

stations has each exceeded \$600 a month. Tr. 132. However, because of the manner in which Kay and Sobel have opted to implement the agreement, Kay has retained all the money and will continue to do so until the total revenue from all the stations exceeds \$9,000 a month (i.e., \$600 x 15 stations). Id. The last time Sobel checked the stations' monthly revenues, which was a few months ago, the total from the Management Agreement stations was between \$6,000 and \$7,000. Id. Except for the hourly fees Sobel has received from working for Kay on the Management Agreement stations, and the money he received in connection with the sale of two stations, Sobel has not received any money from the Management Agreement stations. Tr. 131-132.

B. Misrepresentation/Lack of Candor Issue³

January 1995 Affidavits

49. The January 24, 1995 affidavit executed by Sobel was submitted as part of a pleading entitled "Motion to Enlarge, Change, or Delete Issues" filed on Kay's behalf in the Kay proceeding on January 25, 1995. WTB Ex. 44. (Refiled Motion). The January 24, 1995 affidavit is similar to the affidavit executed by Sobel on January 11, 1995 which was submitted to the Commission as part of a pleading entitled "Motion to Enlarge, Change or Delete Issues" filed on Kay's behalf in the Kay proceeding on January 12, 1995. WTB Ex. 41 (Affidavit); WTB Ex. 41 (Motion). The Refiled Motion was filed because the Motion was misfiled with the Commission. Tr. 141, 369-370.

50. On January 9 or 10, 1995, Kay received an unsigned version of WTB Ex. 41 from Brown & Schwaninger. Tr. 370. Kay read the package, talked to Brown & Schwaninger, called Sobel, and told him "that there was an affidavit that my attorneys wanted him to read. And, if correct, execute it." Tr. 371. Kay and Sobel then had a face-to-face meeting, and Kay asked Sobel if he would sign the document. Tr. 140, 371. Although he understood he could add anything he wanted to the document, Sobel signed the document without making any changes and without adding any material. Tr. 141.

51. The portion of the Motion relating to the licenses in Sobel's name reads as follows:

James A. Kay, Jr. is an individual. Marc Sobel is a different individual. Kay does not do business in the name of Marc Sobel or use Sobel's name in any way. As shown by the affidavit of Marc Sobel attached as Exhibit II hereto, Kay has no interest in any of the licenses or stations held by Marc Sobel. Marc Sobel has no interest in any of the licenses or stations authorized to Kay or any business entity in which Kay

³ Sobel has not offered any proposed findings on the added misrepresentation issues.

holds an interest. Because Kay has no interest in any license or station in common with Marc Sobel and because Sobel was not named named [sic] as a party to the instant proceeding, the Commission should either change the OSC to delete the reference to the stations identified as stations 154 through 164 in Appendix A, or should dismiss the OSC with respect to those stations.

WTB Ex. 42, Pp. 7-8. The Refiled Motion makes the same factual statements and argument, although the language is changed slightly because the pleading was filed with Judge Sippel as opposed to the Commission. WTB Ex. 44, Pp. 4-5. When Sobel was twice asked the question whether he understood the purpose of the affidavit was to attempt and have his licenses removed from the Kay hearing, his answers indicate that he did understand that to be the purpose. Tr. 142-143, see also Tr. 164.

52. Nothing in the affidavits or the pleadings, WTB Exs. 41-44, provides any description of the actual relationship between Sobel and Kay with respect to the Management Agreement stations. The affidavits and the pleadings fail to disclose the following acts to the Commission and the Presiding Judge: (1) Kay manages Sobel's 800 MHz stations pursuant to a Management Agreement (Tr. 103-104, 108-109); (2) Kay was responsible for finding the frequencies and preparing the applications for the Management Agreement stations (Tr. 73-75); (3) Kay provided all the money and the equipment needed to build the Management Agreement stations (Tr. 144); (4) when Sobel worked on the stations, he did so as a contractor selected and paid by Kay (Tr. 106-108); (5) Kay made the arrangements to acquire and dispose of these licenses (Tr. 101, 126-128, 366); (6) Kay's employees were involved in virtually every aspect of the stations' daily operations (Tr. 339-347); (7) Kay paid all the expenses of the Management Agreement stations, including Sobel's legal fees (Tr. 109, 131); (8) the revenues from the Management Agreement stations were deposited in Kay's bank account, and Sobel has not received any of the operating revenues of the stations (Tr. 144, 348); (9) Kay may purchase the Management Agreement stations at any time for \$500 each (Tr. 125); and (10) Kay had agreed to purchase the stations upon Sobel's death (WTB Ex. 47, Tr. 137-138).

53. Sobel believed that the reason the Commission was delaying the processing of his applications and finder's preference requests was because of the relationship he had with Kay. WTB Ex. 46. He believed the Commission was "confused" about the relationship. Tr. 258. Sobel understood that the Commission would want to know about the actual relationship between himself and Kay. Tr. 143, 151, 156. Notwithstanding those facts, Sobel claims that he did not think the Presiding Judge in the Kay proceeding would have wanted to know the actual relationship between himself and Kay because it "wasn't necessary" or it wasn't "the forum to do

it." Tr. 143, 156. Sobel described the purpose of the affidavit "was to establish to the Bureau that I am not an a/k/a of Mr. Kay. I am a real living person and they screwed up." Tr. 143.

54. Sobel claims that he had an expectation that when he signed the affidavit, the Bureau would obtain or become aware of the management agreement. Tr. 302. He and Kay discussed the possibility that their relationship would be explored in discovery in the Kay proceeding. Tr. 300. Sobel claims he had no expectation that by signing the affidavit, he was going to prevent the Bureau from becoming aware of the agreement. Tr. 302.

55. The record shows that Kay found the frequencies for Sobel to apply for, and he prepared most, if not all, of the applications. Tr. 143-144, WTB Ex. 1. Kay provided the equipment and the money needed to build the stations. Tr. 107-108, 144. Kay's personnel performed services with respect to the stations. Tr. 144. The work Sobel performs on the stations is as a contractor for Kay. Id. Kay sells service on the stations. Id. He pays all the expenses relating to the stations. Id. The operating revenue from the stations goes to Kay. Id. Kay can buy these stations at any time for \$500 each. Tr. 145. Kay is obligated to buy the stations if Sobel dies. Id., WTB Ex. 47.

56. Sobel testified that what he meant by the statement "Mr. Kay has no interest in any radio station or license of which I am the licensee" was that "the station license was issued to myself. It wasn't issued to him." Tr. 146. He said, "The context in which I said the word interest was an ownership interest in the license, not necessarily in ownership of the equipment or whether he would or would not make any money from the station." Id. When counsel for the Bureau pointed out that Sobel stated in the affidavit that Kay had no interest in any of Sobel's stations as well as Sobel's licenses, the following exchange ensued:

Q. In fact, he (Kay) owned the equipment. Correct?

A. But he rented it to me. I pay him for it, so he didn't have an interest in it. The issue here is that the radio station license is mine, not his. He had no part of it. That's what the context of this affidavit was.

Tr. 147-148. The management agreement defines the term "Stations" as meaning the "800 MHz band radio facilities", i.e., the equipment (physical facilities). WTB Ex. 39, P. 1. With respect to Sobel's claim in the affidavit (and on the witness stand) that Kay has no interest in the equipment, Paragraph IV A. of the management agreement provides:

During the term of this agreement all equipment provided by Agent [i.e., Kay] and leased by Licensee [i.e., Sobel] shall remain the sole and exclusive property of Agent. Nothing contained herein shall be

interpreted to provide to Licensee any title, interest, or control over said equipment, except such use of the equipment as is specifically described herein.

WTB Ex. 39, P. 3.

57. Sobel admitted that Kay's receipt of monies and revenues from the Management Agreement stations was an interest, "but not in the context which I signed this affidavit." Tr. 148. When asked whether Kay's right to buy the stations for \$500 each was an interest, Sobel responded, "Whatever happens in the future, I don't know." Id.

58. Sobel testified that when he signed the affidavit, he thought about the word "interest" "because it was the only thing in here" that "might have been questionable . . ." Tr. 156. Kay recalls that when he and Sobel met to discuss the affidavit, Sobel asked him about the meaning of the word "interest." Tr. 371. Kay told him that to the best of his knowledge, as it had been explained to him:

It referred to ownership as in a partnership or ownership of stock, as having a direct financial stake in something. Being an owner or a stockholder or direct party to something.

Id. Sobel testified that Kay has a direct financial stake in the Management Agreement stations. Tr. 150. He testified that he does not think Kay told him that a direct financial stake is an interest in a business. Id. Kay denied having a financial stake in the licenses, but he admitted that with respect to the stations, he owned the equipment and that he obtains revenues from the stations. Tr. 372.

59. The record also discloses that Sobel has done extensive work for Kay with respect to both the stations licensed to Kay, as well as the Management Agreement stations. See generally WTB Ex. 25. Sobel is paid an hourly fee by Kay for that work. Tr. 106. Sobel believes that despite the extensive work he has done for Kay, he has never been an employee of Kay. Tr. 246. He doesn't believe Kay has ever made any tax withholdings for Sobel, and he has never received any W-2 forms from Kay. Tr. 247. Sobel believes he complies with the IRS guidelines for being an independent contractor. Tr. 247-248.

60. Although the affidavit makes the claim that Sobel is not an employee of Kay, Sobel claims that it "wasn't appropriate subject material" to mention that he performed various types of work for Kay as a contractor. Tr. 150. He denied it was deceptive to tell the Commission he was not an employee of Kay without stating that he performed work for Kay as a contractor. Tr. 150-151. He claimed it was not relevant "for the purpose of this affidavit" to mention the work he performed for Kay, and he repeated his claim that the affidavit was designed to tell the

Commission he was a "separate person." Tr. 151. He knew the Commission wanted to know what the relationship was between Kay and himself. Id.

61. Sobel periodically contacts customers or potential customers on Kay's behalf. Tr. 72, 327-328. Sobel performs this work as part of his contracting business. Tr. 72. The Management Agreement stations, which are licensed to Sobel, are marketed in Kay's name or names under which Kay conducts business. Tr. 152-153. Kay signs all the customer contracts, performs the billing, and receives all the revenues from customers using the Management Agreement stations. Tr. 119-120, 132. When asked why it was not deceptive to omit the fact that Kay was doing business for these stations in Kay's name, Sobel testified it was because Kay's agreement with the customers was a separate agreement from Sobel's agreement with Kay. Tr. 153.

The Management Agreement

62. Sobel repeatedly testified that the purpose of the Management Agreement was to show that he and Kay were separate entities doing business together. Tr. 258, 262-263. The alleged purpose of the Management Agreement was to explain the relationship between Sobel and Kay. Tr. 301. Sobel asked for his oral agreement with Kay to be reduced to writing because "the Commission was confused about our relationship between Mr. Kay and myself." Tr. 258. Notwithstanding those facts, Sobel did not file the written agreement with the Commission when he signed it. Tr. 303. When the Presiding Judge first asked whether Sobel filed the agreement when he signed it, Sobel attempted to claim that Kay filed the agreement along with Kay's motion to enlarge. Id. Counsel for Sobel then stipulated that Sobel was incorrect. Id. In fact, Sobel did not submit the Management Agreement to the Commission until July 3, 1996, after the Commission specifically asked for it in its letter of inquiry to Sobel. Tr. 313-314.

The Stanford Letter

63. On December 6, 1994, Sobel wrote to Gary Stanford at the Federal Communications Commission office in Gettysburg, PA. WTB Ex. 46. Sobel composed the letter personally. Tr. 158. The letter complains about Sobel's applications being held up because of an investigation of Kay. WTB Ex. 46, P. 1. Sobel represented to the Commission in his letter:

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.

WTB Ex. 46, P. 1 (emphasis in original). The letter does not state the following facts: (1) Kay manages Sobel's 800 MHz stations pursuant to a Management Agreement (WTB Ex. 39); (2) Kay was responsible for finding the frequencies and preparing the applications for the Management Agreement stations (Tr. 73-75); (3) Kay provided all the money and the equipment needed to build the Management Agreement stations (Tr. 144); (4) when Sobel worked on the stations, he did so as a contractor selected and paid by Kay (Tr. 106-108); (5) Kay made the arrangements to acquire and dispose of these licenses (Tr. 101, 126-128); (6) Kay's employees were involved in virtually every aspect of the stations' daily operations (Tr. 339-347); (7) Kay paid all the expenses of the Management Agreement stations, including Sobel's legal fees (Tr. 109, 131); (8) the sales, billing, collections and record keeping for the Management Agreement stations was performed by Kay and his staff at Kay's office (Tr. 339-347); and (9) the revenues from the Management Agreement stations went into Kay's bank account, and Sobel had not received any of the operating revenues of the stations. Tr. 144, 348. Notwithstanding those facts, Sobel repeatedly testified at the hearing that he is independent of Kay with respect to the Management Agreement stations. Tr. 157-159.

Responses to Application Return Notices

64. In the responses to the application return notices relating to the Management Agreement stations (WTB Exs. 19, 21, and 23), Kay provided invoices from certain customers of the Management Agreement stations. WTB Ex. 19, Pp. 4-7, WTB Ex. 21, Pp. 5-7, WTB Ex. 23, Pp. 4-7. Certain information is masked out on the invoices, and it was masked out when it was sent to the Commission. Id., Tr. 88. While Kay does not recall masking out the information, he testified he probably did so. Tr. 337-339. The information that was masked out on the invoices was the name and address of Lucky's Two-Way Radio, a name under which Kay does business (Tr. 333). Tr. 90-91, 94. The information concealed from the Commission was the fact that Lucky's performed the billing for the Management Agreement stations. While Sobel does not specifically recall seeing these letters with the masked out invoices attached, he believes he did because the letters came from his files. Tr. 238-239. Sobel and Kay testified that the name and address of Lucky's was masked out because it was "unnecessary" or "irrelevant." Tr. 91, 95, 98, 337-339. None of the other information on the invoices was masked out, including

the fees charged the customers. WTB Ex. 19, Pp. 4-7, WTB Ex. 21, Pp. 5-7. WTB Ex. 23, Pp. 4-7.

Conclusions of Law

Unauthorized Transfer of Control Issue

65. Section 310 (d) of the Communications Act of 1934, as amended, 47 U.S.C. § 310 (d), states, in pertinent part:

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

66. The HDO in this proceeding summarized the law concerning control of a non-broadcast facility or license:

In determining whether de facto control of a non-broadcast license or facility has been transferred in violation of Section 310 (d), the Commission and the courts have traditionally relied upon a six-part test announced in Intermountain Microwave, 24 RR 983 (1963). The six indicia of de facto control are:

- (a) Does the licensee have unfettered use of all facilities and equipment?
- (b) Who controls daily operations?
- (c) Who determines and carries out the policy, decisions, including preparing and filing applications with the Commission?
- (d) Who is in charge of employment, supervision and dismissal of personnel?
- (e) Who is in charge of the payment of financing obligations, including expenses arising out of operating.
- (f) Who receives monies and profits from the operation of the facilities.

See also Telephone and Data Systems, Inc. V. FCC, 19 F. 3d 42 (1994), and La Star Cellular Telephone Co., 5 FCC Rcd 3286 (1990). The Commission has held that actual control is the touchstone of the Intermountain test. See e.g. News International, PLC, 97 FCC 2d 349, 355-56 (1984).

67. The record clearly demonstrates that, in light of the above cited standards, Kay has been entrusted with and in fact exercised virtually all aspects of operation of Sobel's

Management Agreement stations. The record reveals the following participation by Kay. Kay has prepared the applications for Sobel's Management Agreement stations, as well as the letters which were submitted in response to the Commission's return notice. Findings 11, 32, 33, 36. Kay selected, purchased and provided all the equipment used in connection with the Management Agreement stations. Finding 18. Kay is the exclusive supplier of labor required to maintain and repair the stations' facilities. Finding 18. Kay controls the hiring and firing of personnel to operate the Management Agreement stations. Findings 44, 45. Pursuant the Management Agreement Kay has assumed all administrative duties associated with marketing the stations, including bookkeeping, billing and collections. Finding 22. Kay is responsible for paying all expenses relating to the construction of the Management Agreement stations and the expenses associated with the operation of same. Findings 46, 47. Kay has the discretion to negotiate (including the setting of prices) and execute contracts with customers on the Management Agreement stations. Finding 42. Kay did the work and provided the money to clear the channels used by the Management Agreement stations. Finding 37. The licenses for three of Sobel's Management Agreement stations were obtained through assignments, but Sobel could not relate any of the details on the assignments. Finding 39. Kay has the exclusive option to purchase any of the Management Agreement stations at any time for \$500.00 each. The sale would include not only the license and the station assets, but also any business created by the duration of the station. Finding 40. The revenues from the operation of the Management Agreement stations are deposited into Kay's bank account. Finding 48.

68. In light of all the foregoing and on the record taken in its entirety, it is abundantly clear that Kay has the ultimate control of Sobel's Management Agreement stations. This transfer of control has not been authorized by any Commission action. Accordingly the unauthorized transfer of control issue must be resolved against Sobel.

Misrepresentation/Lack of Candor Issue

69. Commission precedent holds that misrepresentation involves false statements of facts made with an intent to deceive the Commission. Lack of candor involves concealment, evasion and other failures to be fully forthcoming or informative, accompanied by an intent to deceive the Commission. Both represent deceit, differing only in form. Fox River Broadcasting, Inc., 93 FCC 2d 127, 129. Intent may be found from the false statement of fact coupled with proof that the party making it had knowledge of its falsity. See David Ortiz Radio Corp. v. FCC, 941 F 2d 1253, 1260 (D.C.Cir. 1991). Intent may also be found from motive. See Joseph Bahr, 10 FCC Rcd 32,33 (Rev. Bd. 1994).

70. Absolute candor is perhaps the foremost prerequisite for Commission licenseeship. Catoctin Broadcasting Corp. of New York, 2 FCC Rcd 2126 (Rev. Bd. 1987), aff'd in pertinent part, 4 FCC 2d 2553 (1989), recon. denied 4 FCC Rcd 6312 (1989). The duty of candor requires applicants to be fully forthcoming as to all facts and information that may be decisionally

significant to their applications. Swan Creek Communications v. FCC, 39 F 2d 1217, 1222 (D.C. Cir. 1994).

71. As noted above, Sobel submitted an affidavit in a FCC proceeding against Kay. The intended effect was to persuade the Commission to understand that Kay and Sobel were separate entities, each operating his separate business and neither having any interest in the other's licenses or radio stations. However the record demonstrates that the Sobel's averment differed from the actual state of facts. Record evidence clearly shows that at the time Sobel executed the above stated affidavit Kay was managing Sobel's 800 MHz stations pursuant to the Management Agreement; that Kay was responsible for finding the frequencies and preparing the applications for the Management Agreement stations; that Kay provided all the money and equipment needed to build the Management Agreement stations; that when Sobel worked on his own 800 MHz stations he did so as a contractor selected and paid by Kay; that Kay made the arrangements to acquire and dispose of Sobel's licenses; that Kay's employees were involved in virtually every aspect of the daily operations of the Management Agreement stations; that Kay paid all the expenses of these stations including Sobel's legal fees; that the revenues from the operation of the Management Agreement stations were deposited in Kay's bank account; that Sobel has not received any of the operating revenues of the stations; that Kay has the option to purchase the Management Agreement stations at any time for 500 each; and that Kay had agreed to purchase the Management Agreement stations upon Sobel's death. Finding 52.

72. Additionally, at the time Sobel executed the affidavit he worked for Kay with respect to both the stations licensed to Kay, as well as the Management Agreement stations. Sobel received an hourly pay for that work. Finding 59. Also, Sobel's Management Agreement stations were marketed in Kay's name or names under which Kay conducted business. Finding 61.

73. All of this amounts to a fair amount of interest. Sobel maintains that the word interest used in the context of the affidavit only means having legal title. But this assertion must be rejected as being false. Sobel has admitted that when he read the affidavit he wondered about the word "interest" and met with Kay to discuss the affidavit. Kay recalls that he told Sobel that it was explained to him that the word interest referred to "ownership . . . as having a direct financial stake in something." Finding 58. Both Kay and Sobel had strong motive to withhold from the Commission the true nature of their business relationship. Sobel well realized that had he been truthful in his affidavit his requests for finders' preference would have been placed in jeopardy. The wording of the affidavit was calculated to ward off the Commission from being apprised of the true nature of the Kay - Sobel business relationship. Such dissembling may not be countenanced.

74. Sobel also exhibited lack of candor regarding the Management Agreement. Sobel maintains that in late 1994 he requested of Kay that their oral agreement regarding Sobel's 800 MHz stations be reduced to writing because the Commission was confused about their

relationship. But, even though the Management Agreement fully disclosed their relationship, Sobel did not voluntarily submit it to the Commission until requested by the Commission to do so in a letter of inquiry. Finding 62. Considering the context of the Management Agreement, it is obvious that Sobel could ill afford the Commission being apprised of it.

75. And again, in his letter to Gary Stanford at the FCC office in Gettysburg, Pa. Sobel had the opportunity to disclose to the Commission his true relationship with Kay but failed to do so. Rather he strongly asserted his independence from Kay in the operation of his stations.

76. The record also shows that in response to the application return notices relative to Sobel's Management Agreement station invoices were provided but the name and address of Lucky's Two Way Radio (one of Kay's business names) were masked out. Kay and Sobel testified that the masking was made because that information was irrelevant but no other information was masked out. Of course, not to have masked out Kay's business name and address from Sobel's invoice would have alerted the Commission that Kay & Sobel were not as independent of one another as Sobel has claimed. The withholding of this information was deemed crucial by Sobel as well as by Kay.

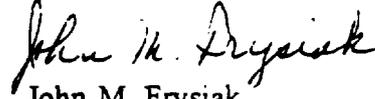
77. The findings establish, and it is concluded that Sobel intended to mislead and deceive the Commission with respect to Kay's actual role in the affairs of Sobel's 800 MHz stations. There is no doubt that if Sobel had wanted the Commission to know about Kay's true activities regarding Sobel's stations, a clear statement to that effect would have been submitted and the Commission would have known in no uncertain terms exactly what Kay was doing. The fact that no such statement was submitted until the Commission requested the Management Agreement indicates that Sobel had no intention of disclosing those activities to the Commission.

78. The ultimate issue in this proceeding is to determine, in light of the evidence adduced under the unauthorized transfer of control issues and the misrepresentation/lack of candor issues, whether Sobel possesses the requisite qualifications to be or remain a licensee. The record compels the conclusion that Sobel is unfit to be a licensee. It has been concluded that Sobel unlawfully transferred control of his Management Agreement 800 MHz stations without Commission authorization, made misrepresentations and lacked candor about the transfer of control. Sobel's misconduct is deemed egregious in that it was wilful, repeated and continued throughout the hearing. Sobel cannot be relied upon in the future to have the essential character traits of truthfulness and reliability. The record amply demonstrates that Sobel cannot be expected to meet the burden of licensees to be forthcoming in their dealings with the Commission and to comply with the rules and policies. Revocation of all Sobel's licenses is mandated.

79. With respect to the question of whether a forfeiture should be assessed against Sobel for an unauthorized transfer of control. It is concluded that in light of the revocation of all Sobel's licenses a forfeiture assessment is not necessary.

Accordingly, IT IS ORDERED THAT unless an appeal from this this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,⁴ the licenses held by Marc Sobel or Marc Sobel d/b/a Air Wave Communications and designated for hearing in this proceeding ARE REVOKED, that the applications designated for hearing in this proceeding ARE DENIED, and that the finder's preference requests filed by Marc Sobel and designated for hearing in this proceeding ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION



John M. Frysiak
Administrative Law Judge

⁴ In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release, pursuant to 47 C.F.R. 1.27(d).

ATTACHMENT 2

RECEIVED

JUN - 3 1994

BROWN AND SCHWANINGER

LAWYERS

1835 K STREET, N.W.

SUITE 650

WASHINGTON, D.C. 20006

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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GETTYSBURG, PENNSYLVANIA 17325

June 2, 1994

W. Riley Hollingsworth
Deputy Chief, Licensing Division
Federal Communications Commission
Gettysburg, Pennsylvania 17325

Re: Compliance File No. 94G001
Application Nos. 415060, 415243, 415255,
415274, 415303, 415304, 628816, 632210

Dear Mr. Hollingsworth:

We represent the radio system interests of James A. Kay, Jr. before the Federal Communications Commission. On behalf of Mr. Kay, we hereby respond to various letters from your office concerning the above referenced matters.

1) In response to Item one of your letter dated January 31, 1994, Mr. Kay states that he holds radio station licenses in his own name, as an individual. Mr. Kay owns an interest in two closely-held corporations, namely, Buddy Corp. and Oat Trunking Group, Inc. Each of those corporations holds a small number of licenses. However, the Commission's requirements for construction and loading of the stations authorized to the two corporations do not affect Mr. Kay's eligibility to hold any other license. Mr. Kay states that he does not operate any station of which either he or the two above named corporations is not the licensee.

Mr. Kay leases various types of radio equipment, including community repeater facilities, to a number of customers, each of whom holds its own license to operate the facility. However, the leasing of radio equipment, including community repeater equipment,

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is not regulated by the Commission and the Commission does not appear to hold persons who are in the position of lessors of radio communications equipment responsible in any way for operation of such facilities.

Mr. Kay does not, of course, hold any license of which the Commission would not have its own record. Accordingly, the Commission already has possession of all of the information which it requested concerning the call signs and licensee names of stations which are owned or operated by Mr. Kay or by any company under which he does business. Therefore, we trust that this information is fully responsive to the Commission's request for the call signs and licensee names of all facilities which are owned or operated by Mr. Kay or by any company under which he does business.

In response to the Commission's request that Mr. Kay "annotate those facilities which are located on U.S. Forest Service land," Mr. Kay respectfully declines to supply that information for the reason that whether or not a station is located on U.S. Forest Service land is irrelevant to the stated purpose of the Commission's inquiry. The Commission's jurisdiction does not extend to regulation of the use of Forest Service land, and neither the Communications Act nor the Commission's Rules prohibit the location of a radio facility on U.S. Forest Service land. Therefore, whether a station is or is not located on U.S. Forest Service land would be immaterial and irrelevant to a determination of whether Mr. Kay is qualified to be a Commission licensee. Consequently, the Commission has no need for and no authority to request information concerning the identity of all stations which are located on Forest Service land.

Your recent letters have indicated that certain complaints have alleged that certain facilities licensed to Mr. Kay are on U.S. Forest Service land but do not have the requisite permits for such use. The Commission has taken the position that "the presumption is that those facilities were not constructed and made operational as required by the Commission's rules and therefore, the licenses have cancelled." While the Commission's recent letters have taken that position, they have not disclosed the nature or extent of proof required to overcome the alleged presumption. Accordingly, Mr. Kay respectfully submits that providing the information requested, namely, an annotation of those stations which are are located on U.S. Forest Service land might be nothing more than an exercise in futility, because the Commission has not informed Mr. Kay whether the provision of such information would be sufficient to overcome the alleged presumption.

At Item one of its request, as well as at items three and four of its request, the Commission made inquiry concerning stations which Mr. Kay had, in fact, constructed and placed in operation, but for which, if any, he did not hold a U.S. Forest Service permit. The timely construction and placing in operation of an authorized facility is exactly what the Commission expects of a licensee. Therefore, we respectfully submit that evidence that

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Mr. Kay had constructed a station on U.S. Forest Service land and placed it in operation would not raise any question, whatsoever, concerning his qualifications to be a Commission licensee. Accordingly, any information which the Mr. Kay might submit in response to the Commission's request that he identify stations which he had constructed and placed in operation on Forest Service land could not possibly demonstrate that he was not qualified to be a Commission licensee.

Had any license held by Mr. Kay cancelled automatically because he failed to construct an authorized station in a timely manner, we respectfully submit that such an automatic action of law could not, in any way, raise a question concerning his qualifications to be a Commission licensee. Had any license cancelled automatically because Mr. Kay failed to construct the authorized facilities and place them in operation in a timely manner, then Mr. Kay would no longer hold a license for such station, and whether he were qualified to hold any such license would be moot. Because Sections 90.155, 90.269, and 90.631(f) of the Commission's Rules provide for the routine, automatic cancellation of a license if the authorized facilities are not constructed and placed in operation in a timely manner, no failure to construct facilities and place them in operation in a timely manner violates either the Communications Act or any of the Commission's Rules. Accordingly, the requested information would not be material to a determination by the Commission of whether Mr. Kay is qualified to be a Commission licensee.

We respectfully suggest that, rather than making an *ultra vires* request for annotation of all stations which are located on U.S. Forest Service land, that the Commission determine whether the allegations raised by the reported complaints constitute a *prima facie* case that Mr. Kay has not constructed the facilities which the Commission has authorized. If the Commission determines that the complaint was sufficient to present a *prima facie* case, then we suggest that the Commission inform Mr. Kay of the exact charges which have been made against him and give him an opportunity to demonstrate that each such challenged station was constructed in a timely manner. If the Commission determines that the allegations are not sufficient to constitute a *prima facie* case, then we suggest that the Commission disregard the complaint.

2) With respect to Item two of the Commission's January 31, 1994, letter, Mr. Kay respectfully notes that the Commission's Rules do not require him to keep records of the original grant date of station licenses. To the extent that the Commission needs such information, we respectfully submit that that information is already in the Commission's possession and the Commission has no need for Mr. Kay to supply it. With respect to the Commission's request that Mr. Kay provide "the date the licensed station was constructed and placed in operation," we respectfully call to the Commission's attention that the Commission's Rules do not require Mr. Kay to keep any record of that information. To the extent that the Commission's Rules require Mr. Kay to report such information to the

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Commission, Mr. Kay has previously reported that information to the Commission and, therefore, the Commission already has that information in its possession.

The Commission has requested that Mr. Kay identify the "type of facility" of each facility for which he holds a license. In its letter to our office dated May 20, 1994, the Commission explained that its request for the "type of facility" was for "the radio service in which the facility was licensed (i.e., YX, GX, YB, GB, etc.)". Mr. Kay respectfully submits that all of the requested information is already within the Commission's possession and can be found within the license information for each station to which Mr. Kay has referred the Commission at item one, above.

3) For Mr. Kay's response to Item three of the Commission's January 31, 1994, letter we respectfully refer the Commission to our letter to the Commission on behalf of Mr. Kay dated April 7, 1994, which was received for filing by the Commission on April 8, 1994. We also refer the Commission to item one, above.

4) At Item four of the Commission's January 31, 1994, letter, requested that "for those facilities which are authorized on U.S. Forest Service lands, but for which you do not hold a permit, please explain the reason why a permit has not been obtained." Mr. Kay respectfully submits that the Commission's jurisdiction does not extend to the regulation of U.S. Forest Service lands. The reasons why Mr. Kay may or may not hold a U.S. Forest Service permit for a certain radio facility are immaterial to the Commission's regulation of the radio spectrum. Therefore, Mr. Kay respectfully declines to supply the requested information.

5 and 6) At Item five of its January 31, 1994, letter, the Commission requested that Mr. Kay supply a user list for each station of which is the licensee or the operator and that he list the total number of units operated on each station. In its letter dated May 20, 1994, the Commission clarified Item six of its request to request "a listing of the total number of units operated on each station for all facilities owned or operated by Kay or by any companies under which he does business." In response to the Commission's clarified request, in our letter to the Commission on behalf of Mr. Kay dated May 17, 1994, Mr. Kay stated that "a total in excess of 7,000 mobile units and control stations operate in association with all of the facilities which he and his companies own or operate." In its letter to our office dated May 27, 1994, the Commission stated that the "answer of '7,000' is hardly helpful and is not acceptable unless you are contending that each system serves 7,000 mobiles and control stations." Mr. Kay hereby clarifies his response of "7,000" to state that that number is a grand total and that he does not contend that each station for which he is authorized serves 7,000 mobile units and control stations.

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With respect to the Commission's request that Mr. Kay provide information concerning users as of January 31, 1994, Mr. Kay respectfully submits that such information would neither prove nor disprove the complaints which served as the expressly stated basis for the Commission's letter dated January 31. As does any provider of communications service, Mr. Kay experiences a continual churn of customers onto and off of his facilities. Accordingly, if not with reference to the date of each complaint which the Commission has reportedly received, the information requested concerning users could not be relied upon to establish either the truth or the falsity of the complaints. The Commission's January 31, 1994, letter stated that its request was based on certain complaints. Since the requested information would not reliably establish the veracity of the complaints, the requested information would not allow the Commission to determine whether Mr. Kay is qualified to be a Commission licensee.

With respect to the above referenced applications, Mr. Kay respectfully submits that, except for the application which has been assigned file number 415303, none of the above referenced applications requests the use of a channel for which Mr. Kay is not already a licensee. Application number 415303 requests only the conversion of an existing community repeater which already has customer loading to a private carrier authorization. Accordingly, the loading of existing facilities for which Mr. Kay currently holds a license is not a factor in any of the above referenced applications. Therefore, none of the information which the Commission has requested would be material to a determination of whether the Commission should grant the applications.

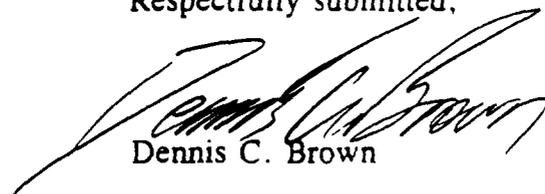
In our earlier letters on behalf of Mr. Kay, we explained that Mr. Kay is not convinced that the Commission would keep confidential any information that the Commission requested. In its most recent letter on the subject, the Commission stated that it had no intention of disclosing Mr. Kay's proprietary business information, such as customer lists, except to the extent that the Commission would be required by law to do so. The Commission's expression of its present intent, however, is far from a promise that the Commission would keep all such information confidential. The Commission's recent demand that Mr. Kay supply the Commission with 50 copies of his letter dated April 7, 1994, coupled with its demands that he supply the Commission with 50 copies of the instant response, calls into serious doubt for Mr. Kay the Commission's intent to honor his requests for confidentiality. Because the confidentiality of the information which the Commission has requested concerning the identity of Mr. Kay's customers is crucial to his business, Mr. Kay respectfully submits that his declining to submit such information to an agency which refuses to promise to keep such information confidential is entirely reasonable, and that, in the absence of a promise to keep such information confidential, the Commission's request for such information is not a reasonable exercise of its authority.

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To date, the Commission has refused to disclose to Mr. Kay the complaints on which it reportedly based its January 31, 1994, request for information, and has refused to postpone the date for him to respond to the Commission's request until such time as the courts can determine, in currently pending litigation, his right to have disclosure of the complaints on which the Commission's request was reportedly based. Mr. Kay is aware that the Commission has, from time to time, received allegations that Mr. Kay had engaged in serious criminal activity. Not only has the Commission refused to allow Mr. Kay to inspect the complaints which reportedly formed the basis for its request, but the Commission has refused to provide Mr. Kay with immunity from criminal prosecution based on the information which it has requested. The Commission has threatened to impose sanctions on Mr. Kay for failing to comply with the Commission's request for information, including an express intent to sanction him by subjecting him to the cost and loss of time involved in undergoing a hearing before the Commission. With the Commission in the posture of refusing to disclose to Mr. Kay the alleged facts of the complaints which reportedly formed the stated basis for the Commission's request, refusing him a reasonable opportunity to ascertain the specific facts of the reported complaints, refusing to permit him an opportunity to confront his accusers and their accusations, and refusing to provide Mr. Kay with immunity from criminal prosecution, all the while threatening to impose sanctions on Mr. Kay, including the intended abuse of the Commission's hearing process, itself, as a sanction, Mr. Kay respectfully submits that the Commission's January 31, 1994, request is entirely unjustified and unreasonable, and constitutes a violation of Mr. Kay's right to due process of law, as well as a violation of other rights to which Mr. Kay is entitled under the United States Constitution.

We respectfully note that Mr. Kay is filing herewith the number of copies of Mr. Kay's response which are required to be filed by Section 1.51 of the Commission's Rules. The Commission's more recent letters have purported to require that if Mr. Kay claims copyright protection, that he not only file 50 copies of his response, but that he also file a "full justification of how the copyright laws apply, including statutory and case cites with [his] request [sic]". Mr. Kay respectfully submits that it is not the duty of a copyright proprietor to advise any person on the legal basis of Mr. Kay's claim of copyright. Mr. Kay respectfully submits that if any person infringes on his copyright, such person or entity does so at his/its own peril.

Respectfully submitted,



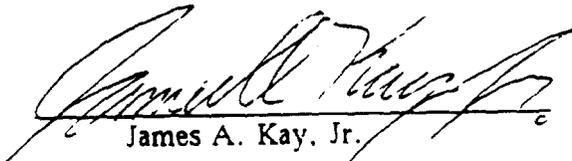
Dennis C. Brown

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DECLARATION

I declare under penalty of perjury under the laws of the United States that the foregoing response to the Commission's request for information is true and correct.

Executed on June 2, 1994.

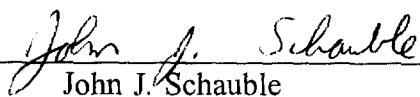

James A. Kay, Jr.

CERTIFICATE OF SERVICE

I, John J. Schauble, an attorney in the Enforcement and Consumer Information Division, Wireless Telecommunications Bureau, certify that I have, on this 30th day of December, 1997, sent by hand delivery, copies of the foregoing "Wireless Telecommunications Bureau's Motion to Enlarge Issues" to:

Barry A. Friedman, Esq.
Thompson, Hine & Flory
1920 N Street, N.W., Suite 800
Washington, D.C. 20036
(Counsel for James A. Kay, Jr.)

Administrative Law Judge Richard L. Sippel
Federal Communications Commission
2000 L Street, N.W.
Second Floor
Washington, D.C. 20554
(Via Hand Delivery)



John J. Schauble