Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	WT Docket No. 97-56
	)	
MARC SOBEL	)	
	)	
Applicant for Certain Part 90 Authorizations in the Los Angeles Area and Requestor of Certain Finder's Preferences	)	
	)	
MARC SOBEL and MARC SOBEL d/b/a AIR WAVE COMMUNICATIONS	)	
	)	
Licensees of Certain Part 90 Stations in the Los Angeles Area	)	
	)	

APPEARANCES

Robert J. Keller, Esq. and Scott A. Fenske, Esq. on behalf of Marc Sobel; and John J. Schauble, Esq. and William H. Knowles-Kellett, Esq. on behalf of the Wireless Telecommunications Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

Issued: November 24, 1997 ; Released: November 28, 1997

Preliminary Statement

1. By Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, 12 FCC Rcd 3298 (1997) (HDO), the Commission instituted a revocation proceeding against the following licenses held in the name of Marc D. Sobel (Sobel): KAC8275 (GMRS), KD53189 (Business), KNBT299 (Conventional SMR), KRU576 (Conventional SMR), WIH718 (Business). WIJ516 (Business), WIJ698 (Business), WIJ716 (Business), WIK548 (Business), WIK657(Business), WIK833 (Business), WIL516 (Business), WIL598 (Business), WNPX844 (Business), WNPY680 (Conventional SMR), WNWB334 (Conventional SMR), WNXL471 (Conventional SMR), WNYR424 (Conventional SMR), WNZC764 (Business), WNZJ445 (Business), WNZS492 (Conventional SMR), WPAD685 (Conventional SMR), WPCA891 (Conventional SMR), WPCZ354 (Conventional SMR), WPDB603

(Conventional SMR), WPFF529 (Conventional SMR),WPFH460 (Conventional SMR), and WPCG780 (Conventional SMR). The Commission also designated for hearing the following pending applications filed by Sobel:

File No.	Date File	Call Sign	Frequency	Service	Type
670861	6/9/94	KKT934	851.8875	Conventional SMR	Assignment
415367	4/18/94	______	507.2875	Business	New
697577	3/22/95	WPAD695	852.1625 852.4125	Trunked SMR	Modification
416021	7/31/95	______	472.4125	Business	New
154618	5/16/95	______	463.6750	Business	New
501542	4/17/95	WPCZ354	853.1375	Conventional SMR	Reinstate
666673	5/6/94	WNWB334	854.0375	Conventional SMR	Modification
415478	9/16/94	______	471.9375	Business	New
614567	11/13/92	WNZS492	854.0875	Conventional SMR	Modification
R28310	12/15/94	WIJ716	471.8375 474.8375	Business	Renewal
R28311	12/15/94	KD53189	465.7375 468.7375 468.6125 463.4875 463.6125 468.5375 463.5375	Business	Renewal
D024171	2/20/96	WIK833	471.5125 474.5125	Business	Assignment
	1/24/96	WIK833	471.5125 474.5125	Business	Renewal

The Commission also held in abeyance five finder's preference requests filed by Sobel.

2 The Commission designated the following issues for resolution in this proceeding:

(a) To determine whether Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications have willfully and/or repeatedly violated § 310(d) of the Communications Act of 1934, as amended, by engaging in unauthorized transfers of control of their respective stations to James A. Kay, Jr.;

(b) To determine, in light of the evidence adduced pursuant to the foregoing issue, whether Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications are qualified to be and remain Commission licensees;

(c) To determine whether the above-captioned applications filed by Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications should be granted.

(d) To determine whether the above-captioned licenses held by Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications should be revoked.

3. The HDO placed the burden of the introduction of evidence and the burden of proof on the Wireless Telecommunications Bureau (WTB) with respect to issues (a), (b), and (d). The burden of the introduction of evidence and the burden of proof on issue (c) was placed with Sobel. The HDO also directed the Presiding Judge to determine whether a forfeiture should be issued against Sobel for willful and repeated violations of §310(d) of the Communications Act.

4. By Memorandum Opinion and Order, FCC 97M-43 (released March 24, 1997), the Presiding Judge granted the "Petition to Intervene" filed by James A. Kay, Jr. (Kay) and named Kay a party to the proceeding.

5. By Memorandum Opinion and Order, FCC 97M-82 (released May 8, 1997), the Presiding Judge added the following issues against Sobel:

(a) To determine whether Marc Sobel misrepresented material facts or lacked candor in his affidavit of January 24, 1995.

(b) To determine, based upon the evidence adduced pursuant to the foregoing issues, whether Marc Sobel is basically qualified to be and remain a Commission licensee

The burdens of proceeding and of proof under those issues were placed on the WTB.

6. Hearings on all the issues were held in Washington, D.C. on July 29 and 30, 1997. The record in this proceeding was closed on July 30, 1997. Tr. 377. Proposed findings were filed by the WTB and Sobel on September 25, 1997. Replies were filed on October 21, 1997 by all the parties hereto.

Findings of Fact

A. Transfer of Control Issue

Sobel's Relationship with Kay

7. Sobel has been involved in the land mobile radio business in the Los Angeles area for approximately 20 years. In that capacity he operates and maintains UHF (450 MHz and 470-512 MHz) repeaters on which he sells service to various business users; installs, maintains, and repairs repeaters and radio systems for other land mobile radio licensees; and provides consulting services on the design and operation of such radio systems. He is also an authorized mobile radio equipment dealer for several vendors, selling and leasing mobile radio equipment to repeater licensees and end users.

8. James A. Kay, Jr. (Kay) began operating a radio/television repair service in 1972 or 1973. Tr. 325. He started providing repeater service on a commercial basis in the early 1980s. Id. Kay holds approximately 152 licenses from the FCC, of which approximately 50 licenses are in the 800 MHz band. Tr. 329-330. He has approximately seventy-five repeaters in the 800 MHz band that are licensed to him, and he also manages around 25 to 30 additional 800 MHz repeaters that are licensed to other entities. Tr. 330. Kay does business under the name Lucky's Two-Way Radios, which provides repeater service and does some site rental business. Tr. 333-334. Kay is the sole stockholder and president of Buddy Corp., which does business under the fictitious business name of Southland Communications. Tr. 334. Southland provides sales, service, and installation of two-way radios. Id.

9. Sobel has known Kay for about 20 years. Tr. 71, 326. They first met when Sobel was working at Sandy's Electronics and Kay was a customer there. Id. Kay and Sobel were both active in Citizens Band radios in the 1970s (Tr. 326), and they have been friends since the 1970s. Tr. 71, 326-327. They have repaired equipment, shared leases, and helped each other for more

than a decade. Tr. 327. Since the mid-to-late 1980s, Sobel has installed, maintained and serviced Kay's repeaters as a contractor paid by Kay Tr. 72, 106, 327. Sobel repairs and maintains approximately 350 stations that Kay currently owns or manages. Tr 105. Sobel has had the first call to repair, maintain, and install Kay's stations (Tr 105), except for three sites where another contractor is located much closer to the sites than Sobel Tr. 105, 328. Kay generally turns to Sobel when there is a difficult and complicated technical problem that Kay will not handle himself. Tr. 328 Kay will also ask Sobel to contact a potential customer to solve a troubling problem that Kay's regular staff is unable to solve. Tr. 327. Sobel might perform that service as often as twice a month Tr 72, 328. On occasion, Sobel will also contact someone on Kay's behalf to determine whether they are still operating a station. Tr 72. If they were not operating, Sobel will help Kay get the license cancelled. Id. If the licensee was operating, Sobel would attempt to convince the licensee to change over to Mr. Kay's system Tr 72-73.

10. During the period October 1990 to April 1997 Sobel billed Kay for approximately 3,360 hours of work that he performed for Kay. Kay receives the lowest rate Sobel charges because of the large amount of work Sobel performs for Kay. WTB Ex. 25, Tr. 245-246

Agreement Regarding Sobel's 800 MHz Repeaters

Background

11 In the early 1990s, Sobel became interested in holding 800 MHz licenses himself. Tr. 73. Sobel asked Kay if he would help Sobel get involved in 800 MHz licenses. Id. Sobel approached Kay for assistance because he knew Kay had 800 MHz stations that were making money. Tr. 183-184. Kay agreed to help. Tr. 73. While Sobel believes he could have prepared the applications himself, he relied on Kay to prepare the applications because Kay had the software and additional knowledge needed to prepare the applications, and because it was more convenient to have Kay prepare the applications. Tr. 184

12. Around the time the first 800 MHz station in Sobel's name was being constructed in the early 1990s, Sobel and Kay reached an oral agreement under which Kay would provide the equipment and money needed to construct and to operate Sobel's 800 MHz repeater stations, manage and market those stations, and pay all the operating expenses. Tr. 103-104. In return, Kay would receive the first $600 of revenue each month from each station, and the revenue over and above that would be split equally between Kay and Sobel. Tr. 104. Sobel did not have the disposable funds to invest in 800 MHz at the time he obtained the licenses. Tr. 187. Sobel did not have the option of going into 800 MHz on his own. Id. Sobel estimated that it would cost $500 to $600 a month to lease a repeater site and the equipment needed for the repeater, install, maintain and repair the equipment, and obtain insurance. Tr. 104.

13. Under the oral agreement, Sobel was to be the person responsible for maintaining, repairing, and installing Sobel's 800 MHz stations. Id. Sobel performed most of the actual construction and installation. Tr. 107. Sobel performed that work as a contractor for Kay, and he was paid an hourly fee by Kay for that work. Tr. 106-108. Sobel cannot distinguish based upon his invoices what work he has done on Sobel's 800 MHz stations and what work relates to Kay's stations. Tr. 116, 243. Kay selected and purchased the equipment needed to construct the stations. Tr. 107, 351, 353. Kay did not keep track of which equipment went to stations licensed to him and which equipment went to Sobel's 800 MHz stations (or other stations he managed). Tr. 354.

14. At some point between the time Kay and Sobel entered into their original oral agreement and the time they entered into a written management agreement, they orally agreed that Kay would have an option to purchase Sobel's 800 MHz stations for $500 each. Tr. 108. Kay asked for the option because he needed to protect himself since his customers were on Sobel's stations. Tr. 365-366.

15. At some point in late September or October 1994, in response to a Freedom of Information Act (FOIA) request, Kay received a draft hearing designation order relating to his qualifications to be a Commission licensee. Tr. 261. Kay informed Sobel that the draft order contained the following language (or substantially similar language):[1] "Information available to the Commission also indicates that James A. Kay, Jr. may have conducted business under a number of names. Kay could use multiple names to thwart our channel sharing and recovery provisions. We believe these names include . . . AirWave Communications and Marc Sobel, d/b/a AirWave Communications." Tr. 259, 262.

16. Based on the language in the draft hearing designation order, and because of Kay's problems with the FCC and his knowledge that parties had complained about the relationship between Sobel and Kay, Sobel asked Kay to have their oral agreement reduced to writing. Tr. 108-109, 262. On October 28, 1994, Kay and Sobel executed a "Radio System Management and Marketing Agreement." WTB Ex. 38, Tr. 108. The agreement was prepared by Brown & Schwaninger, a law firm representing both Kay and Sobel. Tr. 109.

17. Under Paragraph VII A. of the management agreement, Kay was required to pay Sobel an option fee of $100 as consideration for the option to purchase Sobel's 800 MHz stations. WTB Ex. 38, P. 4, Tr. 111. Kay initially forgot to pay the option fee. Tr. 111. In addition, the agreement had some clerical errors, and some stations were omitted from the agreement. Tr. 110-111. Kay and Sobel entered into a new written agreement to allow Kay to pay the $100, thus making the option binding, and to make the corrections to the agreement. Id. WTB Exs. 39 and 40, which are the December 30, 1994 agreement and an addendum, constitute the written

[1] The quoted language is from the actual order designating Kay's licenses for hearing. Tr. 258-259.

agreement between Kay and Sobel concerning Sobel's 800 MHz Repeater stations. Tr. 112. There are no other written agreements between Kay and Sobel concerning Sobel's 800 MHz stations (hereinafter referred as the "Management Agreement Stations"). Tr. 361.

18. The agreement is effective for ten years. WTB Ex. 39, P. 6. The agreement automatically renews for five consecutive ten year periods unless Kay alone gives notice to the contrary at least ninety days prior to the end of the term. Id. Sobel has no right to prevent the agreement from automatically renewing. Id.

19. Paragraph III of the Management Agreement provides:

> Agent [Kay] shall be the sole and exclusive supplier of all equipment and labor required to maintain and repair the Stations' facilities, employing Agent's reasonable best efforts. Agent may either supply required labor and equipment and labor directly or may supply required equipment and labor through arrangements with other firms on behalf of Agent.

WTB Ex. 39, P. 3. Kay selected, purchased and provided all the equipment used in connection with the Management Agreement stations. Tr. 107, 351, 353. Paragraph IV of the agreement provides that all equipment provided by Kay shall remain his sole and exclusive property. WTB Ex. 39, P. 3. The equipment was "leased" to Sobel for a term coterminous with the agreement, but Sobel was given no title, interest, or control over the equipment, except to the extent he was granted permission to use Kay's equipment. Id.

20. As discussed below in greater detail, Sobel currently works on maintaining and repairing the Management Agreement stations. Tr. 112. Nothing in the management agreement provides that Sobel will be the person who maintains and repairs the stations. Tr. 113, 359-360. Paragraph XX of the management agreement provides that the agreement "is the entire agreement between the Parties with respect to the subject matter thereof, making void all previous negotiations and agreements . . ." WTB Ex. 39, P. 8. Sobel testified that it was not necessary to have a provision in the agreement stating that he would maintain and repair the facilities because he was already performing that work. Tr. 113. Kay testified that it was a "basic assumption" that Sobel would be performing the work. Tr. 360.

21. Most of the Management Agreement stations and Kay's stations are located high on mountaintops. Tr. 118. Generally, Sobel must drive through locked security gates to get to the sites. Id. The buildings at the sites, as well as the cabinets containing the equipment, are often locked. Id. For both the Management Agreement stations and the Kay stations, Sobel has in his personal possession the keys he needs to access the sites and the equipment. Id. Generally, the

control points for the Management Agreement stations are located at Sobel's home office, Sobel's car, and Kay's office. Tr. 118-119.

Control Over Daily Operations

22. Paragraph I of the management agreement provides that Kay shall be the sole and exclusive agent for the sale of all services provided by the Management Agreement stations. WTB Ex. 39, P. 2, Tr. 119. Kay's duties include all administrative duties associated with marketing the stations, including, but not limited to, bookkeeping, billing and collections. WTB Ex. 39, P. 2. Kay is given the "sole and exclusive discretion" to negotiate and execute contracts with customers, and Sobel is relieved of any liability under those contracts. Id. Paragraph II of the management agreement appoints Kay as the "sole and exclusive Agent for the management of the Stations' transmitting facilities and associated business." Id. Kay's duties under this provision include "all management functions associated with the operation of the Stations, including but not limited to the invoicing of users, collection of payments from users, bookkeeping and accounting processes, disbursement of payments to suppliers of goods and services, and control point operation." Id. Kay employs a staff to assist in these duties. Tr. 339, et seq. Kay has the sole and exclusive right to negotiate and execute any contracts entered into under Paragraph II of the Management Agreement, and Sobel has no liability under those contracts. WTB Ex. 39, P. 2.

23. When a customer receives service on one of the Management Agreement stations, the customer signs a contract which is also signed by Kay. Tr. 119. The Management Agreement stations have several hundred customers. Id. Sobel does not know the number of customers per month who have signed up to be on the Management Agreement stations in 1997. Tr. 122. Sobel recruits customers himself on his 450 MHz stations. Tr. 119. On occasion, Sobel will be approached by a customer who would be better placed on an 800 MHz system. Id. In that instance, Sobel will refer those customers either to Mr. Kay's stations or one of the Management Agreement stations. Tr. 119-120. He has not placed more than a handful of customers on the Management Agreement stations. Tr. 120. Kay and Sobel refer customers to one another, and they both receive referrals from and give referrals to other dealers. Tr. 318-319.

24. Kay's employees deal with the customers. Tr. 343. Kay's salespeople sell radios. Tr. 344. The salespeople do not know whether they are selling time on a repeater Kay owns, a repeater Kay manages, or a community repeater. Id. Some of Kay's customers are on Kay's stations, some customers are on just managed stations, and some customers are on both types of stations. Tr. 348-349. The important consideration in determining where a customer is placed is the needs of the customer. Tr. 344-345. Kay looks at factors such as where service is needed, how much air time is needed, when the air time is needed, and whether the customer is conventional or trunked. Tr. 345. Ownership of the repeaters is not an important factor in determining where to place a customer, and Kay does not prefer stations licensed to himself over

stations licensed to Sobel Tr. 346. When a salesperson has made a sale, the salesperson will go to Barbara Ashaur, a Kay employee, and request that a code and frequency be assigned. Tr. 344. About half the time, the salesperson will make the initial recommendation as to where to place the customer. Tr. 345 Sometimes, Ms. Ashaur can take care of assigning the codes herself. Tr. 347. If Ms. Ashaur needs specific frequencies assigned or needs further assistance for some other reason, she will ask either Sobel or Kay for assistance, regardless of who owns the repeater in question. Id. Sobel assigns "an awful lot" of frequencies for Kay's stations. Id. Once the frequency and code are assigned, Ms Ashaur generates a request to activate the customer's radio system. Id.

25. Only Sobel and Kay have the access codes needed to activate repeaters. Tr. 124 Kay's repeaters have computerized controllers, and each customer is assigned a specific code. Id. When the customer's code is activated, and the customer's radio transmits that tone, the repeater will repeat that customer's signal. Tr. 124-125. Sobel testified that he turns on "all" the codes for the Management Agreement stations, and he conducts the majority of the activations on Kay's stations. Tr. 123-124. Kay testified that Sobel performs slightly more than two-thirds of the activations for both the Management Agreement stations and Kay's stations. Tr. 347-348. When Sobel reviews frequency placement and activates customers on either the Management Agreement stations or Kay's stations, he is paid an hourly fee by Kay for that work. Tr. 125

26. Kay and his employees bill customers and collect fees from customers for the Management Agreement stations. Tr. 120. A lot of customers (about 500 to 700) use both Kay stations and Management Agreement stations. Tr. 348-349. By and large, those customers receive one consolidated bill, unless the customer wishes to receive separate bills. Tr. 349. Kay or his employees perform the bookkeeping relating to the Management Agreement stations. Tr. 120. Kay or his employees make sure any obligations incurred with respect to the Management Agreement stations get paid. Id. Kay or his employees keep and maintain the financial records for the Management Agreement stations. Tr. 120-121, WTB Ex. 39, P. 6. Sobel reviews the revenue levels for the Management Agreement stations every few months or six months. Tr. 121-122. He obtains the information from Kay's computer. Tr. 121. Sobel has free access to Kay's office during business hours. Tr. 237.

27. Sobel can learn of the need to work on the Management Agreement stations either from Kay's office or by monitoring the stations himself. Tr. 116. Sobel monitors the Management Agreement stations possibly at least once a month. Tr. 117. Sobel monitors Kay's stations as often as he monitors his own stations. Id. Currently, Kay rarely monitors the stations, although he monitored the stations more regularly until a couple of years ago. Id. Some of Kay's employees also monitor the Management Agreement stations when a customer calls and says a station does not work. Id. While giving a time frame is difficult, Sobel estimates that he maintains or repairs Management Agreement stations as a whole several times a month. Tr. 114. Sobel cannot distinguish based upon his invoices what work he has done on the Management

Agreement stations and what work relates to Kay's stations. Tr 116. It did not make any difference to Kay whether Sobel was working on a Management Agreement station or a station licensed to Kay. Tr. 243. Whenever Sobel performs work relating to a Management Agreement station, he is working as a contract technician for Kay, and Kay pays Sobel an hourly fee for that work. Tr. 106, 144.

28. Kay's technicians will check the repeaters and other equipment for stations Kay owns or manages. Tr 341-343. A technician working on a repeater would have no reason to know who holds the license. Tr. 343. Similarly, a salesperson selling air time to a customer would have no reason to know whether the station the customer will be using is licensed to or managed by Kay. Tr. 344. By and large, none of Kay's employees performing work on a station would have any reason to know to whom the station is licensed. Tr. 340.

29. Sobel does not consider himself to be an absentee owner because he is involved in the operation of the stations on a day-to-day basis. Tr. 293-294. That involvement is as a contractor selected and paid by Kay. Tr. 144.

Preparation of Applications and Policy Decisions

30. Kay did the research needed to locate available frequencies for which Sobel could apply. Tr. 73. Kay would then tell Sobel of the frequency and review with Sobel information such as who else was on the channel, where the repeater would be located, and the need for the repeater. Tr. 73-74.

31. The Management Agreement stations are located at the following sites: Mount Lukens, Santiago Peak, Snow Peak, Hollywood Hills, Mount Wilson, Heaps Peak, and possibly Sunset Peak. Tr. 79-84.[2] Sobel uses the Hollywood Hills site for his 470 MHz stations, and he leases that site from Louella McNeal. Tr. 78. Sobel, in turn, subleases that property to Kay, who pays Sobel $7,000 to $8,000 a year in rent. Tr 78, 250-251. For each of the other sites, Kay made the arrangements with the property owners to make sure the Management Agreement stations could operate from those sites, and he has leases with the property owners for those sites. Tr. 84-85. Under the management agreement, a transmitter site may be relocated on sixty days notice to Kay only if the relocation is in the best interests of both parties. WTB Ex. 39, P. 5.

32. Sobel initially testified that Kay prepared "most" of the Management Agreement applications. Tr. 74. He claimed that there were times when he prepared the applications personally, but he could not recall which applications he prepared. Id. The applications were

[2] Many of the sites listed on the licenses (WTB Exs. 2-18) are secondary sites which are not required to be constructed under the Commission's Rules. Tr. 80. In several cases, Sobel could not recall whether secondary sites listed on his licenses had been constructed. Tr. 80-83.

prepared using specialized software from Slattery Software that Kay had on his computer. Tr. 74-75. Kay had a template in his computer that showed the various locations and contained the technical information needed for the applications. Tr. 206. The majority of Sobel's applications contain handwritten information concerning emission designators. WTB Ex. 1, Pp. 5, 8, 10, 12, 14, 16, 19, 21, 24. In every case, the handwriting is that of Kay. Tr. 76-78. While Sobel believes he could have prepared the applications himself, he knew Kay had the software and additional knowledge needed to prepare the applications, and it was more convenient "that he did the applications for me." Tr. 184.

33. Item 37 on FCC Form 574 asks for the name of the individual who completed the application form. WTB Ex. 1. In some of the Management Agreement applications, Sobel is sometimes identified as the person who completed the form, while in other applications, Kay is listed as the preparer. Id. Kay and Sobel construed Item 37 as asking for the identity of the person who should be contacted if there is a question, rather than asking who actually prepared the application. Tr. 208. Sobel is thus sometimes listed as the preparer of applications which were in fact prepared by Kay.

34. In some services, the Commission requires a non-agency entity called a "frequency coordinator" to review a land mobile application before it is submitted to the Commission in order to ensure that the application complies with the Commission's technical regulations and to ensure that spectrum is available. Tr. 86. The National Association of Business and Educational Radio (NABER) was a frequency coordinator for the frequencies used by the Management Agreement stations. Id. NABER requires applicants to fill out a form asking for basic information. Id. When dealing with NABER, Kay filled out the forms, and Sobel then signed the forms. WTB Ex. 2, Tr. 86-87.

35. Sobel reviewed and signed each application for the Management Agreement stations. Tr. 75, 206-207. The only edits Sobel can remember making to the applications occurred a couple of times when Kay misspelled Sobel's name. Tr. 75.

36. Kay has prepared letters for submission to the Commission regarding the Management Agreement stations. Tr. 335. Ordinarily, when the Commission finds a problem with a land mobile application, it returns the application to the applicant with an application return notice. Tr. 234. The record contains three responses to application return notices involving Management Agreement Stations -- all three responses were prepared by Kay. WTB Exs. 19, 21, 23; Tr. 88, 92, 96, 335-336, 338, 339. Sobel received the application return notices and asked Kay to prepare responses. Tr. 228-229.

Clearing of Channels and Acquisition and Disposition of Licenses

37. Unlike other services, land mobile frequencies are often shared with different licensees on the same frequency in the same area (an encumbered channel) Tr. 193 Under certain circumstances, however, a licensee can get exclusive use of a channel in an area (a clear channel). Id. A clear channel has several advantages over an encumbered channel. With a clear channel, a licensee can operate in an enhanced mode, there is no need to monitor the frequency for other users, and clear channels are substantially more valuable than encumbered channels. Tr. 195. There are several actions that can be taken towards clearing channels. If a party finds that another licensee has not operated its station for a year, it can ask the Commission to cancel the license and, in some cases, give the party the first opportunity to apply for the cancelled license. Tr. 196-197. If a co-channel station is operating, the licensee can attempt to persuade the co-channel licensee to cancel or to assign its license in return for new equipment or for favorable rates on repeater service on the licensee's repeaters. Tr. 197-198.

38. All of the initial applications for the Management Agreement stations were for encumbered channels. Tr. 198-199. Sobel claims that he did not have the time or the money to do the work needed to clear the channels himself. Tr. 199. Kay and Sobel therefore agreed that Kay would do the work and spend the money needed to clear the channels used by the Management Agreement stations. Id. Sobel knew Kay had been successful in this activity in the past, and he believed Kay had the knowledge and staff needed to do this work. Id. Sobel works from 30 to 60 hours a week. Id. As a contractor, he has assisted Kay in doing the work needed to clear Kay's channels. Tr. 72-73

39. The licenses for stations KNBT299, WNYR424, and WNPY680 were obtained through assignment. Tr. 101. Sobel paid nothing for those licenses, and he does not know whether money was paid for those licenses (or any of the other details on the assignments). Tr. 102.

40. Under Paragraph VII of the management agreement, Kay has the exclusive option to purchase any of the Management Agreement stations at any time for $500 each. WTB Ex. 39, P. 4. The sale includes not only the license and the station assets but also any business created by operation of the station. WTB Ex. 39, P. 5. Paragraph VII E. requires Sobel to "maintain exclusive ownership and control of the license for the Stations" until and unless the licenses are assigned to Kay. Id. Therefore, Sobel cannot sell any of the Management Agreement stations without Kay's permission. Tr. 125-126. In contrast, if Kay wished to sell any of the Management Agreement stations, he could exercise his option to purchase the station and then direct Sobel to assign the station to Kay's designee, even if Sobel objected.

41. There are three stations subject to the Management Agreement that have been sold. Tr. 126. One station was sold to William Matson for between $70,000 and $100,000. Tr. 126, 366. Kay arranged for the sale of that station. Tr. 366. Sobel received $20,500 from that sale, and Kay received the balance of the money. Tr. 126-127, 366-367. Part of Kay's consideration

for receiving the majority of the sales proceeds was expenses he incurred in clearing the channel. Tr. 127, 373. Sobel asked Kay for $20,000, and Kay agreed. Tr. 374. With respect to the second station that was sold, Sobel only received $500; Sobel does not know how much money the second station was sold for. Tr. 127-128. The third station was sold as part of a trade, so no money was exchanged. Tr. 127. The exchange appears to be part of Kay's work in clearing the Management Agreement channels because Sobel received a cancellation of a license on another frequency, which increased the value of one of his licenses. Tr. 128. Sobel convinced Kay not to accept a $1.5 million offer for the Management Agreement Stations. Tr. 275. Sobel believed that the Management Agreement station could generate enough profit to make the investment lucrative. Tr. 267-268.

Setting of Prices

42. Paragraph I of the management agreement gives Kay the sole right to negotiate contracts with customers. WTB Ex. 39, P 2, Tr. 128. The standard rate charged to customers of both the Management Agreement stations and Kay's stations is twelve dollars a month for each mobile transmitter. Tr. 129. Kay charges the same rate for use of the 800 MHz stations licensed in his name. Id. Since Kay's salespeople do not know whether they are selling time on a station owned by Kay or a station managed by Kay (Tr. 344), it follows that the rates for both types of stations would always be the same unless there were special negotiations. The last change in the standard rate was approximately three or four years ago. Tr. 129-130. Sobel does not recall whose idea it was to make that change. Tr. 130. At times, discounts are negotiated with the larger customers. Tr. 129. According to Sobel, Kay or his employees do the majority of the negotiating with customers, but he also does some negotiating wih customers. Id. Sobel only discusses rates with Kay or his employees a handful of times a year, if that. Id. Sobel also handles special problems involving Kay's customers. Tr. 72.

Retention of Counsel

43. Brown & Schwaninger became Sobel's FCC attorneys in the early-to-mid 1990s. Tr. 109. Kay introduced Sobel to that firm, which also represented Kay. Tr. 109, 370-371. Brown & Schwaninger represented both parties when they were preparing the management agreement. Tr. 109-110. Robert Keller, who also represents Kay in certain FCC matters, is currently Sobel's FCC counsel. Tr. 110. Sobel asked Kay whom he could use instead of Brown & Schwaninger, and Kay directed him to Mr. Keller. Id. Kay has paid all of Sobel's legal fees with respect to the Management Agreement stations, including the legal fees in connection with this hearing. Tr. 109, 112.

Control Over Personnel

44. Sobel has no employees. Tr 130. Sobel is not sure if he has ever hired a contractor to do work relating to the Management Agreement stations. Id. The employees of Kay who perform work relating to the Management Agreement stations are hired, fired, and supervised by Kay Id

45. As noted above, Kay's salespeople sell time on the Management Agreement stations as well as other stations Kay owns or manages Tr 344-345 The employees of Kay described below perform their duties with respect to the Management Agreement stations as well as other stations Kay owns or manages. Tr. 340, 342-343. Ms. Ashaur performs the billing, the receivables, and runs the accounting department, and sometimes serves as Kay's secretary Tr 339. Ophelia Nunez works on accounts receivable, posts monies, prepares bills, prepares bank deposits, works on legal matters, and prepares summons and complaints. Tr. 340-341. Damon Crowley, Sr. performs secretarial work, sorts files, performs accounts receivable and collections work, and works on legals. Tr 341. Ken Schultz, who until recently was the acting general manager or service manager for Southland, is now a lead technician who repairs radios. Id. Randy French is a technician. Tr. 342. The technicians also check and test repeaters that may have failed. Tr. 343.

Payment of Operating Expenses

46. Under Paragraph IV of the Management Agreement, Kay is responsible for paying all expenses relating to the construction of the Management Agreement stations. WTB Ex. 39, P. 3. Similarly, under paragraph XIII of the agreement, Kay is responsible for paying all expenses associated with the operation of the stations. WTB Ex. 39, P. 6, Tr. 131.

47. Kay estimates that his total investment in equipment for the Management Agreement stations is about $97,500. Tr. 354. Kay cannot accurately estimate how much he has paid in operating expenses for the Management Agreement stations because he does not break out his expenses based upon who holds the underlying licenses. Tr. 351-352. For example, Kay pays one check for rent on Mount Lukens, and pays one electric bill for equipment used by stations licensed to him, Sobel, or other stations he manages. Tr. 352. Kay explained that one reason he functions efficiently is that he cuts down "on a lot of extraneous and unnecessary bookkeeping to keep it simple." Tr. 355.

Receipt of Monies and Profit

48. The revenues from the operation of the Management Agreement stations are deposited into Kay's bank account, which is the same bank account that the revenues from the operation of Kay's owned stations are deposited. Tr. 348. Pursuant to the management agreement, if any station's monthly revenue exceeds $600 a month, Sobel is entitled to fifty percent of the excess revenue. WTB Ex. 39, P 4. The revenue from four of the fifteen Management Agreement

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 Issue[3]

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 excercised 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. Additonally, 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 be 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 be 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 assesed 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 Decison 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

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)