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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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

In the Matter of ) WT DOCKET NO. 94-147  
 )  
JAMES A. KAY, JR. )  
 )  
Licensee of one hundred fifty two Part 90 )  
Licenses in the Los Angeles, California, Area )

To: The Commission

**WIRELESS TELECOMMUNICATIONS BUREAU'S**  
**OPPOSITION TO**  
**EMERGENCY MOTION FOR SPECIAL RELIEF**

1. On December 8, 1997, Marc D. Sobel d/b/a Air Wave Communications ("Sobel") filed an Emergency Motion for Special Relief.<sup>1</sup> The Chief, Wireless Telecommunications Bureau, by his attorneys, hereby opposes Sobel's request for relief.<sup>2</sup>

2. Sobel seeks a stay of the effectiveness of the Presiding Judge's Memorandum Opinion and Order, FCC 97M-201 (released December 9, 1997) ("MO&O"), in WT Docket

<sup>1</sup> A copy of Sobel's pleading is attached.

<sup>2</sup> The Bureau notes that the Certificate of Service appended to Sobel's Emergency Motion for Special Relief contains a certification that refers to a totally unrelated pleading filed on December 2, 1997. Additionally, the caption appearing on the face of Sobel's Emergency Motion for Special Relief suggests that Sobel's pleading is being filed in connection with two separate proceedings, i.e., WT Docket No 97-56 and WT Docket 94-147, notwithstanding that the relief requested seeks a stay of an interlocutory order issued in only the latter docketed case.

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No. 94-147 ("Kay proceeding"),<sup>3</sup> to extent that the MO&O authorized the Bureau to depose Sobel in the Kay proceeding on certain matters relating to issues specified in WT Docket No. 97-56 ("Sobel proceeding"). Sobel is scheduled to be deposed in California in connection with the Kay proceeding commencing on December 9, 1997. In support, Sobel states that it would be "unfair" for him to be deposed in the Kay proceeding on matters relating to the Sobel proceeding because the Commission has not yet issued a final determination in the Sobel proceeding.<sup>4</sup> Sobel also claims that he has not been afforded adequate notice, pursuant to Section 1.315(a)(3) of the Commission's, that matters relating to the Sobel proceeding would be among those covered by his deposition in the Kay proceeding.

3. Sobel's request for relief should be summarily denied because Sobel has not made a showing sufficient to warrant a stay of any part of the MO&O. In determining whether to grant a stay, the Commission ordinarily considers the following factors: (a) the likelihood that the moving party will succeed on the merits of its claims; (b) the prospect of irreparable injury to the moving party if the Commission denied its request for a stay; (c) the possibility of harm to other parties if the Commission grants the stay; and (d) the public interest. See Wisconsin Gas Co. v. FERC, 758 F.2d 669 (D.C. Cir. 1985); Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977); Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921 (D.C. Cir. 1958) ("Virginia

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<sup>3</sup> A copy of the subject MO&O is attached.

<sup>4</sup> The time for filing exceptions to the Initial Decision of Administrative Law Judge John M. Frysiak, 97D-13 (released November 28, 1997), in the Sobel proceeding, has not yet run.

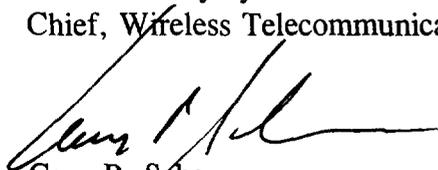
Petroleum"). In the instant case, Sobel has not even attempted to satisfy any of the criteria referenced in Virginia Petroleum. Indeed, Sobel merely claims that it would be "unfair" to question him during his deposition in the Kay proceeding about matters at issue in the Sobel proceeding. A vague claim of unfairness plainly does not satisfy the demanding standards for a stay established Virginia Petroleum.

4. Furthermore, a stay of the Presiding Judge's MO&O by the Commission is particularly unwarranted in this instance where there exist specific rule sections -- Sections 1.315 and 1.319 of the Commission's Rules -- that provide for objections to the substance of any matter covered in a deposition to be directed to the Presiding Judge. Sobel has not sought relief from the Presiding Judge pursuant to these rule sections; nor has he articulated a compelling reason for disregarding them (as well as other procedural rules) and directing his request for relief in the first instance to the Commission.

5. Alternatively, Sobel's request for relief may be considered premature. The portion of the MO&O to which Sobel takes exception authorizes the Bureau to question Sobel on certain matters at issue in the Sobel proceeding. See MO&O at p. 3. Unless and until the Bureau actually posits questions during the deposition to which Sobel objects, Sobel does not have a basis for requesting intervention by the Presiding Judge. Under no circumstance would he have a basis for requesting relief from the Commission.

5. Based on the foregoing, the Bureau requests that the Commission deny Sobel's  
Emergency Motion for Special Relief.

Respectfully submitted,  
Daniel B. Phythyon  
Chief, Wireless Telecommunications Bureau



Gary P. Schonman  
Chief, Compliance and Litigation Branch  
Enforcement and Consumer Information Division  
Wireless Telecommunications Bureau



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December 9, 1997



shall stay the effectiveness of the initial decision until the Commission's review thereof has been completed. ").

2. Sobel objects to the provisions of the *MO&O* authorizing the Bureau to question Sobel on matters relating to WT Docket No. 97-56. Allowing the Bureau to depose Sobel regarding the specific matters at issue in his hearing before the initial decision has become effective and before he has even had the opportunity to present his appeal is in error. It is extremely unfair for Sobel to have to undergo discovery on matters simultaneously with his prosecution of an appeal of those same issues. Sobel therefore respectfully asks the Commission to stay the effectiveness of the *MO&O* insofar as it authorizes the Bureau to depose Sobel on matters within the scope of the issues in WT Docket No. 97-56 prior to a final Commission ruling in that proceeding. The requested stay is required to protect Sobel's procedural due process rights. Moreover, it will not unduly prejudice the Bureau. In the context of WT Docket No. 97-56, the Bureau has already had full discovery on this issue, including extensive document production and depositions of both Sobel and Mr. Kay, as well as a full hearing on the subject. It is therefore not necessary to make this further imposition on Sobel before he has even had an opportunity to appeal the initial decision.

3. Even if it were otherwise proper for the Bureau to depose Sobel on matters within the scope of WT Docket No. 97-56, Sobel has not been given adequate notice to allow for any such examination at the deposition scheduled for tomorrow, Tuesday 9 December 1997, in Los Angeles. The *MO&O* providing for such questioning was issued on Friday 5 December 1997, less than two business days prior to the scheduled deposition, and is apparently not being officially released until Tuesday 9 December 1997, the actual day of the deposition.<sup>1</sup> Pursuant to Section 1.315(a) of the Commission's Rules and Regulations, 47 C.F.R. § 1.315(a)(3), Sobel is entitled to 21 days written notice of the matters on which he will be examined. To spring an entirely new line of inquiry on him on the eve of the deposition is entirely improper and in direct violation of the procedural safeguards of Section 1.315(a)(3).

4. For the reasons stated above, Sobel has been advised by counsel not to answer any questions relating to the issues designated in WT Docket No. 97-56 pending Commission action on this

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<sup>1</sup> ALJ Sippel did not contact Sobel to offer him an opportunity for comment prior to issuing the *MO&O*, nor did he make any attempt to contact Sobel upon issuance of the *MO&O*. Counsel for Sobel was advised of the *MO&O* by counsel for Kay.

motion. Sobel will, however, voluntarily appear at the scheduled deposition and answer, to the extent of his personal knowledge and subject to valid legal objections, questions relating to the issues designated in WT Docket No. 94-147.

WHEREFORE, it is requested that the Commission stay the effectiveness of the *MO&O* to the extent that it permits the Bureau to question Sobel on matters within the scope of WT Docket No. 97-56 pending final Commission action in that proceeding. In the alternative, it is requested that the Commission declare that any deposition of Sobel on matters within the scope of WT Docket No. 97-56 may not proceed until Sobel has been afforded 21 days written notice thereof.

Respectfully submitted,

**MARC D. SOBEL D/B/A  
AIRWAVE COMMUNICATIONS**



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Its Attorney

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Dated: 8 December 1997

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

FCC 97M-201

In Matter of )  
 )  
JAMES A. KAY, JR. )  
 )  
Licensee of one hundred fifty two )  
Part 90 licenses in the )  
Los Angeles, California area. )

WT DOCKET NO. 94-147

**MEMORANDUM OPINION AND ORDER**

Issued: December 5, 1997 ; Released: December 9, 1997

1. There has been a recent adjudication concerning the Affidavit of Marc Sobel ("Sobel") dated January 24, 1995, that was filed on behalf of James A. Kay, Jr. ("Kay") and submitted to the undersigned Presiding Judge in January 1995 in support of a Motion To Enlarge, Change Or Delete Issues ("Motion To Delete") that was filed by Kay. Marc Sobel, WT Docket No. 97-56, Initial Decision of Administrative Law Judge John M. Frysiak (97D-13) released November 28, 1997. Kay also filed his own Affidavit in support of his Motion To Delete. The Sobel Affidavit, when considered in conjunction with a Management Agreement showing interests of Kay in Sobel stations and the related testimony of Sobel and Kay, was found by Judge Frysiak to require a finding of misrepresentation and lack of candor on the part of Sobel. See Id. at Paras. 49-61, 67-68, and 77-78. Those findings raise serious questions about the credibility of Sobel as a witness in this case. Those findings also raise serious questions of credibility and candor/misrepresentation on the part of Kay in filing with the Commission and submitting the Sobel and Kay Affidavits to the Presiding Judge in this proceeding.

2. The Bureau previously sought to enlarge the issues in this case to determine whether Kay, through the filing of the aforesaid Affidavits and the Motion To Delete, misrepresented or lacked candor by representing in this hearing that he had no interest in any of the stations that were licensed to Sobel. The Presiding Judge denied the request to add the issues because of the absence of timeliness under the rules and because the underlying factual issues were being litigated in the Sobel proceeding. See Memorandum Opinion And Order, FCC 97M-183, released November 5, 1997. However, with the ID issued after an evidentiary hearing, there is now a convincing basis and a good cause for considering the issues of Sobel's credibility and Kay's credibility and candor/misrepresentation and truthfulness with the Commission and before the Presiding Judge. Maria M. Ochoa, 9 F.C.C. Rcd 56, 57 (1993), aff'd., Ochoa v. F.C.C., 98 F.3d 646 (D.C. Cir. 1996) (candor/misrepresentation of a party in giving testimony can be adjudicated without designating an issue). In that case, the Judge concluded after a hearing that Ms. Ochoa had deliberately tried to mislead the Commission in her direct testimony and on that basis she was found to be disqualified for a Commission

license. See also Herbert L. Schoenbaum, 11 F.C.C. Rcd 12537, 12540 (1996) (Commission consistently holds that it has a right to expect complete candor from all applicants in their testimony).

3. In this case, given the findings and conclusions in Sobel, the parties are now on actual notice that Kay's and Sobel's credibility and Kay's credibility/candor/misrepresentation are in issue in this case with respect to the preparation and use of the Affidavits, any related documents, and the Motion To Delete that was based on the Affidavit. Therefore, the Bureau is authorized to question Sobel and Kay on those documents and on the issues of credibility, candor/misrepresentation at next week's deposition.<sup>1</sup> This ruling as to Sobel and Kay is not at variance with the protection afforded the witness Christopher Killian. Here the issues of credibility and candor arise from a formal adjudication. In Killian's situation, only a petition for institution of proceeding had been filed -- not adjudicated. The two situations are clearly distinguishable on grounds of the greater reliability and non-speculation of the Sobel ID.

4. There will be a pleading cycle set below for the consideration of requests for formally adding appropriate issues and the manner in which the record of the Sobel proceeding can be used to expedite the receipt of evidence in this case.

#### Rulings

Accordingly, IT IS ORDERED sua sponte that in accordance with the above, the parties and Marc Sobel are on notice that issues of the credibility of Marc Sobel and the credibility, candor and misrepresentation of James A. Kay, Jr. ARE SET with respect to the preparation and/or use by James A. Kay, Jr. of the Affidavit of Marc Sobel and/or the Affidavit of James A. Kay, Jr. in connection with a Motion to Enlarge, Change or Delete Issues that was filed in this case by James A. Kay, Jr. on or about January 25, 1995.

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<sup>1</sup> This authorization for next week does not preclude further deposition of Sobel and Kay at a later date. The conferences held this week were concerned with questions or sequestration and the scope of deposition cross-examination which were considered at length. There was no discussion of the use of the Sobel Affidavit, Management Agreement and related documents and correspondence in connection with next week's West Coast depositions. (At the end of the Prehearing Conference, Kay's counsel asked if the ID would be used in this proceeding and the Presiding Judge responded not as of that time but that the ID was being read.) The Presiding Judge had previously addressed the use of a final decision in Sobel in this proceeding and made a ruling in this case as to the application of collateral estoppel which would allow the direct use of a Sobel ID in this case only after it became final. See Memorandum Opinion And Order, FCC 97M-183, supra at fn. 2, and authorities cited. While the Sobel ID is subject to appeal and thus there is not a finality that would permit use of the ID findings and conclusions under collateral estoppel, the ID provides a reliable basis here to focus on the credibility of Sobel and the credibility and candor/misrepresentation of Kay. Therefore, the parties are now on notice and should proceed accordingly in the deposition examinations of Sobel and Kay.

IT IS FURTHER ORDERED that the following pleading cycle IS SET for the Bureau to request any additional or related issues and for the parties to suggest appropriate use of the Sobel record in this proceeding:

- January 9, 1998 - Bureau to file motion (hand<sup>2</sup> deliver copy).
- January 16, 1998 - Kay to file response (hand deliver copy).
- January 22, 1998 - Bureau to file reply (hand deliver copy).

FEDERAL COMMUNICATIONS COMMISSION<sup>3</sup>

Richard L. Sippel  
Administrative Law Judge

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<sup>2</sup> The Bureau may, at its option, file earlier in which case the pleading cycle prescribed by the Rules of Practice would apply [47 C.F.R. §1.294(c)]. Hand-delivery must be utilized.

<sup>3</sup> Courtesy copies of this Order were faxed or e-mailed to counsel on date of issuance.



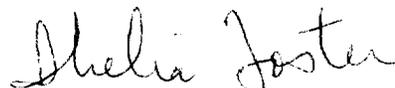
CERTIFICATE OF SERVICE

I, Shelia Foster, a secretary in the Enforcement and Consumer Information Division, Wireless Telecommunications Bureau, certify that I have, on this 9th day of December 1997, sent by regular First Class United States mail and facsimile, copies of the foregoing "Wireless Telecommunications Bureau's Opposition to Emergency Motion for Special Relief" to:

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Federal Communications Commission  
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Shelia Foster