

2. Thompson Tree

31. Sobel also cites an alleged ex parte communication by Anne Marie Wypijewski, a member of the Bureau staff, involving the cancellation of Business Radio Service authorization WIH275, formerly held by Thompson Tree Service. Sobel Request, pp. 32-34. Sobel's argument materially garbles the facts. On September 20, 1993, Kay filed a letter seeking cancellation of the Thompson license because the station had allegedly discontinued operation. Sobel Request, p. 34 n.11. Sobel writes (italics added):

On or about *January 31, 1994*, Kay submitted a finder's preference request pursuant to Section 90.173(k) of the Commission's Rules demonstrating that Thompson had discontinued operation of the station for more than one year, thereby resulting in the automatic cancellation of the license pursuant to Section 90.157(a) of the Rules. The matter was assigned Compliance File No. 93L778.

On *December 23, 1993*, Hollingsworth sent a letter to Thompson, *-serving him with the finder's preference request* and directing him to respond. Exhibit TT-1 is a copy of that letter.

Sobel Request, p. 32. Sobel does not explain how Mr. Hollingsworth could have sent Thompson Tree Service, on December 23, 1993, a finder's preference request dated January 31, 1994. Indeed, the Hollingsworth letter makes no mention of a finder's preference request. Thus, the December 23, 1993, letter was sent as part of the Bureau's independent investigation into Thompson's operation, not in response to Kay's finder's preference request. The Bureau initiated that investigation at the request of Kay.

32. The distinction is important because, as Sobel admits, Kay's finder's preference request was dismissed "on the grounds that the Commission was already investigating the matter prior to receipt of Kay's finder's preference request." Sobel Request, p. 34. The investigation was not a restricted proceeding for ex parte purposes. Kay's finder's preference was a nullity which did not convert the Bureau's independent investigation of Thompson into a restricted proceeding. Accordingly, any conversations Ms. Wypijewski had with Mrs. Thompson did not violate the ex parte rules. Moreover, while Sobel alleges that Ms. Wypijewski left a phone message with Ms. Thompson on April 29 and admits that Ms. Thompson did not return the phone call, he claims that "the purpose of Wypijewski's April 29 call was to alert Mrs. Thompson that both the cancellation and the finder's preference request had been dismissed, and that the time was ripe for Mr. Thompson to refile an application." Sobel Request, p. 34. Sobel's claim that he can discern the obvious purpose of Ms. Wypijewski's alleged April 29 phone message to Mrs. Thompson, when the two women never talked after that time, shows that he is offering bare speculation as fact. Moreover, Kay can hardly claim any prejudice, since he had secured the cancellation of the license, and since he received the letter dismissing his finder's preference request on April 28, 1994, which was before Ms. Wypijewski's phone message.

3. Pro Roofing

33. Sobel describes at length Kay's attempt to prosecute Harold Pick for allegedly stealing Kay's repeater service by placing one of Pick's customers on Kay's repeater. Sobel Request, pp. 35-37. He then argues, with no evidence whatsoever, that "Hollingsworth, or

persons acting under his direction, apparently interfered with a legitimate attempt by Kay to press criminal charges against [Harold Pick]." Sobel Request, p. 35. Sobel not only fails to provide any competent evidence of such "interference," but the documents he provides conclusively show that his allegations are baseless.

34. In acting upon Sobel's request, the Commission need not decide whether Harold Pick in fact stole service from Kay. Sobel's pertinent allegations are that Mr. Hollingsworth in some way acted to prevent the criminal prosecution. In particular, Sobel notes a statement that the detective reviewing the matter received "certain confidential information" from Sharon Bowers, the Chief of the Informal Complaints & Public Inquiry Branch of the Bureau's Enforcement and Consumer Information Division. Sobel notes that the Los Angeles Police Department and the City Attorney decided that criminal prosecution was inappropriate. After citing two cases involving another individual with unknown facts in which Sobel alleges that criminal prosecutions were instituted, Sobel writes:

It is thus clear that Los Angeles law enforcement officials in fact do not consider theft of a licensee's airtime to be a purely civil matter; rather, it is criminally prosecuted. The evidence that Pick engaged in theft of service from Kay is extremely compelling, but the police and prosecutors are not pursuing the matter. It appears very likely that their inaction on this matter is somehow related to or caused by the "confidential information" provided to Detective Martinez. Hollingsworth certainly has knowledge of what information was provided, and he may have even directed the disclosure. Kay was the victim of a criminal act by Pick. Regardless of what Hollingsworth or any other Bureau staff member may think of Kay or may try to prove about Kay in an enforcement proceeding, it is entirely inappropriate for the Bureau to interfere with Kay's efforts to seek redress for criminal acts committed against him.

Sobel Request, p. 37. Clearly, Sobel has absolutely no evidence that the Bureau had any role in dissuading Detective Martinez or the City Attorney from prosecuting Harold Pick. It is irresponsible for Sobel to make scandalous charges with no evidence whatsoever. The argument that, because theft of radio service was prosecuted in two cases, it would be prosecuted in every such case, is risible. While the Bureau is hardly an expert on criminal prosecutions, it would expect that the decision would be made on the individual facts of each case. In this case, the investigating officer wrote, "The I/O could find no evidence of crime. The case is going to be unfounded." Sobel Request, Exhibit PR-6, p. 4. Moreover, Kay's private investigator reports, "Det. Martinez indicated that if he had originally reviewed the case he would have it rejected it out of hand as a civil matter and not a criminal one based upon the information presented." Id., Exhibit PR-7 (emphasis added). Neither office based their conclusions on information received from the Commission. Sobel's argument is therefore groundless.

C. Designation as a "Weapon"

35. Sobel's arguments about the propriety of designating Kay's licenses for hearing should not be considered in this context. The only proper forum for considering the propriety of the Kay HDO is exceptions to any initial decision released in the Kay proceeding. Section 1.106(a)(1) of the Commission's Rules, Trinity Broadcasting of Florida, Inc., 9 FCC Rcd 2567 (1994). Moreover, as discussed above, Sobel does not have standing to challenge the Commission's decision to designate Kay's licenses for hearing. Sobel also ignores the fact that the Kay HDO was issued and released by the Commission, not by the Bureau acting

pursuant to delegated authority. Thus, Sobel's true complaint is with the Commission, not the Bureau.

36. Sobel argues that there was "no basis" for the issues in the Kay HDO (except for the 308(b) issue) other than "the bare and self-serving accusations of biased parties." Sobel Request, p. 38. This argument is nothing more than a transparent and improper request for reconsideration of the Kay HDO. Moreover, Sobel and Kay appear to be acting under the mistaken apprehension that the Bureau or the Commission must have conclusive evidence of wrongdoing before they can designate a licensee for hearing. In fact, Section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(e), provides that designation for hearing is required when a "substantial and material question of fact" is presented. In determining whether a "substantial and material question of fact" exists, the Commission must consider the entire record, including materials provided by the applicant or licensee. Astroline Communications Co. v. FCC, 857 F.2d 1556, 1561 (D.C. Cir. 1988). When the Bureau asked Kay to provide the information it needed to make its determination, Kay refused to provide the information. Accordingly, the Commission was required to make its determination based upon the information available to it, which established a prima facie case of rule violations. Moreover, complaints from competitors can form a valid basis for investigating a licensee and designating its licenses for hearing. Tidewater Radio Show, Inc., supra, Sanders Brothers Radio Station v. FCC, supra.

D. Failure to Verify "Biased" Informants

37. Sobel takes issue with a single passage in a paragraph of a witness statement signed and sworn to by Harold Pick, in which Harold Pick discusses the theft of three of his repeaters. Sobel Request, pp. 39-42. Sobel makes the fantastic accusation "that Hollingsworth, in his pursuit of Kay, solicited from potential witnesses against Kay sworn statements that Hollingsworth knew or should have known were false." As with Sobel's other charges, they are totally devoid of a factual basis.

38. The Bureau must point out that it does not intend to call Harold Pick as a witness in the Kay proceeding. While Sobel speaks repeatedly of Mr. Hollingsworth's intention to "use" Harold Pick's statement, the Bureau has not used that statement in any way, and it does not intend to use that statement in any way. Kay apparently obtained that statement through discovery against Pick in civil litigation. Sobel is therefore arguing over a meaningless document.

39. Moreover, Sobel's and Kay's real disagreement appears to be with Harold Pick. The statements in question were sworn to by Pick, not Mr. Hollingsworth. Pick's statement was subject to further checking, review, and investigation. After further evaluation, the Bureau made the decision not to use Harold Pick as a witness. While Sobel would have had Mr. Hollingsworth fully evaluate and investigate the statement before having Pick reduce the statement to writing, Mr. Hollingsworth had Harold Pick swear to the statement in writing,

and the Bureau then evaluated the statement and decided not to use it. Sobel's claim that Mr. Hollingsworth was "inexcusably negligent" is specious.

E. "Coaching" of a Witness

40. Sobel accuses Mr. Hollingsworth of "coaching" Richard Lewis into making statements designed to implicate Kay and supposedly to make false statements against Kay. Sobel Request, pp. 43-53. This argument is baseless. The Bureau does not intend to use Richard Lewis as a witness in the Kay proceeding. The Bureau has not used the Lewis statement for any purpose, and it does not intend to use that statement. Sobel is thus presenting a meaningless argument. In any event, Sobel is unable to point to any statement in the Lewis statement which was false (other than some possible confusion by Mr. Lewis over dates). Mr. Lewis testified at his deposition that he believed his written statement was true and correct. Sobel Request, Exhibit RL-2, pp. 40-41. It is clear that Sobel's argument is not with the statement but with any possible inferences to be drawn from that statement about Kay's conduct. The Bureau had other information before it (which, to its knowledge, Kay does not have in his possession), which tended to show that Kay deliberately caused interference to the School District and that he was involved in changing the School District license to a general business license. In the normal course of evaluating the available evidence, the Bureau has decided not to use Mr. Lewis' testimony. As for the decision to identify Mr. Lewis in the Bureau's responses to interrogatories as a person "believed to have knowledge of instances of deliberate and/or malicious interference," the Bureau's answers were designed to put Kay on notice as to the universe of allegations against him. If the

Bureau had not listed Mr. Lewis as a person believed to have knowledge relevant to deliberate and malicious interference, and then attempted to call Mr. Lewis as a witness, Kay no doubt would have claimed that he was unfairly surprised. Under those circumstances, it was entirely appropriate to list Mr. Lewis as a person believed to have relevant knowledge.

VI. CONCLUSION

41. The Bureau believes the record in this proceeding shows that Sobel has totally failed to meet his fundamental responsibility to comply with the Commission's Rules and to be honest with the Commission. Sobel's request for an inquiry is merely a procedurally improper attempt to distract the Commission from that record. Sobel does not have standing to raise the issue of Kay's treatment before the Commission. While Sobel attempts to paint a picture of misconduct and unfair treatment by the Bureau, his picture misstates or ignores pertinent facts and simply ignores applicable case law. Such tactics should not be countenanced. The Bureau urges the Commission to expeditiously and thoroughly review the hearing record, and to base its decision on that hearing record. The Bureau believes that after such a review, the Commission will conclude that Sobel is not qualified to be a Commission licensee.

42. Accordingly, the Bureau asks the Commission to dismiss or to deny Sobel's "Revised Request for Inquiry or Investigation."

Respectfully submitted,
Daniel B. Phythyon
Chief, Wireless Telecommunications Bureau

Howard C. Davenport for

Gary P. Schonman
Chief, Compliance and Litigation Branch
Enforcement and Consumer Information Division

John J. Schauble

William H. Knowles-Kellett
John J. Schauble
Attorneys, Wireless Telecommunications Bureau

Federal Communications Commission
2025 M Street, N.W., Suite 8308
Washington, D.C. 20554
(202) 418-0569

March 13, 1998

ATTACHMENT 1

CALLSIGN HISTORY SCREEN

#1 of 2

Callsign **WNZB262** Code **C** Service **GB** Date of Action: **10/10/97**

Name
PICK, HAROLD

Reason for deletion:
PER 405A REQUEST AND ATTORNEY LETTER DATED 10/1/97. EHH

Callsign **WNZB262** Code **O** Service **GB** Date of Action: **10/17/95**

Name
PICK, HAROLD

Reason for deletion:
APPLICANT REQUEST LETTER DATED 9-18-95.

CALLSIGN HISTORY SCREEN

#1 of 2

Callsign **WNZB276** Code **C** Service **GX** Date of Action: **10/10/97**

Name
PICK, HAROLD

Reason for deletion:

PER 405A REQUEST AND ATTORNEY LETTER DATED 10/1/97 EHH

Callsign **WNZB276** Code **C** Service **GX** Date of Action: **9/21/95**

Name
PICK, HAROLD

Reason for deletion:

PER APPLICANT'S REQUEST ON 405A

ATTACHMENT 2

Federal Communications Commission

1270 Fairfield Road
Gettysburg, PA 17325-7245

May 20, 1994

VIA REGULAR AND CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Dennis C. Brown, Esquire
1835 K Street, N.W.
Suite 650
Washington, D.C. 20006

Re: Compliance File No. 94G001; James Kay

Dear Mr. Brown:

On April 8, 1994, you submitted a letter on behalf of your client, James A. Kay, Jr., in reply to a Commission inquiry dated January 31, 1994, requesting information pursuant to § 308(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 308(b).

Kay's letter is inadequate, evasive, and contrived to avoid full and candid disclosure to the Commission. Kay's letter represented a studied effort to avoid producing any information. His failure to disclose pertinent information to the Commission has raised a substantial question about his qualifications to be a Commission licensee. The response is elusive and apparently designed to conceal his operating practices. Kay failed to adequately answer any single question included in our inquiry. Kay is directed to file a fully responsive submission within fourteen (14) days of the date of this letter.

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. Under the provisions of Commission Rules 0.457(d)(2)(i) and 0.461, 47 C.F.R. §§ 0.457(d)(2)(i) and 0.461, a persuasive showing as to the reasons for inspection will be required for requests submitted by the public pursuant to Rule 0.461, which seek information not routinely made available for public inspection under Rule 0.457. You are reminded of your obligation to physically separate those materials to which the request for nondisclosure applies from any materials to which the request does not apply. If a physical separation is not feasible,

the portion of the materials to which the request for nondisclosure applies must be identified. See, Rule 0.459(a).

Kay's claim that the Commission recently disclosed financial information in a finder's preference matter, which target Joseph Hiram requested be kept confidential, is frivolous. In response to a finder's preference request filed by your office on behalf of Kay, Hiram filed three letters stamped "confidential" as part of his Opposition. Hiram later advised the Commission that the three letters could be released to your law office. In a conversation with a member of my staff on March 17, 1994, attorney Katherine Kaercher of your office was advised that the three letters were being released with Hiram's permission. The letters were sent via telefax to your office that same day, with a note that Kay had an additional ten day period in which to comment on the letters. **In light of your firm's knowledge that Hiram's request for confidentiality had been withdrawn, your claim on behalf of Kay that the Commission wrongfully released confidential information is deceptive and highly improper.**

We clearly stated in our letter that we have received complaints alleging that numerous facilities are licensed to Kay on U.S. Forest Service lands but do not have the requisite permits for such use. We went on to explain that without the permits, there is a presumption that those facilities were not constructed and made operational as required by our Rules. Whether or not a station is located on U.S. Forest Service lands is therefore relevant to the stated purpose of the Commission's inquiry. The Commission has also received complaints that Kay's actual loading is inconsistent with the loading that he has reported to the Commission and to the U.S. Forest Service.

Kay should be advised that under the provisions of § 308(b) of the Act, id., the Commission has authority from Congress to require from an applicant or licensee "such other information as it (the Commission) may require," at any time after the filing of an application or during the term of any license. The Commission's resources are to benefit the entire public, not solely to benefit only one licensee.

When asked to name the "type of facility" for each call sign, Kay argued that this request was "not sufficiently specific" to allow him to be sure what the Commission requested. However, he suggested that the requested information is already within the Commission's records.

If Kay did not understand how to respond to the question calling for "type of facility", he had ample opportunity to contact the Commission during the initial 60 day time period provided to respond. Furthermore, on February 17, 1994, your office submitted

a request with the Commission, on Kay's behalf, seeking a tolling of the 60 day period of time in which Kay had to respond to our inquiry, until such time as the Commission replied to the statements in the February 17, 1994 request. In reply, Kay was granted an additional 14 days to supply the information we requested in our January 31, 1994 inquiry letter. If Kay needed clarification of one of our questions, it was his duty to seek it from us prior to the April 14, 1994 revised deadline. He had ample time to seek clarification, but elected not to do so. However, Kay is advised that the term "type of facility", as requested under heading number 2 of our January 31, 1994 inquiry letter, relates to the radio service in which the facility was licensed (i.e., YX, GX, YB, GB, etc.).

As part of our inquiry, the Commission requested that Kay provide a listing of the total number of units operated on each station, with a demonstration of such use substantiated by business records. Kay refused to respond, stating that the question was not sufficiently specific for him to supply the requested information, since "at any given instant of time, Mr. Kay may not know the number of mobile units operated on each of his stations." Kay later states that he "is currently spending one full day per week in the activity of collecting his charges from delinquent customers." Kay's refusal explanation is therefore contradictory, since he must have knowledge of his customer base to be aware of account delinquencies. His refusal to respond is also inexcusable since he was afforded an ample opportunity to clarify the window of time during which the information was requested. Kay is advised, however, that the Commission requests a listing of the total number of units operated on each station for all facilities owned or operated by Kay, or by any companies under which he does business, as of January 31, 1994, (the date of our initial inquiry). Kay is reminded that such demonstration of use during this period must be substantiated by business records.

Failure to provide the requested information constitutes a violation of the Commission's Rules and will subject Kay to sanctions, including a hearing before an Administrative Law Judge to determine whether Kay's licenses should be revoked.

We note that on May 11 and 13, 1994 Kay was notified that we would need an answer to our inquiry in order to determine what action to take on application numbers 415060, 415243, 415255, 628816, 632210 and 415274. We asked for responses by May 25 and May 27, respectively. Those response dates are extended to June 3, 1994 to conform with the instant letter.

The Communications Act requires that a response to a § 308(b) inquiry be signed by the applicant and/or licensee. Please direct Kay's signed response to my attention at the letterhead address.

Sincerely,



W. Riley Hollingsworth
Deputy Chief, Licensing Division

ATTACHMENT 3

Federal Communications Commission

1270 Fairfield Road
Gettysburg, PA 17325-7245

May 27, 1994

VIA FACSIMILE - CERTIFIED MAIL - RETURN RECEIPT REQUESTED -
REGULAR MAIL

Dennis C. Brown, Esquire
Brown and Schwaninger
Suite 650
1835 K Street, N.W.
Washington, DC 20006

Re: Compliance File No. 94G001; James Kay

Dear Mr. Brown:

This is in response to your letter of May 26, 1994, submitted on behalf of James A. Kay, Jr.

In paragraphs two and four of your letter you asked that we clarify the "call sign and licensee information requested by item one which (we) do not already have in our possession and which (we) have any actual need for Mr. Kay to submit." If that was your intended wording, it is readily apparent that if we were assured we had all the information we needed in order to carry out our statutory responsibility in this case, we would not request more. Your letter asks us to determine what we do not have and clarify it, a daunting if not impossible task for anyone.

Our requests for information referred to in paragraphs three and five of your letter, relating to systems on U.S. Forest Service land, are self-explanatory.

Regarding the request for user information, we have no intention of disclosing Mr. Kay's proprietary business information, such as customer lists, except to the extent we would be required by law to do so. Our intent is not to divulge Mr. Kay's proprietary business information to competitors or any non-Commission personnel, but rather to carry out our statutory responsibility to determine whether grant of an application or retention of a license is in the public interest.

Your response on behalf of Mr. Kay in paragraph eight is ludicrous. We asked for the total number of units operated on each station. Your answer of "7,000" is hardly helpful and is not acceptable unless you are contending that each system

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serves 7,000 mobiles and control stations. We respectfully suggest that a substantial time savings would result to both the Commission and Mr. Kay if the effort devoted to submitting a frivolous answer such as that were instead devoted to gathering information the Commission has rightfully requested.

In regard to what action you would expect to take if a hearing were designated, that is a decision you and your client would have to make at the appropriate time, and we cannot advise you in that regard.

Mr. Kay's response remains due on June 3, 1994.

Sincerely,



W. Riley Hollingsworth
Deputy Chief, Licensing Division

CERTIFICATE OF SERVICE

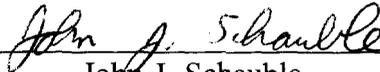
I, John J. Schauble, an attorney in the Enforcement and Consumer Information Division, Wireless Telecommunications Bureau, certify that I have, on this 13th day of March, 1998, sent by first-class mail, copies of the foregoing "Wireless Telecommunications Bureau's Opposition to Revised Request for Inquiry and Investigation" to:

Robert J. Keller, Esq.
4200 Wisconsin Avenue
Suite 106-233
Washington, DC 20016-2143
(Counsel for Marc Sobel and Marc
Sobel d/b/a Air Wave Communications)

Barry A. Friedman, Esq.
Thompson, Hine & Flory
1920 N Street, N.W., Suite 800
Washington, D.C. 20036
(Counsel for James A. Kay, Jr.)

John I. Riffer, Esq.
Assistant General Counsel - Administrative Law
Office of the General Counsel
Federal Communications Commission
1919 M Street, N.W., Suite 610
Washington, D.C. 20554
(Via Hand Delivery)

Administrative Law Judge Richard L. Sippel
Federal Communications Commission
2000 L Street, N.W.
Second Floor
Washington, D.C. 20554
(Via Hand Delivery)



John J. Schauble