimony on the payoff issue.')

When seeking intervention, Kay represented to the Presiding Judge that he would assist in the resolution of this proceeding by providing his first-hand knowledge of the facts. In light of the foregoing, it is deemed that it is necessary that the intervenor Kay give live testimony at the scheduled hearing. Failure to appear on his part will be subject to adverse sanction. See American Broadcasting Companies, Inc., 25 FCC 2d at 494 ¶9.

Accordingly, IT IS ORDERED that James A. Kay, Jr. a party in this proceeding appear as a witness at the hearing scheduled to commence on July 29, 1997.<sup>1</sup>

FEDERAL COMMUNICATIONS COMMISSION

  
John M. Frysiak  
Administrative Law Judge

<sup>1</sup> Counsel in this proceeding have been telephonically advised of the contents of this Order.