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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In the Matter of	)	
	)	
MARC SOBEL	)	WT DOCKET NO. 97-56
	)	
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	)	

To: The Commission

WIRELESS TELECOMMUNICATIONS BUREAU'S
OPPOSITION TO REVISED REQUEST FOR INQUIRY AND INVESTIGATION

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SUMMARY

Marc D. Sobel's (Sobel) "Revised Request for Inquiry and Investigation" is nothing more than a transparent attempt to delay the resolution of the issues in this proceeding and to distract the Commission from the pertinent issues of unauthorized transfer of control and misrepresentation/lack of candor by Sobel. To the extent the pleading discusses matters pertinent to Sobel, it is an untimely and improper attempt to take additional exceptions to the Initial Decision in this proceeding. To the extent it discusses pleadings filed by or matters relating to James A. Kay, Jr. (Kay), Sobel lacks standing to argue these matters. In any event, Sobel's pleading is utterly without merit.

Sobel has failed to demonstrate that the Bureau did anything improper in investigating him or in recommending to the Commission that his licenses and applications be designated for hearing. The Commission and its staff has wide discretion in determining when and how to investigate its licensees. Sobel knew that the Bureau's concern was his relationship with Kay, and he had an opportunity to provide information that would help the Bureau. In light of Judge Frysiak's decision that revocation of Sobel's licenses was "mandated," Sobel's argument that designation for hearing was not warranted is frivolous.

Sobel has failed to show that Kay has been subject to discriminatory treatment vis-a-vis people who filed complaints against him. With respect to Harold Pick, Sobel fails to inform the Commission that Kay has received the relief he sought in one instance, and in the

other instance, the hearing designation order in this proceeding barred the Bureau from acting on the matter at hand. The other matters all involve filings which are pending in due course before the Bureau.

Sobel's arguments concerning the Bureau's conduct in the Kay proceeding are baseless. There is no support for the claim that the Bureau prejudged Kay before sending out the initial 308(b) letter to Kay. The claim that the Bureau intended to damage Kay by disseminating his customer lists to his competitors is totally contrary to the record. Sobel's allegations that a staff member engaged in improper ex parte communications ignore the fact that the matter was an investigation not restricted under the ex parte rules. Finally, the claim that the Commission interfered in Kay's attempt to have Harold Pick criminally prosecuted by communicating information to the Los Angeles Police Department is utterly without support. Sobel's argument that certain issues in the Kay HDO were improperly designated for hearing fails to take into account the standards for designation for hearing and Kay's refusal to provide the Commission with required information. Finally, Sobel's arguments concerning written statements signed by individuals who the Bureau is not planning to call as witnesses has no significance to either this proceeding and the Kay proceeding. Sobel's argument ignores the context in which the statements were prepared and fails to show improper action by Commission staff.

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To: The Commission

WIRELESS TELECOMMUNICATIONS BUREAU'S OPPOSITION TO REVISED REQUEST FOR INQUIRY AND INVESTIGATION

1. The Chief, Wireless Telecommunications Bureau, by his attorneys, now opposes the "Revised Request for Inquiry and Investigation" filed by Marc D. Sobel (Sobel) on March 2, 1998.[1]

2. Sobel requests that the Commission institute an investigation pursuant to Section 403 of the Communications Act of 1934, as amended, 47 U.S.C. § 403. Sobel's pleading accuses the Bureau staff of acting "unlawfully, in bad faith, and with malice" (Sobel Request,

[1] Sobel filed his original "Request for Inquiry and Investigation" on February 27, 1998 without the supporting exhibits. Sobel states that the revised request "supersedes in its entirety" the earlier request. Accordingly, the start date for calculating the Bureau's opposition is March 2, 1998. Pursuant to Sections 1.294(b), 1.4(g), and 1.4(h) of the Commission's Rules, this opposition is due March 11, 1998.

pp. 1-2). It claims that "Sobel has been singled out for discriminatory treatment because of his personal and business relationship with" James A. Kay, Jr. (Kay). Sobel Request, p. 13. These are very serious charges. In fact, Sobel's pleading is little more than a supplement to his exceptions and argument concerning the Kay hearing proceeding. When Sobel's request is examined in detail, however, it turns out that he has no support whatsoever for these charges. Indeed, in making these charges, Sobel misstates material facts, fails to disclose important facts to the Commission, and makes charges of impropriety with no competent supporting evidence. Sobel's pleading is nothing more than a crude attempt to deflect the Commission's attention from the compelling evidence of his misconduct as reflected in the Initial Decision, FCC 97D-13 (released November 28, 1997) (I.D.). The Sobel request should be expeditiously denied as a frivolous pleading, and the Commission should rule on Sobel's and Kay's exceptions to the I.D. in the normal course of business.

I. BACKGROUND

3. The history of this proceeding is closely related to the history of the Kay proceeding, which is largely set forth in James A. Kay, Jr., 12 FCC Rcd 2898, 2899-2900 (Gen. Coun. 1997):

> Numerous complaints were received about Kay's operations including allegations that he was 'falsely reporting the number of mobile units he serves... in order to avoid the channel sharing and recovery provisions of [the] rules.' James A. Kay, Jr., 10 FCC Rcd 2062 ¶ 2 (1994) (Order to Show Cause), modified, 11 FCC Rcd 5324 (1996). Section 308(b) of the Communications Act provides that: 'The Commission at any time ... during the term of any such licenses, may require from [a] licensee further written statements of fact to enable it to determine whether ... such license [should be]

> revoked.' Similarly, Section 1.17 of the rules authorizes the 'Commission or its representatives ... in writing' to request such additional 'written statements of fact relevant to a determination ... whether a license should be revoked....'
>
> 6. On January 31, 1994, the Commission's staff served Kay with a letter of inquiry which, inter alia, directed him 'to provide information detailing the loading of end users on Kay's base stations in order to assess Kay's compliance with the channel loading requirements of our rules. 47 C.F.R. § § 90.313, 90.623, 90.627, 90.631 and 90.633.' Kay was also requested to 'substantiate the loading of his stations by providing customer lists and telephone numbers. Such business records are the Commission's acceptable proof of loading.' James A. Kay, Jr., 10 FCC Rcd [2062], 2063-64 ¶¶ 6-7 [Kay HDO], citing Amendment of Part 90 of the Commission's Rules to Eliminate Separate Licensing of End Users of Specialized Mobile Radio Systems, 7 FCC Rcd 5558, 5560 (1992). See also Report and Order, 7 FCC Rcd 6344, 6345 n. 21 (1992) (amending rules pertaining to end user and mobile licensing information).

The Kay HDO then reports:

> Kay filed a response, but it provided none of the requested information. He simply referenced some unrelated information provided to the Commission staff at other times. Kay failed to provide the requested information after numerous extensions of time, reporting at one time that "there is no date. . .for which submission of the requested information would be convenient."

10 FCC Rcd at 2064 (¶8). Accordingly, Kay's licenses were designated for a revocation hearing.

4. The Kay HDO noted concern about Kay's relationship to licenses issued to, inter alia, Sobel and AirWave Communications, the trade name under which Sobel conducts business. 10 FCC Rcd at 2063. Appendix A of the designation order included some licenses

that were granted to Marc Sobel. Sobel, erroneously, was not made a party to the proceeding. After discussions with Sobel's counsel, the Bureau requested that the Presiding Judge certify a question to the Commission relating to whether the Sobel licenses should be deleted from the list of licenses at issue in the Kay proceeding. Judge Sippel certified the requested question. Order, FCC 96M-35 (released March 15, 1996). The Commission then ordered that the Sobel licenses be deleted from the Kay Order to Show Cause and directed that the Bureau conduct an investigation into Sobel's compliance. James A. Kay, Jr., 11 FCC Rcd 5324 (1996).

5. The Bureau then sent Sobel a request for information pursuant to Section 308(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 308(b).[2] The request, *inter alia,* sought a detailed description of Sobel's relationship with Kay. Sobel responded with a letter, which in three paragraphs purported to describe Sobel's relationship with Kay.[3] Sobel also attached a management agreement that appeared to have transferred control of many of Sobel's stations to Kay. The agreement was executed on December 30, 1994 -- two weeks after the Commission had commenced the Kay proceeding that included an issue to determine whether Kay possesses the necessary character qualifications to be a Commission licensee. While the Bureau was reviewing Sobel's response, Sobel filed a Petition for Writ of Mandamus at the U.S. Court of Appeals for the D.C. Circuit. See Sobel Request, Exhibit MDS-3. The court denied Sobel's petition after the Commission explained that a staff

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[2] Letter from William H. Kellett to Robert J. Keller, Esq. dated June 11, 1996 (attached to Sobel's request as Exhibit MDS-3, Attachment 9).

[3] Letter from Robert J. Keller, Esq. to William H. Kellett dated July 3, 1996. (Attached to Sobel's request as MDS-3, Attachment 10.)

recommendation relating to the disposition of Sobel's applications was pending before the Commission. Case No. 96-1361, 1997 WL 150091 (February 27, 1997).

6. In February, 1997, based on Sobel's July 3, 1997, response and the accompanying management agreement, the Commission designated Sobel's licenses and pending applications for hearing. Marc Sobel, 12 FCC Rcd 3298 (1997). After full discovery, Judge Frysiak conducted a hearing during July 1997, and released his initial decision on November 28, 1997. Marc Sobel, FCC 97D-13 (released November 28, 1997) (I.D.) Judge Frysiak determined that Marc Sobel had engaged in an unauthorized transfer of control of some of his Part 90, Private Land Mobile stations to James A Kay, Jr. (Kay) and that Sobel had misrepresented facts relating to his relationship with Kay. Judge Frysiak concluded that Sobel is not qualified to be a Commission licensee. This proceeding is pending before the Commission on Sobel's and Kay's exceptions to Judge Frysiak's I.D.

II. PROCEDURAL MATTERS

7. Sobel's request is procedurally improper and should be dismissed for several reasons. First, the matters raised herein relating to Sobel (Part II of the document) should have been raised in Sobel's exceptions to Judge Frysiak's I.D. Sobel raises arguments as to the propriety of the Bureau's pre-designation investigation of him, the Commission's decision to designate his licenses for hearing, and the Bureau's decision to request that Judge Frysiak specify a misrepresentation/lack of candor issue against Sobel. These issues all related to the conduct of the instant proceeding. Section 1.277(a) of the Commission's Rules, 47 C.F.R.

§ 1.277(a), provides that "[a]ny objection not saved by exception pursuant to this section is waived." Sobel filed the full twenty-five pages of exceptions allowed by the rules. While Sobel's instant request is offered in the guise of a request for a Section 403 investigation, it is in reality nothing more than additional impermissible exceptions. As such, the pleading is both untimely and exceeds the page limitations contained in Section 1.277(c) of the Commission's Rules, 47 C.F.R. § 1.277(c). It should therefore be dismissed as procedurally improper.

8. Furthermore, with one exception,[4] the allegations in Parts III and IV of the Request have nothing to do with Sobel. Instead, they relate either to pleadings filed by Kay or to the hearing proceeding involving Kay. While Sobel is a friend and business associate of Kay, he does not have standing to raise these issues. In order to have standing, Sobel must show that the actions he complains of caused him "(1) personal injury, (2) that is 'fairly traceable' to the challenged action, and (3) a substantial likelihood that the relief requested will redress the injury claimed." MCI Communications Corp., 12 FCC Rcd 7790, 779_ (1997) and cases cited therein. Even if Sobel had established that the Commission had taken action against Sobel because of an animus against Kay -- and he has not -- he has not shown that any of the actions taken against Kay, or any alleged inaction against those who complained against Kay, has caused him any personal injury. Moreover, even if the Commission was inclined to take

[4] The exception is Section III(A)(2) of the Request, which discusses a finder's preference request filed by Sobel. It should be noted, however, that the Presiding Judge found that the 800 MHz licenses held in Sobel's name were in fact controlled by Kay. In any event, as the Bureau will show below, Sobel is complaining about the Bureau's failure to act on a matter upon which it has no authority to act.

action regarding Kay or Kay's "enemies" (Sobel Request, p. 13) the Commission would still have to consider the evidence that Sobel is not qualified to be a Commission licensee. The Commission should not allow itself to be distracted by the voluminous allegations contained in the Sobel Request. It should focus itself on the matters that are pertinent to a resolution of this proceeding: (1) Did Sobel participate in an unauthorized transfer of control of his 800 MHz stations to Kay? (2) Did Sobel misrepresent facts or lack candor in his representations to the Commission concerning his relationship with Kay? and (3) In light of the evidence, should Sobel's licenses be revoked?

9. Moreover, the complaints about how Kay has been treated and the status of his petition have nothing to do with the issues in this proceeding and should be deferred and resolved in the Kay proceeding, not here. The hearing in the Kay proceeding has not yet taken place. If the Commission resolves the allegations concerning Kay in this proceeding, it may have to resolve the same or similar allegations later upon review of any initial decision in the Kay proceeding. The most efficient means of using Commission's scarce resources is to resolve issues relating to Sobel in this proceeding and issues relating to Kay in the Kay proceeding. Thus, to the extent Sobel's Request addresses filings made by Kay or Kay's treatment before the Bureau or the Commission, it should therefore be dismissed.

10. Another reason for dismissing Sobel's request is that it is inexcusably tardy. Almost all of the events in question took place before the HDO in this proceeding was released. Sobel did not request that the Presiding Judge enlarge the issues to consider any of

the matters he now raises. Indeed, he waited until after an initial decision was released and exceptions were filed to allege misconduct. In Colorado Radio Corp. v. FCC, 118 F.2d 24, 26 (D.C. Cir. 1941), the court wrote that it "cannot allow the appellant to sit back and hope that a decision will be in its favor and then, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed." Indeed, the timing of Sobel's request and its utter lack of merit indicate that the request was filed primarily for the purpose of delaying the Commission's resolution of this proceeding.

11. Sobel asks that he be named a party to the Section 403 investigation he requests, and he asks that he be accorded full discovery rights in the investigation. Sobel Request, p. 2. In fact, there are no parties to an inquiry commenced pursuant to Section 403 other than the Commission. Inquiry into Alleged Abuses of the Commission's Processes by Applicants for Broadcast Facilities, 4 FCC Rcd 1568 (1989), Inquiry Into Alleged Improper Activities by Southern Bell Telephone and Telegraph Company and Southwestern Bell Telephone Company, 70 FCC 2d 705, 707 (1979). Accordingly, even if any basis existed for an investigation, Sobel's request for party status and discovery rights must be denied.

III. THE INVESTIGATION AND DESIGNATION OF SOBEL'S LICENSES

12. Sobel complains about the Bureau's treatment of him during the predesignation investigation of Sobel (Sobel Request, pp. 3-8) and argues that the Hearing Designation Order, 12 FCC Rcd 3298 (1997) in this proceeding was issued "in bad faith and without

sufficient grounds." Sobel Request, pp. 8-12. Neither argument has any merit. The Bureau's investigation of Sobel was conducted in good faith and in a manner consistent with all applicable laws and policies. Moreover, Sobel's disagreement with the decision to designate his licenses for hearing ignores the obvious fact that Judge Frysiak found in the I.D. that revocation of Sobel's licenses was legally mandated.

A. The Predesignation Investigation

13. Sobel complains about the manner in which he was investigated prior to the release of the Hearing Designation Order in this proceeding. He claims that the Bureau: (1) suspended processing of his applications without notice or cause; (2) knew the Hearing Designation Order in the Kay case contained false statements about Sobel; (3) did not give Sobel an opportunity to informally address the Bureau's concerns; and (4) somehow acted improperly in preparing and then having the Commission adopt and then release the HDO in this proceeding. Sobel Request, pp. 3-8. None of these arguments has any merit whatsoever.

14. The predesignation investigation about which Sobel complains was done in a manner fully consistent with all applicable laws and rules. In Tidewater Radio Show, Inc., 75 FCC 2d 670, 677-678 (1980), the Commission held that the staff has wide discretion in how it conducts investigations:

> We also find unpersuasive the petitioners' claims of improper conduct by certain Commission staff members during the course of this proceeding. The first of these allegations, that it was improper for Commission personnel to launch an investigation into petitioners' broadcast operations on the basis of

> information supplied by arguably interested parties, can be dismissed forthwith. Under Section 403 of the Communications Act, as amended, 47 U.S.C. § 403, full authority and power are given to the Commission to institute an inquiry on its own motion, with or without complaint, as to any matter falling within its jurisdiction. See Stahlman v. FCC, 126 F.2d 124 (D.C. Cir. 1942). As we recently stated in PTL of Heritage Village Church and Missionary Fellowship, Inc., 71 FCC 2d 324 (1979), that power is frequently exercised by members of our staff, acting under delegated authority. The decision to investigate, moreover, is not purely discretionary. As the PTL decision also held, 'where, as in the instant case, the Commission has reason to believe a licensee may be violating the Act or its policies, rules, or regulations. . . it has a responsibility to inquire and determine whether, in fact, such activity is occurring.' 71 FCC 2d 324, 327. By virtue of this mandate and the provisions of Section 403, it is therefore irrelevant if (as is frequently the case) the party providing initial information to the Commission which leads to the investigation may be interested in its outcome. The decision to launch an inquiry, even in such a circumstance, is fully authorized by the Act and in fact required when a sufficient showing has been made.

Sobel has utterly failed to show how the Bureau's investigation of him violated any rule, regulation, or policy. When Sobel complains about the fact that the Bureau suspended processing his applications and requests, he ignores the fact that in light of the questions before the Bureau about his qualifications, the Bureau had a statutory duty not to grant his filings. If the Commission is unable for any reason to make the required findings that an applicant has the necessary qualifications to be a Commission licensee, Section 309(e) of the Communications Act, as amended, 47 U.S.C. § 309(e), precludes the Commission from granting the application. Indeed, as the Commission said in Tidewater Radio Show, the staff is obliged to start an investigation when a sufficient showing of misconduct has been made. In deferring action on Sobel's applications, the Bureau was simply carrying out the Commission's statutory duty to investigate Sobel's qualifications to be a Commission licensee.

15. Sobel complains that certain language in the Kay HDO, which was adopted by the Commission, was known to be inaccurate by the Bureau. Sobel Request, pp. 3-4. In making that argument, however, Sobel ignores the plain meaning of the language in question. The language reads, "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." 10 FCC Rcd at 2063 (¶3). As the Bureau told Sobel in its June 11, 1996 308(b) letter to his counsel (Sobel Request, Exhibit MDS-3, Attachment No. 9):

> At the time of designation, the Commission believed that because of Mr. Sobel's business relationship with Mr. Kay, some of his licenses were in fact controlled by Mr. Kay. Mr. Kay has asserted that this was in error. We requested that the Commission delete the Sobel licenses from the list designated in order to conduct a nonadjudicatory investigation of the relationship.

Sobel now interprets that language solely in terms of whether he existed as a real person or whether he was an "alias" of Kay. Sobel Request, pp. 3-4. This argument is nothing more than an after-the-fact attempt to distort the meaning of the letter. In his December 6, 1994, letter (Sobel Request, Exhibit MDS-3, Attachment No. 3), Sobel correctly describes his perception of the problem not in terms of his existence as a real person but "my association with Mr. Kay." The pertinent question was whether Kay controlled the licenses. There were no false statements in the Kay HDO, as Sobel understood what the pertinent issue was as early as December 1994.

B. The Sobel HDO

16. Sobel complains that in urging the Commission to issue the HDO in this proceeding, the Bureau acted in bad faith and without sufficient grounds to justify revocation of Sobel's licenses. Sobel Request, pp. 8-11. In light of Judge Frysiak's conclusion that "[r]evocation of all Sobel's licenses is mandated" (I.D., ¶78), this argument is simply incredible. First, Sobel's claim that "the Bureau gave no indication that it even suspected an unauthorized transfer of control from Sobel to Kay" (Sobel Request, p. 9) is disingenuous. Sobel knew in late 1994 and early 1995 that "the Commission wanted to know what the relationship was between Kay and himself." I.D., ¶60. He was explicitly told on June 11, 1996, that the Commission believed at the time of designation that "because of Mr. Sobel's business relationship with Mr. Kay, some of his licenses were in fact controlled by Mr. Kay." Sobel Request, Exhibit MDS-3, Attachment No. 9.

17. Sobel complains at length that, prior to designation, he was allegedly never given a "statement of the Bureau's concerns and an opportunity to address them informally." Sobel Request, p. 5. That argument is factually incorrect and legally insufficient. As shown above, Sobel knew what the Bureau's concerns were. He also had a full opportunity to address the Bureau's concerns and respond to them when he responded to the Bureau's June 11, 1996 308(b) letter. Instead, he provided a response that was long on argumentation and short on information (other than the information which he was expressly required to provide). See Sobel Request, Exhibit MDS-3, Attachment No. 10. In any event, because Sobel had entered into an agreement which he had no right to terminate (I.D., ¶18), and because the Bureau

believed the agreement was evidence of a flagrant transfer of control, the Bureau is unaware of any truthful representations Sobel could have made that would have eliminated the need for an evidentiary proceeding. In any event, the staff would have had the discretion to investigate Sobel without even notifying Sobel of such action, if it deemed appropriate. Tidewater Radio Show, Inc., supra.

18. Sobel goes on to argue that the Bureau did not in fact believe in good faith that an unauthorized transfer of control existed and that it showed "bias and bad faith" by seeking total disqualification as a sanction. Sobel Request, p. 10, see generally, pp. 8-11. This argument is simply amazing, particularly in light of Judge Frysiak's conclusion that revocation of Sobel's licenses was "mandated." In his quest to show that the Bureau has acted in "bad faith" and with "ill will and malice" towards him, Sobel conveniently ignores two simple facts. First, it was the Commission, not the Bureau, that designated his licenses for hearing. Second, it was Judge Frysiak, not the Bureau, that issued the decision revoking his licenses. Sobel has the right to argue that his licenses should not be revoked. He does not have the right to make specious claims of bad faith by the Bureau when both the Commission and an Administrative Law Judge have taken action consistent with the Bureau's position.

IV. ALLEGED DISCRIMINATORY TREATMENT

19. Sobel alleges that while he "has been singled out for discriminatory treatment because of his personal and business relationship with Kay," "those who complain, inform, or testify against Kay are afforded favored treatment." Sobel Request, p. 13. Initially, as the

Bureau has shown above, Sobel lacks standing to make these arguments because most of his complaints concern filings by Kay, not Sobel. If Sobel's allegations are examined on the merits, it readily becomes clear that the allegations are utterly without merit. Sobel's request misstates or ignores critical facts. Indeed, many of the matters Sobel discusses are matters which are currently before the Bureau. It would therefore be totally inappropriate for the Bureau to even discuss the merits of those proceedings.[5] Sobel has utterly failed to show any error on the part of the Bureau. He has not even come close to supporting his serious charges that the Bureau has acted in bad faith.

A. Harold Pick

20. Harold Pick is one of the individuals who filed complaints against Kay which led the Bureau to begin an investigation of Kay. Mr. Pick is not on the Bureau's list of contemplated witnesses in the Kay proceeding, so his credibility is not at issue in the Kay proceeding. Sobel complains about the Bureau's action in reinstating two licenses held by Pick and the Bureau's and the Commission's supposed inaction on petitions for reconsideration or applications for review of that action. Sobel Request, pp. 14-17. Sobel offers nothing more than sheer speculation for his claim that the Commission or Pick violated the ex parte rules. Moreover, Sobel fails to inform the Commission that on October 10, 1997, the two licenses in question, WNZB262 and WNZB276, were deleted from the Commission's

[5] Indeed, to the extent that Sobel discusses the merits of restricted proceedings without serving his request on the other parties to those restricted proceedings, Sobel has violated the Commission's ex parte rules.

data base.[6] Thus, Kay and the trustee have received the relief they sought. The true facts are totally inconsistent with Sobel's unsupported allegations of bias.

21. The second matter relating to Harold Pick raised by Sobel is an allegation that Pick falsified a document and misrepresented facts in a finders preference proceeding initiated by Sobel. Sobel Request, pp. 17-19. While Sobel complains about the Bureau's inaction on his allegations, he ignores the fact that the Bureau was ordered to hold in abeyance all of Sobel's finders preference requests. Marc D. Sobel, 12 FCC Rcd 3298, 3302 (1997) (Finder's Preference Case 93F600). Once that proceeding was designated for hearing, the Bureau lost authority to unilaterally take action on that request. The Bureau has not resolved the issues relating to that finder's preference request because it does not have the authority to do so.

B. James Doering

22. Sobel complains about Commission inaction on a formal complaint filed by Kay and United Corporation of Southern California (United) against James Doering, another individual whose complaints against Kay led the Bureau to begin investigating Kay. Like Mr. Pick, Mr. Doering is not on the Bureau's list of contemplated witnesses in the Kay proceeding, so his credibility is not at issue in that proceeding. The complaint has not been served upon the defendants because the complaint is undergoing review in the normal course of business. It would be inappropriate for the Bureau to comment on the merits of a matter

[6] Copies of the records from the Commission's data base showing the deletions are submitted as Attachment 1 to this opposition.

in which it is a decision maker. Sobel's allegations that Mr. Doering "is given free reign to steal licenses, misrepresent, and falsify applications right under the Bureau's nose" (Sobel Request, p. 21) is specious.

C. Liberty Paving, Inc.

23. Sobel complains about the Bureau's failure to act on a request for cancellation of a license held by Liberty Paving, Inc. (Liberty) on the grounds that the facility had discontinued operation for more than a year. Sobel Request, pp. 21-23. Sobel's request is pending before the Bureau and will be acted on in the normal course of business. Sobel's request is being reviewed and will be decided in the normal course of business. The identity of the parties has nothing to do with why action has not yet been taken. Furthermore, Sobel's attacks on the credibility of Frank Barnett, Liberty's President, are only relevant to the Kay proceeding. While Mr. Barnett has no relationship to this proceeding, he will probably be a witness in the Kay proceeding.

D. Christopher Killian

24. Sobel complains that the Bureau has not yet taken action on a petition Kay filed on October 22, 1997, alleging that Mr. Killian allegedly engaged in misconduct in connection with a license which was assigned to another party by an assignment application granted on February 25, 1997, or almost 8 months before Kay filed his petition. Sobel alleges, based upon those facts, that:

> Insofar as the authorization was obtained by means of misrepresentation and lack of candor which the Bureau refuses to sanction, and insofar as the Killian matter is but one in a host of examples of the Bureau pulling regulatory punches in favor of informants and witnesses against Kay, it is not too far fetched to characterize the Bureau's conduct as payment to Killian for testifying against Kay.

Sobel Request, p. 27. This overblown rhetoric has no relationship to the actual facts. First, since Kay waited over eight months until after the assignment application for WPCM497 to file his petition, Sobel can hardly blame the Bureau for granting the assignment application based upon a petition Kay did not file in a timely manner. Second, while Sobel complains that the Bureau has not acted upon Kay's petition within four months after it was filed, he has utterly failed to explain why Kay waited eight months after the assignment application was granted to file the petition. The Bureau would note that over two years passed from the time complaints were filed against Kay to the time his licenses were designated for hearing. Kay's petition is pending before the Bureau, and Sobel's claim that the Bureau is "pulling regulatory punches" in return for Mr. Killian's testimony is both ludicrous and totally unrelated to this proceeding.

V. THE KAY PROCEEDING

25. As noted above, the Bureau believes Sobel's allegations concerning the treatment of Kay should be resolved in the Kay proceeding, not here. If the Commission disagrees, however, Sobel's allegations must be rejected as utterly without foundation. Sobel alleges that the Bureau's conduct towards Kay shows that the "Bureau bears an improper animus toward Kay. . ." Sobel Request, p. 27. The request argues that:

> the Bureau staff (a) had already prejudged Kay and became determined to seek revocation of Kay's licenses before even advising him he was under investigation, (b) engaged in improper *ex parte* communications and disseminated inside information in contested proceedings so as to damage Kay, and otherwise improperly interfered with Kay's legitimate business activities, (c) designated issues against Kay without any supporting evidence in the hope of using discovery as a fishing expedition, (d) accepted unquestioningly, relied upon, and used unsupported allegations against Kay from sources known to be biased against Kay, without making even minimal efforts to verify or corroborate the charges, and (e) coached witnesses against Kay, even to the point of soliciting false sworn statements against Kay.

Sobel Request, pp. 27-28. None of these charges is supported by any competent evidence. Instead, Sobel has distorted the record and made unwarranted speculations based upon the flimsiest of evidence.

A. "Prejudgment" of Kay

26. Sobel alleges that the initial 308(b) letter the Bureau issued to Kay showed that the Bureau "had already decided the guilt of the accused." Sobel Request, p 29. That allegation is based solely upon the fact that the 308(b) letter stated that information was needed "to determine whether you are qualified to be a Commission licensee" and language referring Kay to 18 U.S.C. § 1001 and noting "that a willful false reply to a letter of this type may result in fine or imprisonment." Sobel Request, p. 29. Those two statements are wholly insufficient to support the serious charge of prejudgment. As a matter of standard practice, whenever an investigation could potentially affect a licensee's qualifications, 308(b) letters issued by the Enforcement and Consumer Information Division of the Bureau routinely contain that language.

27. Sobel also suggests that because the initial 308(b) letter to Kay and the Kay HDO were based in part upon complaints from competitors of Kay, the 308(b) letter and the Kay HDO were somehow improper. Sobel Request, pp. 28-29. As noted above, the Commission has held that the staff has wide discretion to investigate allegations of misconduct by Commission licensees based upon complaints of competitors. Tidewater Radio Show, Inc., supra. Moreover, Sobel's own counsel, writing on behalf of Kay, has cogently explained why this argument is frivolous:

> And it has long been settled Title III licensee [sic] has standing to challenge the applications or licenses of a competitor. *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940). In fact, the presentation of violations by competitors is to be encouraged, not discouraged, on the theory that competitors are, because of their private interest, likely to bring to the attention of the Commission matters that might otherwise go undiscovered by the Commission's own enforcement activities, *i.e.*, the competitor serves as a kind of "private attorney general." *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940), *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942).

"Reply to Opposition," filed December 1, 1997, pp. 6-7 (submitted as part of Exhibit CK-1 to the Sobel Request). Moreover, the Bureau did not merely accept the complaints at face value. Instead, it asked Kay to provide information so it could make its own independent judgment. Instead of providing the information, however, Kay repeatedly failed to provide the information required to be produced by the 308(b) letter. James A. Kay, Jr., supra, 10 FCC Rcd at 2064.

B. Ex Parte Allegations and Damage to Kay's Business

1. The 308(b) Letter

28. Sobel claims that the Bureau intended to use its 308(b) letter to damage Kay, apparently by intending to disseminate Kay's customer lists to his competitors. Sobel Request, pp. 30-31. Sobel also alleges that it was somehow improper to send blind carbon copies of the 308(b) letter to people who had filed complaints against Kay. Sobel Request, pp. 31-32. Sobel's arguments do not accurately reflect the facts and fail to show anything other than legitimate actions by the Bureau.

29. Sobel repeatedly claims that "the Bureau repeatedly refused Kay's requests for assurances that any information provided would be kept confidential." Sobel Request, p. 30, see also p. 31. That statement is false. In a letter dated May 20, 1994 addressed to Kay's counsel, Mr. Hollingsworth wrote:[7]

> With respect to Kay's request that information provided to the Commission in response to our inquiry be withheld from public inspection, we will not make those materials which are specifically listed under the provisions of Rule 0.457, 47 C.F.R. § 0.457, routinely available for inspection to the public. Therefore, materials which include any information containing trade secrets or commercial, financial, or technical data which would customarily be guarded from competitors, will not be made routinely available to the public.

[7] A copy of this letter is submitted as Attachment 2 to this opposition.

Mr. Hollingsworth provided a more direct assurance to Mr. Kay in a May 27, 1994 letter to Kay's counsel:[8]

> Regarding the request for user information, we have no intention of disclosing Mr. Kay's proprietary business information, except to the extent we would be required by law to do so.

Unless Kay expected the Bureau staff to break the law in order to accommodate his wishes, he had no right to expect any further assurance. Notwithstanding those assurances, however, Kay still refused to provide the required information.

30. The argument that it was somehow improper to send copies of the 308(b) letter to those people who had filed complaints against Kay is baseless. The Commission routinely provides complainants with information concerning the status of investigations. There is nothing improper or inappropriate about this. Since the investigation was not restricted for ex parte purposes, and since Kay naturally received the 308(b) letter, there was no violation of the Commission's ex parte rules. As for the argument that the Bureau should have sought "corroboration of the claims of biased accusers before rushing to judgment against Kay," the purpose of the 308(b) letter was to determine the facts. Kay did not provide the required information.

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[8] A copy of this letter is submitted as Attachment 3 to this opposition.