

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
JAMES A. KAY, JR.) WT DOCKET NO. 94-147
)
)
Licensee of 152 Part 90 Stations in the)
Los Angeles, California Area)

To: Honorable Richard L. Sippel
Administrative Law Judge

**REPLY TO OPPOSITION TO WIRELESS TELECOMMUNICATIONS
BUREAU'S MOTION TO ENLARGE ISSUES**

1. The Chief, Wireless Telecommunications Bureau, by his attorneys, now replies to the "Opposition to Wireless Telecommunications Bureau's Motion to Enlarge Issues" filed by James A. Kay, Jr. (Kay) on January 9, 1998.

2. In its December 30, 1997 "Motion to Enlarge Issues," the Bureau showed that the Initial Decision of Administrative Law Judge John M. Frysiak, FCC 97D-13 (released November 28, 1997 (Sobel I.D) raised substantial and material questions of fact as to whether Kay had the character qualifications to be a Commission licensee. The Bureau showed in its motion that Judge Frysiak's conclusions (1) that Kay had assumed control of Marc Sobel's 800 MHz stations in violation of Section 310(d) of the Communications Act of 1934, as amended and (2) that Sobel had misrepresented facts and lacked candor in an affidavit submitted to the Presiding Judge in a pleading filed in this proceeding were directly

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relevant to a consideration of Kay's character qualifications. In his opposition, Kay first argues that the motion should be dismissed as untimely. Paradoxically, he then argues that the motion is in effect premature because the Sobel decision is not yet final. Finally, Kay then briefly argues that the motion is legally insufficient. None of Kay's arguments has any merit, and the Bureau's requested issues are appropriate.

I. TIMELINESS

3. In his Memorandum Opinion and Order, FCC 97M-201 (released December 9, 1997) at ¶1, the Presiding Judge took cognizance of the Sobel I.D. and concluded that "Those findings 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." At the end of the order, the Presiding Judge then set January 9 as the deadline "for the Bureau to request any additional or related issues and for the parties to suggest any appropriate use of the Sobel record in this proceeding." As noted in its motion, the Bureau filed ten days before the deadline because the exact nature of the issues added by the Presiding Judge would determine whether any additional discovery was needed.¹

¹ Kay argues that the Presiding Judge's December 9 order somehow "provides further evidence of the Presiding Judge's bias against Kay." Kay Opposition, p. 3 n.1. Kay apparently believes that the Presiding Judge is somehow "coaching the Bureau." The Commission has reviewed Kay's allegations of bias and rejected them as unwarranted. James A. Kay, Jr., 12 FCC Rcd 15662 (1997). Indeed, the Commission found that "Kay has taken the ALJ's words out of context, and unfairly distorted their meaning." 12 FCC Rcd at 15665 (¶12). Kay's allegations are insulting and totally unsupported. It is unfortunate that Kay and his counsel allege "bias" every time they suffer an adverse ruling on the merits.

4. Notwithstanding the fact that the Bureau filed its motion before the Presiding Judge's January 9 deadline, Kay argues that the Bureau's motion is untimely. Kay argues that the Bureau's motion should have been filed back in 1995, when Kay provided the Bureau with a copy of the Management Agreement between Kay and Sobel. Kay Opposition, p. 4. Kay explicitly argues that the Presiding Judge's Memorandum Opinion and Order "was improperly issued" and was issued "without authority." Kay Opposition, p. 3. Kay's argument is therefore nothing more than a thinly disguised petition for reconsideration of the Memorandum Opinion and Order and should be ignored as not in compliance with Section 1.106(a)(1) of the Commission's Rules. Moreover, the argument that the Presiding Judge did not have authority to issue the December 9 order is wrong. Administrative Law Judges have the authority to add issues on their own motion. See Section 0.341(b) of the Commission's Rules ("Any question which would be acted upon by the Administrative Law Judge if it were raised by the parties to the proceeding may be raised and acted upon by the administrative law judge on his own motion."), Sound Broadcasting Co., 6 FCC Rcd 3626 (Rev. Bd. 1991) (Review Board adds issue on its own motion). Finally, the Bureau's latest motion is based upon the Sobel I.D. (as opposed to the underlying documents in the record). The Bureau could not file a motion to enlarge issues based upon a decision prior to the release of that decision. Kay's argument is the same argument that he made with respect to the Bureau's April 9, 1997 motion to enlarge issues, which the Presiding Judge denied by Memorandum Opinion and Order, FCC 97M-183 (released November 5, 1997). In his December 9, 1997 Memorandum Opinion and Order, FCC 97M-201, supra, at ¶2, the Presiding Judge explicitly distinguished the current situation from the situation that existed when he denied the earlier petition.

5. Regardless of whether there is any merit to Kay's argument that the Bureau should have filed its motion two years ago, the Presiding Judge has ample authority to consider the motion on the merits. Section 1.229(b)(3) of the Commission's Rules provides that the Presiding Judge can consider a late-filed motion for "good cause." The Presiding Judge clearly has found good cause for consideration of Kay's misconduct with respect to the Sobel licenses at this time. Moreover, Section 1.229(c) of the Commission's Rules directs consideration of an untimely motion to enlarge issues if the motion "raises a question of probable decisional significance and such substantial public interest importance as to warrant consideration in spite of its untimely filing." The Bureau's motion raises questions of substantial public interest importance because it implicates Kay's basic qualifications to be a Commission licensee. Great Lakes Broadcasting, Inc., supra, 6 FCC Rcd at 4332 ¶9. In order to meet the "probable decisional significance" portion of the test, the Bureau must show that there is "a likelihood that potentially disqualifying allegations will be proven." Id. In this case, where Judge Frysiak revoked all of Sobel's licenses for virtually the same conduct that is in question here, a strong likelihood has been shown that potentially disqualifying allegations will be proven. The Presiding Judge did not apply Section 1.229(c) to the Bureau's earlier motion because he was concerned about "duplicative litigation" in this proceeding and the Sobel proceeding. Memorandum Opinion and Order, FCC 97M-183, supra, at ¶6. Now, with the Sobel I.D. released, there is no reason to be concerned about "duplicative litigation." The Bureau believes that the Sobel record shows that Kay has engaged in very serious misconduct, and none of Kay's procedural arguments provide a valid reason for avoiding scrutiny of Kay's conduct.

II. "EFFECTIVENESS" OF THE SOBEL I.D.

6. Kay next argues that Judge Frysiak's I.D. cannot serve as a basis for enlarging the issues because, under Section 1.276(d) of the Commission's Rules, the filing of exceptions to an initial decision stays the effectiveness of the decision. Kay Opposition, p. 6. This argument, which in effect is an argument that the motion is premature because the I.D. is not yet final, is inconsistent with his argument that the Bureau should have filed its motion three years ago. In any event, Kay is wrong. Kay is arguing that, under Section 1.276(d) of the Commission's Rules, an initial decision can never serve as the basis for enlargement of issues in another proceeding if exceptions to the initial decision are filed. In Ocean Pines FM Partnership, 4 FCC Rcd 3490 (Rev. Bd. 1989), the Review Board held otherwise. In Ocean Pines, an applicant challenged an ALJ's decision to add a character issue against it because its principal had been found in an initial decision to be the real-party-in-interest in another application. Although the Review Board dismissed the applicant's challenge on procedural grounds, it also held:

Unless and until the adverse resolution against Dr. Berger and his applicant in the Fenwick Island case is reversed or modified on appeal, the Ocean Pines ALJ was eminently correct in adding the subject issue(s) in this proceeding. As explained more fully in our recent memorandum in Montgomery County Media Network, Inc., d/b/a/ Imagists, FCC 89R-17, released March 29, 1989, the findings and conclusions regarding a particular party in one hearing proceeding are plainly relevant in another proceeding, where the parties and the issues are similar or interrelated. After all, "[a]n initial decision is not a mere report to be arbitrarily disregarded." Stereo Broadcasters, Inc., 74 FCC 2d 543, 545 (1979), aff'd, 652 F.2d 1026,1030 (D.C. Cir. 1981). . .

We find no predisposition in the ALJ's language; only an intent to take full cognizance of the findings and conclusions reached, thus far in the Fenwick Island case. Should those adverse Fenwick Island findings and conclusions be

reversed or modified on appeal, conforming action -- either by the Ocean Pines ALJ or by the appellate body having jurisdiction -- will assuredly be taken in the instant case.

4 FCC Rcd at 3491. The Ocean Pines decision shows that an initial decision can be the valid basis for adding an issue in another proceeding, even if the initial decision has been appealed. Moreover, the decision fully supports the Bureau's argument that the proper course is to add issues now and recognize that if the Sobel I.D. is modified, that modification would have to be taken into account in this proceeding. Kay's argument that the Sobel I.D. cannot serve as a basis for enlarging the issues in this proceeding must be rejected.

III. THE MERITS

7. Finally, Kay argues that the Bureau has not made a prima facie case that Kay either misrepresented facts and lacked candor or participated in an unauthorized transfer of control. Kay Opposition, pp. 7-10. In light of the findings and conclusions reached in the Sobel I.D., Kay's arguments are specious.² With respect to the proposed misrepresentation/lack of candor issues, Kay argues that the Bureau has not alleged or shown the existence of an intent to deceive the Commission. Kay Opposition, p. 8. Kay's argument simply ignores the Bureau's detailed showing of a prima facie case that Kay intentionally

² In a last procedural argument, Kay argues that the motion does not comply with Section 1.229(d) of the Commission's Rules because no affidavit was attached to the motion. Kay Opposition, p. 7. Section 1.229(d) implements Section 309(d) of the Communications Act, which states that petitions to deny (and, by implication, motions to enlarge issues), shall be supported either by affidavits or by materials which may be officially noticed. The Sobel I.D., which was the product of a full evidentiary hearing, certainly qualifies as a document which may be officially noticed.

misrepresented facts and/or concealed information from the Commission. In its motion, the Bureau showed that: (1) Kay made the statement that he had no interest in any of Sobel's stations or licenses; (2) Kay understood that a "direct financial stake" was an "interest"; and (3) Kay knew he owned the stations' equipment and received revenue from the stations; thus constituting a "direct financial stake" in the stations. Bureau Motion, pp. 6-7. "[T]he fact of misrepresentation coupled with proof that the party making it had knowledge of its falsity [is] enough to justify a conclusion that there was fraudulent intent." Leflore Broadcasting Co. Inc., 636 F.2d 454, 462 (D.C. Cir. 1980). Similarly, while Kay claimed on June 2, 1994 that he did not operate any stations not licensed to himself, Buddy Corp., or Oat Trunking Group, Inc., he knew at that time he was operating Sobel's stations. Bureau Motion, pp. 7-8.

8. With respect to Kay's participation in an unauthorized transfer of control, Kay argues that the Bureau has improperly sought a transfer of control issue (as opposed to an unauthorized assumption of control issue). Kay Opposition, p. 9. This argument mischaracterizes the issue sought by the Bureau, to wit:

To determine, based upon the findings and conclusions reached in WT Docket No. 97-56 concerning James A. Kay, Jr.'s (Kay) participation in an unauthorized transfer of control, whether Kay is basically qualified to be a Commission licensee.

The remainder of Kay's arguments were considered and rejected by Judge Frysiak. Kay had a full and fair opportunity to present evidence and make arguments as to why there was no unauthorized transfer of control. Judge Frysiak found that there was an unauthorized transfer

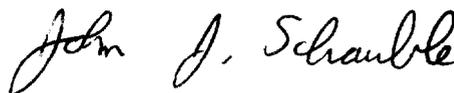
of control. Kay (and Sobel) have filed exceptions with the Commission challenging Judge Frysiak's findings and conclusions. Under these circumstances, there is no reason to give Kay another opportunity to make the same arguments in this case. The findings and conclusions with respect to transfer control in the Sobel case should be binding in this case.

9. Accordingly, the Bureau asks the Presiding Judge to specify the issues contained in the "Wireless Telecommunications Bureau's "Motion to Enlarge Issues."

Respectfully submitted,
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January 16, 1998

CERTIFICATE OF SERVICE

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