

4000 E. 17th St.

FEDERAL MAIL SECTION

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

FCC 98M-15

80424

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

DISPATCHED BY

WT DOCKET NO. 94-147

MEMORANDUM OPINION AND ORDER

Issued: January 29, 1998 ; Released: February 2, 1998

Background

1. This is a ruling on Motion To Enlarge Issues filed by the Wireless Telecommunications Bureau ("Bureau") on December 30, 1997. An Opposition was filed by James A. Kay, Jr. ("Kay") on January 9, 1998. The Bureau filed a Reply on January 16, 1998.

2. Kay was an intervenor party to a Commission formal adjudicative proceeding to determine whether Marc Sobel ("Sobel") engaged in unauthorized transfers of control of land mobile licensed stations to Kay. Marc Sobel, et al., 12 FCC Rcd 3298, WT Docket No. 97-56, released February 12, 1997. An Initial Decision was issued by Administrative Law Judge John M. Frysiak which determined that Kay did control stations licensed to Sobel in violation of Section 310(b) of the Communications Act. Marc Sobel, et al., FCC 97D-13, ___ FCC Rcd ___, released November 28, 1997. Judge Frysiak also found that Sobel had misrepresented Kay's control of Sobel licenses in an affidavit of Sobel's that was filed by Kay in this proceeding. There was no finding or conclusions made with respect to Kay's comparable affidavit.

Facts

3. On January 25, 1995, Kay filed a Motion To Enlarge, Change or Delete Issues ("Motion to Delete") in which he represented through affidavits of Kay and Sobel that "Kay has no interest in any of the licenses or stations held by Marc Sobel." On December 30, 1994, Sobel and Kay had entered into a written Management Agreement which allegedly contradicts the affidavits. The issue was not added at an earlier stage because it was late filed and there had been a failure to show good cause for the failure to timely seek the issue. Memorandum Opinion And Order, FCC 97M-183, released November 5, 1997. The Presiding Judge also ruled that there was not a sufficient showing of public interest to overcome the absence of good cause. Id. The Bureau had requested a certification to the Commission to consider a Bureau request to remove the issue of control of Sobel stations and related licenses in order to consider a motion for summary decision which, if granted, would terminate

the proceeding. The Commission approved the request and modified the designation order to remove the Sobel licenses which could be examined in another proceeding to determine whether the Sobel licenses were attributable to Kay. James A. Kay, Jr., 11 F.C.C. Rcd 5324-25 (1996). The Commission held in its ruling:

Given the uncertain relationship between the licensees of the [Sobel] facilities and Kay, there is no reason at this time to subject them to possible sanctions or to encumber this proceeding with their participation.

11 F.C.C. Rcd at 5324. Thereafter, the control issue was set to be heard in the Sobel proceeding. Marc Sobel, 12 F.C.C. Rcd at 3298. There had been no decision in the Sobel proceeding at the time the Bureau's motion to add the issues was denied last November and the outcome of the Sobel proceeding at that time was speculative.

4. The control issue as to Sobel and Kay and the added issue of misrepresentation/lack of candor as to Sobel have now been litigated. Although the Initial Decision is not final, it is a finding made by an independent adjudicator after a formal hearing. There now is sufficient probable cause and sufficient public interest shown by the Bureau to permit the issues to be litigated in this case as to Kay. If the issues as to Kay are not litigated here, there is a likelihood that there would be a remand to require a determination of the substantial question raised by the Sobel Initial Decision as to whether Kay misrepresented or lacked candor in presenting affidavits which denied control or interest in the Sobel licenses under the Management Agreement in an attempt to eliminate an issue from this case. Cf. Herbert L. Schoenbohm, 11 F.C.C. Rcd 12,537 (General Counsel 1996).

Discussion

5. The issues of control in the Sobel Initial Decision should not be relitigated in this case and Kay should be permitted to offer evidence and argument only on the ultimate issue as to whether his exercise of control of the Sobel stations impact on his qualifications to hold a Commission license. The Commission has approved the preclusion of litigating fact issues where the parties and issues are similar, acknowledging that "[a]n initial decision is not a mere report to be arbitrarily disregarded." Stereo Broadcasters, Inc., 74 F.C.C. 2d 543, 545 (1979), aff'd, 652 F.2d 1026, 1030 (D.C. Cir. 1981). The Review Board has held that "the findings and conclusions of a particular party in one hearing proceeding are plainly relevant in another proceeding, when the parties and the issues are similar or interrelated." Ocean Pines FM Partnership, 4 F.C.C. Rcd 3490, 3491 (Review Bd 1989). Under the Ocean Pines authority, the Presiding Judge will "take full cognizance of the findings and conclusions reached, thus far, in the [Sobel] case." Id. The Sobel findings and conclusions establish for this case that "Kay has the ultimate control of Sobel's Management Agreement stations." Sobel Initial

Decision at 22.¹ Should that holding in Sobel be reversed or modified on appeal, conforming action will be taken by the Presiding Judge or the appropriate appellate body. Ocean Pines, supra at 3491.

6. The adding of related issues at this time would not be inconsistent with the Commission's modification order. The Commission ruled when it deleted the Sobel stations and licenses:

If further investigation discloses pertinent questions concerning the [Sobel] facilities, the Bureau may take further appropriate steps.

Id. The findings and conclusions of the Sobel Initial Decision raise substantial questions of credibility, candor or misrepresentation on the part of Kay with respect to Kay's use of the Sobel affidavit and the Kay affidavit in an attempt to have a disqualifying issue dismissed from this case. With the conclusion of a formal adjudication through issuance of the Sobel Initial Decision, the Presiding Judge is authorized to take "appropriate steps" to add the issues here.

7. However, there will be no issue added with respect to Kay's letter of June 2, 1994. The letter concludes that as of June 2, 1994, Kay does not "operate" any of Sobel's stations. The Bureau relies on that exclusionary language to argue that Kay had represented to the Commission that Kay has no interest in any of Sobel's stations. But there was no written Management Agreement in existence between Kay and Sobel until six months later in December 1994. Therefore, the issue of whether Kay "operated" Sobel stations to a degree of control before the Management Agreement was effected would be speculative and may require uncertain additional proof. The Bureau may not boot strap the June 2 letter to the Sobel Initial Decision and thereby shift the burden to Kay to prove that the letter was not a misrepresentation or was not lacking in candor. However, if the June 2 letter is received in evidence for any purpose and if other evidence of record and/or findings of the Sobel Initial Decision support a finding that Kay had or was exercising control of Sobel's stations on or before June 2, 1994, there may be a separate finding sought of a misrepresentation and/or lack of candor on the part of Kay under the Old Time Religion doctrine. See Mary Ochoa, supra. Kay now is on sufficient notice of how the Bureau views the June 2 letter.

8. Finally, there was an earlier ruling on the relevance of the Initial Decision to this proceeding that is consistent with the adding of issues sought by the Bureau. At the time of the release of the Initial Decision, counsel were about to take depositions of Kay and Sobel in

¹ Official notice will be taken of Initial Decision FCC 97D-13. See 47 C.F.R. §1.361 and FRE 803(6).

California.² The Initial Decision raised substantial questions about the credibility of Sobel and Kay as witnesses as well as substantial questions as to whether there was misrepresentation and/or lack of candor on the part of Kay in connection with his use of the Sobel and Kay affidavits in this proceeding. In the interest of conducting thorough depositions and to avoid or limit subsequent depositions, it was ruled sua sponte that issues of the credibility of Sobel and the credibility, candor, or misrepresentation of Kay were set with respect to Kay's use of the affidavits in this proceeding. Memorandum Opinion And Order, FCC 97M-201, released December 5, 1997. A pleading cycle also was established in the event the Bureau intended to file a motion to add issues and to address in that motion "the manner in which the record of the Sobel proceeding can be used to expedite the receipt of evidence in this case." Id. That ruling was issued on December 5, 1997, as a result of the simultaneous occurrence of two fortuitous events: release of the Initial Decision and the imminent departure of counsel for California to depose Kay and Sobel. See 47 C.F.R. §0.341(b) (any question that could be raised by any counsel may be raised and acted upon by the Presiding Judge on his own motion.) The Bureau filed its Motion To Enlarge Issues on December 30, 1997, which was several days before the date set. Therefore, the Bureau's filing was timely.

9. The sworn affidavits of Sobel and Kay were used to represent in this proceeding that Kay had no interest in the Sobel stations that were subject to the Management Agreement. Both affidavits were filed in this case in January 1995 and both affidavits were prepared by the same legal counsel. The Commission has held that evidence of misrepresentation or lack of candor that arises in the course of a hearing should be considered in findings even in the absence of an issue. Maria M. Ochoa, 8 F.C.C. Rcd 3135 (1993), aff'd, 98 F.3d 646 (D.C. Cir. 1996). The presentation and sponsoring of the Kay and Sobel affidavits in connection with a Motion To Delete a disqualifying issue meets the standards of Ochoa and, in light of the findings as to the evidence in the Sobel Initial Decision, the issue should be added in order to put Kay on further notice. The burden of proof will be assigned to Kay but the burden of proceeding will be assigned to the Bureau.

10. The Presiding Judge previously denied motions to add issues against Kay. In Memorandum Opinion And Order, FCC 97M-167, released October 9, 1997, it was ruled that the Bureau was late in asking for issues on an alleged misrepresentation or lack of candor on the part of Kay in his answers to the Bureau's Interrogatory No.4.³ In Memorandum Opinion And Order, FCC 97M-183, released November 5, 1997, the Bureau moved to add

² Kay and Sobel were among those slated to be deposed. While motions for protective orders were being considered, the Initial Decision was released. It was in the interest of efficiency in allowing questions on the credibility of Sobel and Kay in light of the findings and conclusions in the Sobel Initial Decision that the Bureau was authorized to ask questions about the affidavits while deposing Sobel and Kay.

³ But if the evidence shows at the conclusion of the hearing that the answer of Interrogatory No.4 was misleading or lacking in candor, appropriate findings could be made. Id., citing Old Time Religion News, Inc., 95 F.C.C. 2d 713, 719 (Review Bd 1983).

essentially the same issues as those sought in its current motion to enlarge. There were two overriding reasons for denying the motion. First, the issues had been removed from this case by the Commission at the Bureau's request. Second, the issues as to whether Kay was controlling stations licensed to Sobel were being litigated in the Sobel case. Now there has been a substantial new development by the release of the Initial Decision in a formal adjudication. The findings and conclusions of the Initial Decision raise substantial questions as to whether the Kay affidavit and the Sobel affidavit used by Kay were misrepresentations or lacked candor.

11. Furthermore, there is sufficient public interest in adding the misrepresentation/lack of candor issues here that are limited to Kay because the affidavits were used by Kay in this case in an effort to remove disqualifying issues of transfer of control and there were no findings or conclusions on Kay's misrepresentations or lacking of candor in the Sobel Initial Decision. The determination in the Initial Decision that Sobel's affidavit was a disqualifying misrepresentation is a significant new development that arose on November 28, 1997, upon the release of the Initial Decision. Had the decision been otherwise as to Kay's control of the licenses, and if there had been findings of no misrepresentation on the part of Sobel, there probably would be no basis to now add the issues here with respect to Kay. Also, the Initial Decision, which was based in part on the testimony of Kay and Sobel, meets the concern for reliability that is usually met by affidavits on "personal knowledge". 47 C.F.R. §1.229(d). The testimony heard in the Sobel proceeding meet the standards of an affidavit based on personal knowledge and therefore the purpose for the rule in requiring reliable evidence has been met. The Sobel record also has a high degree of reliability for use in this proceeding since there was an opportunity for Kay to participate as a party, introduce evidence, cross-examine witnesses, and to submit proposed findings and conclusions.

Rulings

Accordingly, IT IS ORDERED that the Motion To Enlarge Issues filed by the Wireless Telecommunications Bureau on December 30, 1997, IS GRANTED in part and IS DENIED in part.

IT IS FURTHER ORDERED that the following issues are added:

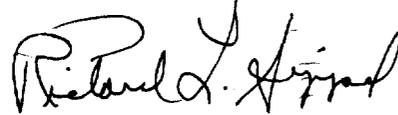
To determine, based on the findings and conclusions of Initial Decision FCC 97D-13 reached in WT Docket No. 97-56 concerning James A. Kay, Jr.'s (Kay) participation in an unauthorized transfer of control, whether Kay is basically qualified to be a Commission licensee.

To determine whether James A. Kay, Jr. misrepresented facts or lacked candor in presenting a Motion To Enlarge, Change, or Delete Issues that was filed by Kay on January 12, 1995, and January 25, 1995.

To determine whether in light of the evidence adduced under the aforementioned added issues whether James A. Kay, Jr. is qualified to hold a Commission license.

IT IS FURTHER ORDERED that the burden of going forward IS ASSIGNED to the Wireless Telecommunications Bureau and the burden of proof IS ASSIGNED to James A. Kay, Jr.⁴

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel
Administrative Law Judge

⁴ Copies of this Memorandum Opinion And Order were e-mailed or faxed to all counsel on the date of issuance.