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FEDERAL RESERVE

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

FCC 97M-201

80207

In 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.)

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.¹ 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.

¹ 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 of 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 (hand² deliver copy).
- January 16, 1998 - Kay to file response (hand deliver copy).
- January 22, 1998 - Bureau to file reply (hand deliver copy).

FEDERAL COMMUNICATIONS COMMISSION³



Richard L. Sippel
Administrative Law Judge

² 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.

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