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FCC MAIL SECTION

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

FCC 98M-26

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DISPATCH

In Matter of	)	WT DOCKET NO. 94-147
	)	
JAMES A. KAY, JR.	)	
	)	
Licensee of one hundred fifty two	)	
Part 90 licenses in the	)	
Los Angeles, California area.	)	

**MEMORANDUM OPINION AND ORDER**

Issued: March 3, 1998

Released: March 5, 1998

1. This is a ruling on Petition For Leave To Appeal that was filed by James A. Kay, Jr. ("Kay") on February 9, 1998. At the request of the Presiding Judge, the Wireless Telecommunications Bureau ("Bureau") filed an Opposition on February 23, 1998.

2. On the Bureau's motion, the Presiding Judge added issues against Kay based on an Initial Decision in another case, Marc Sobel, FCC 97D-13, released November 28, 1997. ("Sobel ID"). Memorandum Opinion And Order 98M-15, released February 2, 1998. The issues added were:

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.

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.

3. Kay moved to intervene in the Sobel case as a party. His motion was granted. Kay appeared as a party and fully participated as a party in the Sobel case by attorney and by Kay's testimony. The Sobel ID found, inter alia, that stations licensed to Sobel were operated and controlled by Kay pursuant to an unauthorized transfer. The ID also found that Sobel was responsible for misrepresentation/lack of candor in executing written statements that denied Kay's control and that were used in support of a motion to delete issues in this case. The ID is now on appeal.

4. An interlocutory appeal is authorized only where (1) the appeal presents a new or novel question of law or policy; and (2) the ruling is such error that there would likely be a remand should the appeal be deferred and raised as an exception. 47 C.F.R. §1.301(b). In the case of Ocean Pines FM Partnership, 4 F.C.C. Rcd 3490 (Review Bd 1989) it was held that an Initial Decision can serve as the basis for adding an issue in another proceeding, even if the Initial Decision is on appeal.<sup>1</sup> The Presiding Judge also ruled that any decision on appeal would be taken into account in this proceeding so that if the ID were to be reversed the ID's findings would no longer apply in this case.

5. Kay relies on Imagists, 4 F.C.C. Rcd 3749 (Review Bd 1989) which was decided after Ocean Pines. In Imagists, the case was remanded to determine whether a witness lied, misrepresented, or lacked candor in another proceeding. The ruling in Imagists turned on the testimony of Ms. Jo Ann Garcia who had provided a declaration in another proceeding, Opal Chadwell. Ms. Garcia was a controlling shareholder and the president of one of the applicants in the Imagists proceeding. She had been only a witness in the Opal Chadwell proceeding. However, in the Opal Chadwell proceeding she was found to have misrepresented her interest in the application that was filed by her in the Imagists proceeding. The question arose on appeal as to whether collateral estoppel applied which would preclude litigation of the same misrepresentation in Imagists. The Review Board held:

[U]nlike Ocean Pines Broadcasting - where Dr. Berger was a common principal with a full opportunity to litigate the adverse holdings against him - Garcia was merely a witness in the Opal Chadwell case, and therefore without an unfettered litigative opportunity therein. The Ocean Pines paradigm is thus unavailable in this Conroe proceeding.

Imagists, 4 F.C.C. Rcd at 3751. Here, under a completely different scenario, Kay participated as a party in the Sobel proceeding and he is participating as a party in this proceeding. Both cases concern the same issues of control by Kay of Sobel licenses and written representations made in this proceeding denying that control. Therefore, Kay had the opportunity for "unfettered litigation" of the control issues found in Sobel. The burden of proof is assigned to Kay here to show by a preponderance of the evidence that he is qualified to be a licensee notwithstanding the Sobel ID.

6. There were entirely different issues being litigated in the Imagists/Opal Chadwell situation. In Opal Chadwell, a misrepresentation/lack of candor issue was added against Messrs. Schultz and Brigham. But it was a real-party-in-interest issue that was later litigated in the Imagists case. Id. at 3750. This case has the same issues of unauthorized transferred control of licenses pursuant to a Management Agreement and of the truthfulness of the statements that denied control

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<sup>1</sup> The appeal from an Initial Decision is taken through exceptions filed with the Commission which automatically stay the effectiveness of the Initial Decision until the Commission's review is completed. 47 C.F.R. §1.276(d). However, under the Commission's rules there is no automatic stay of the Initial Decision's findings in another case which qualifies for issue preclusion.

which Kay filed in this proceeding. Issue preclusion would apply only to the issues of control of the same licenses and the factual inaccuracies and factual misrepresentations of the written statements. Any disqualifying findings and conclusions of misrepresentation/lack of candor as to Kay can be litigated by Kay in this proceeding.<sup>2</sup>

7. There is sufficient differentiation between this case and Imagists to conclude that there is no novel issue and that a remand is unlikely if the Sobel ID is used to preclude unnecessary litigation in this case. The standards for an interlocutory appeal are not met. 47 C.F.R. §1.301(b).

### **Ruling**

Accordingly, IT IS ORDERED that the Petition For Leave To Appeal filed by James A. Kay, Jr. on February 9, 1998 IS DENIED.<sup>3</sup>

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel  
Administrative Law Judge

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<sup>2</sup> The statements were found in Sobel to be misrepresentations that were made by Sobel in conjunction with a motion to delete issues in this case. There were no findings made in the Sobel ID as to Kay's knowledge and responsibility of any misrepresentation/lack of candor with respect to those statements.

<sup>3</sup> Copies of this ruling were faxed or e-mailed to counsel on date of issuance.