

FEB 23 1998

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC

Federal Communications Commission  
Office of 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

**WIRELESS TELECOMMUNICATIONS BUREAU'S OPPOSITION  
TO PETITION FOR LEAVE TO FILE APPEAL**

1. The Chief, Wireless Telecommunications Bureau, by his attorneys, and pursuant to the Presiding Judge's Order, FCC 98M-19 (released February 11, 1998) now opposes the "Petition for Leave to File Appeal" filed by James A. Kay, Jr. (Kay) on February 9, 1998.

2. Kay seeks leave to appeal the Presiding Judge's Memorandum Opinion and Order, FCC 98M-15 (released February 2, 1998), adding the following issues in this proceeding:

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.

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

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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.

Kay now seeks leave to appeal the order to the extent that the first framed issue precludes relitigation of the question of whether there was an unauthorized transfer of control of stations from Marc Sobel to Kay. Kay also reiterates his prior argument that Section 1.276(d) of the Commission's Rules prohibits the Presiding Judge's reliance upon the Initial Decision in the Sobel case to add issues in this proceeding. Kay's petition presents a faulty analysis and fails to meet the standard contained in Section 1.301(b) of the Commission's Rules. It must therefore be denied.

3. Section 1.301(b) of the Commission's Rules provides that a request for leave to appeal an interlocutory order must show "that the appeal **presents a new or novel question of law or policy** and that the ruling is such that error would be **likely to require remand** should the appeal be deferred and raised as an exception." (Emphasis added). Neither circumstance is present here. The question of law raised by Kay's petition is neither new nor novel. As the Bureau demonstrated in its earlier pleadings, the Review Board held in Ocean Pines FM Partnership, 4 FCC Rcd 3490, 3491 (Rev. Bd. 1989), that an initial decision can serve as the basis for adding an issue in another proceeding, even if the initial decision is being appealed. Furthermore, it is highly unlikely that the addition of these issues will require a remand of this proceeding. Kay's argument is that it is premature for the Presiding Judge to add issues based upon an initial decision until that initial decision has been reviewed

by the Commission. Given the complexity of this proceeding, it is likely that the Commission will rule on Sobel's and Kay's exceptions to the Sobel I.D. prior to the issuance of an initial decision in this case. The Presiding Judge has ruled that if the Sobel I.D. is reversed or modified, he will take any conforming action consistent with the Ocean Pines ruling. Memorandum Opinion and Order, FCC 98M-15, supra at ¶5. Thus, a remand is highly unlikely because any action in this case will be consistent with the Commission's action in the Sobel proceeding by the time this case is appealed. Indeed, given the serious questions the Sobel I.D. raises about Kay's qualifications, a remand would be more likely if the Presiding Judge declined to add issues at this time. Accordingly, Kay's petition must be denied because it fails to meet the test contained in Section 1.301(b) of the Commission's Rules.

4. If the Presiding Judge considers the arguments in Kay's petition notwithstanding its failure to comply with Section 1.301(b) of the Commission's Rules, the Presiding Judge should hold that Kay's arguments lack merit. The argument that Section 1.276(d) of the Commission's Rules prohibits the Presiding Judge from relying on the Sobel I.D. to add issues in this proceeding is directly contrary to the Ocean Pines decision, where the Review Board held that an ALJ was "eminently correct" in adding an issue against a principal based upon an initial decision that was in the process of being appealed. If Kay's argument was correct, there would never be any circumstances under which an initial decision that was being appealed could constitute a basis for adding issues in another proceeding. The stay referred to in Section 1.276(d) refers to the actions ordered in the initial decision, not necessarily to any effect the decision could have in another proceeding. Thus, by filing

exceptions, Sobel and Kay stayed the revocation of Sobel's licenses. Nothing in the rule, however, explicitly or implicitly prevents the Presiding Judge from considering the effect of that decision on Kay's qualifications to be a Commission licensee.

5. Kay argues that this case is different from Ocean Pines and Stereo Broadcasters, Inc., 74 FCC 2d 543, 545 (1979), because while Sobel was disqualified, this proceeding involves the qualifications of a different individual (i.e., Kay). Kay Petition, pp. 2-3. This distinction is irrelevant to Kay's argument that Section 1.276(d) prohibits the Presiding Judge from considering the Sobel I.D. If Kay's interpretation of the rule was correct, no initial decision which was subject to appeal could ever serve as a basis for adding issues in a different proceeding.

6. Moreover, Kay ignores the fact that while his qualifications were not directly in issue in the Sobel proceeding, his conduct was directly at issue. The transfer of control issue in the Sobel proceeding read as follows:

(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.;

By its very nature, the issue could not be resolved without determining what role Kay had in controlling the stations licensed to Sobel. Indeed, Kay's central role in resolving the issue was recognized when he was allowed to intervene as a party in the Sobel proceeding.

Memorandum Opinion and Order, FCC 97M-43 (released March 24, 1997). It would have been impossible to determine whether there was an unauthorized transfer of control to Kay without examining Kay's conduct.

7. Kay argues that "the issue before the Commission is one of issue preclusion and not application of the Ocean Pines precedent." Kay Petition, p. 3. In fact, as the Bureau has shown, Ocean Pines is the controlling legal precedent. In any event, the Presiding Judge's order is fully consistent with principles of issue preclusion. It is important to note what was and what was not decided in the Sobel proceeding. Judge Frysiak determined that there was an unauthorized transfer of control of stations from Sobel and Kay. He determined that the unauthorized transfer of control, together with misrepresentations and lack of candor by Sobel, demonstrated that Sobel did not have the qualifications to be a Commission licensee. Judge Frysiak did not determine what effect the transfer of control had on Kay's qualifications. The issue added in this proceeding only precludes relitigation of the question of whether there was an unauthorized transfer of control from Sobel to Kay. It does not seek to preclude Kay from arguing that, notwithstanding the transfer of control, he retains the basic qualifications to be a Commission licensee. Kay is perfectly free to present evidence and to make arguments in that regard. There is no reason why he should have the opportunity to relitigate the transfer of control issue which he already had a full and fair opportunity to litigate in the Sobel proceeding.

8. As Kay notes, there are four elements to determining whether issue preclusion is applicable: (1) whether the issues to which estoppel applies is identical to those previously litigated and were essential to the previous decision; (2) whether the prior adjudication has become a final judgment on the merits; (3) whether the party to be estopped was a party to the prior litigation; and (4) whether the estopped party had a full and fair opportunity to litigate the issue in the prior proceeding. Kay Petition, p. 3. An analysis of these factors shows that the issue as framed does not violate any due process rights of Kay. With respect to the first issue the only issue which Kay is precluded from relitigating is whether there was an unauthorized transfer of control of the Management Agreement stations. That identical issue was litigated in the Sobel case and constituted an essential part of the Sobel I.D. Kay is clearly wrong that "there was no issue involving Kay's actions before the Presiding Judge." The issue that was litigated explicitly sought to determine whether he had acquired control of stations licensed to another individual in violation of Section 310(d) of the Communications Act.

9. With respect to the second factor, while the Sobel I.D. is not a final decision, the Ocean Pines decision makes clear that it is appropriate to add issues based upon an initial decision that is being appealed, so long as any modification of the original decision on appeal is taken into account. Kay has exercised his right to seek review of the I.D. He has vigorously exercised his right during the Sobel hearing to present evidence and to make arguments showing that no unauthorized transfer of control took place. Kay has no due process right to litigate the same issue twice.

10. Kay's attempt to deny that he was a party to the Sobel proceeding and that he "was merely an intervenor" (Kay Petition, p. 4) is totally baseless. As an intervenor, Kay was a party to the Sobel proceeding. In Paragraph 4 of the Sobel I.D., Judge Frysiak wrote, "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."

11. Contrary to Kay's arguments, Kay had a full and fair opportunity to argue whether he participated in an unauthorized transfer of control in the Sobel proceeding. He testified, had every opportunity to present other witnesses if he so desired, and presented reply findings on the designated issues. Kay's participation in the Sobel proceeding was not limited. Furthermore, Kay's attempt to distinguish unauthorized transfer of control from unauthorized assumption of control is meaningless. In this context, it is absurd to argue that Sobel could have transferred control of the Management Agreement stations to Kay but that Kay did not assume control of the same stations. The issue added by the Presiding Judge correctly balances Kay's due process rights with the interest in preventing repetitive litigation which serves no purpose.

12. Accordingly, the Bureau asks the Presiding Judge to deny Kay's "Petition for Leave to Appeal."

Respectfully submitted,  
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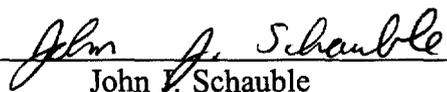
February 23, 1998

CERTIFICATE OF SERVICE

I, John J. Schauble, an attorney in the Enforcement and Consumer Information Division, Wireless Telecommunications Bureau, certify that I have, on this 23rd day of February, 1998, sent by the method indicated, copies of the foregoing "Wireless Telecommunications Bureau's Opposition to Petition for Leave to File Appeal" to:

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