

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

RECEIVED

MAR 23 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
MARC SOBEL)
)
Applicant for Certain Part 90 Authorizations)
in the Los Angeles Area and Requestor of)
of Certain Finder's Preferences)
)
MARC SOBEL AND MARC SOBEL)
d/b/a AIR WAVE COMMUNICATIONS)
)
Licensee of Certain Part 90 Stations in the)
Los Angeles Area)

WT DOCKET No. 97-56

To: The Commission

REPLY TO OPPOSITION

(in response to the *Wireless Telecommunications Bureau's*
Opposition to Revised Request for Inquiry and Investigation)

Law Office of Robert J. Keller, PC
4200 Wisconsin Ave NW #106-233
Washington DC 20016-2157

Telephone: 301-229-6875
Facsimile: 301-229-6875
Email: rjk@telcomlaw.com

March 23, 1998

No. of Copies rec'd 0414
A B C D E

TABLE OF CONTENTS

	<u>Page</u>
I. PROCEDURAL ISSUES	1
A. Sobel's <i>Request</i> is Proper.	1
B. Sobel is Adversely Affected by the Bureau's Misconduct.	3
C. Sobel Should Be Afforded Party Status in the Investigation.	5
II. IMPROPRIETY AND BAD FAITH IN THE SOBEL PROCEEDING	5
A. Predesignation Investigation and Irregularities	5
(1) <u>Unreasonable Delay</u>	5
(2) <u>False Statement in <i>Kay HDO</i></u>	7
B. Seeking Revocation in Bad Faith and Without Sufficient Grounds	8
(1) <u>Insufficient Grounds for Seeking Revocation</u>	8
(2) <u>The Bureau's Responsibility</u>	9
C. The Bureau's Failure to Inform Sobel of its Concern	11
III. DISCRIMINATORY TREATMENT OF SOBEL VIS-À-VIS KAY'S ENEMIES	12
A. Harold Pick	13
(1) <u>Unlawful and Untimely License Reinstatement</u>	13
(2) <u>Misrepresentation and Falsification of Documents</u>	15
B. Seeking Revocation in Bad Faith and Without Sufficient Grounds	16
C. Liberty Paving, Inc.	17
D. Christopher C. Killian	19
IV. BUREAU MISCONDUCT IN THE KAY PROCEEDING	20
A. The Bureau's Prejudgment of Kay	21
B. The Bureau's Improper Efforts to Interfere With Kay's Business	23
(1) <u>Distribution of the Section 308(b) Letter</u>	23
(2) <u>Kay's Request for Confidentiality</u>	24
(3) <u>The Thompson Tree Matter</u>	25
(4) <u>The Pro Roofing Incident</u>	27
C. Use of Designation and Discovery as a Weapon Against Kay	27
D. The Bureau's Failure to Verify Accusations of Biased Informants	28
E. Coaching and Soliciting False Statements from Potential Witnesses	30

SUMMARY

The *Revised Request for Inquiry and Investigation* ("*Request*") filed by Marc D. Sobel ("Sobel") is not an improper and untimely supplement to Sobel's appeal from the *Initial Decision of Administrative Law Judge John M. Frysiak* ("*Initial Decision*"), FCC 97D-13, released November 28, 1997. Sobel is not seeking to supplement his appeal from the *Initial Decision*; rather, he is separately seeking an inquiry and investigation into misconduct by Bureau personnel in connection with the proceeding.

Although most of the disputes referenced in Part III of the *Request* involve James A. Kay, Jr. ("Kay") rather than Sobel, Sobel is not urging any particular resolution on the merits of those disputes. Sobel points to those disputes simply as examples of discrimination against him. Each matter discussed is a situation in which a Commission licensee has been conclusively demonstrated (in some cases has admitted under oath) to have engaged in conduct similar to or far worse than that which allegedly prompted the Bureau's investigation and prosecution of Sobel. The Bureau has nonetheless not sought to impose sanctions on these parties, and in many cases has even afforded them favorable treatment. The parties receiving this favorable treatment, moreover, are complainants, informants, and/or witnesses against Kay. Similarly, the information presented in Section IV of the *Request* is offered by Sobel as evidence of the Bureau's negative animus and bad faith toward Kay, and hence its motive for discriminating against Sobel.

In the pre-designation phase of the Sobel proceeding, the Bureau acted improperly and violated Sobel's rights in numerous ways. These offenses include unreasonable delay and cessation of processing Sobel's applications without explanation or hearing, ignoring Sobel's repeated inquiries and offers of cooperation and information to resolve any problems, refusal to respond to Sobel's numerous requests for a statement of the concerns held by the Bureau,

designating Sobel for license revocation on legally insufficient grounds in retaliation for his seeking judicial relief from the delay, and trumping up a bogus candor issue based on a stale declaration when the legal insufficiency of the attempted revocation was revealed.

Sobel has presented substantial and fully documented evidence of discrimination against Sobel, a friend and business associate of Kay, vis-à-vis complainants, informants, and witnesses against Kay. The Bureau has taken absolutely no action against persons who are known to have filed false declarations, submitted forged and altered documents, filed sham applications to thwart FCC rules on channel limits, made false statements to the Bureau in an attempt to have authorizations reinstated, etc. In some cases the Bureau is permitting these persons to retain and sell for profit authorizations they are not entitled to hold. These persons are all enemies of Kay. Meanwhile, the Bureau pursues the harshest of regulatory remedies against Sobel, a friend of Kay, for far less. Sobel has also presented substantial and fully documented evidence of grossly improper conduct by the Bureau in Kay's hearing proceeding, confirming its bad faith toward Kay and its ability and willingness to act improperly in its pursuit of Kay.

The Bureau has presented virtually no response to Sobel's well documented factual allegations, and the few conclusory denials it does offer are self-serving and entirely unsupported statements of counsel. The legal demurrers offered by the Bureau are misplaced and inadequate. These are serious charges, but they are fully supported--in most cases by sworn testimony or verified statements--and documented. Sobel has more than justified his request for a full investigation into this matter by the Commission.

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)
)
MARC SOBEL)
)
Applicant for Certain Part 90 Authorizations)
in the Los Angeles Area and Requestor of)
of Certain Finder's Preferences)
)
MARC SOBEL AND MARC SOBEL)
d/b/a AIR WAVE COMMUNICATIONS)
)
Licensee of Certain Part 90 Stations in the)
Los Angeles Area)

WT DOCKET NO. 97-56

To: The Commission

REPLY TO OPPOSITION

Marc D. Sobel d/b/a AirWave Communications ("Sobel"), by his attorney and pursuant to Section 1.45(b) of the Commission's Rules and Regulations, 47 C.F.R. § 1.415(b), hereby replies to the *Wireless Telecommunications Bureau's Opposition to Revised Request for Inquiry and Investigation* ("*Opposition*").

I. PROCEDURAL ISSUES

A. Sobel's Request is Proper.

1. The Bureau argues that Sobel's *Revised Request for Inquiry and Investigation* ("*Request*") is an improper and untimely supplement to Sobel's appeal from the *Initial Decision of Administrative Law Judge John M. Frysiak* ("*Initial Decision*"), FCC 97D-13, released November 28, 1997. *Opposition* at ¶¶ 7, 10. But Sobel is not seeking to supplement his appeal. Sobel timely submitted his *Consolidated Brief and Exceptions* ("*Exceptions*") and he stands by that pleading insofar as the Commission's review of the *Initial Decision* is concerned. For purposes of the *Request*, Sobel is not challenging the presiding officer's conduct of the hearing

and his *Initial Decision*, nor is he challenging the actions of the Commission in designating the hearing. Sobel here is separately seeking an inquiry and investigation into misconduct by Bureau personnel in connection with the proceeding. Accordingly, the Bureau's reliance on *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941) is misplaced.

2. It is disingenuous for the Bureau to suggest that the hearing proceeding is the proper forum to raise these matters, since the Bureau repeatedly opposed any and all attempts by Sobel to introduce evidence or arguments that related to pre-designation matters or Bureau misconduct. For example, when Sobel introduced as an exhibit a copy of his *Petition for Writ of Mandamus*, including attachments detailing Bureau delay and misconduct, Bureau counsel objected as follows:

Your Honor, I object on the basis of relevance. This is a pleading that was filed in September of 1996, and it appears, Your Honor, that this is a pre-designation pleading. It appears to go into matters which Your Honor already ruled are not relevant in your memorandum of April 17, 1997, FCC 97 M-57, where Sobel propounded interrogatories on the Bureau concerning contact between the Bureau and Mr. Sobel or his representatives in the 1996 time frame. Your Honor ruled that those matters are not relevant to the designated issues, and I believe this matter is not relevant and object on the basis of relevance.

Transcript (WT Docket No. 97-56) at p. 66. The Bureau similarly objected when Sobel was questioned about his knowledge of the reasons for the Bureau's freeze on the processing of his applications, *id.* at pp. 169-170, and when he sought to introduce evidence of the Bureau's nonresponsiveness to his pre-designation attempts to learn the Bureau's concerns and to resolve them cooperatively and informally, *id.* at pp. 297-299.¹ The Bureau can not have it both ways. The Bureau balked at every attempt by Sobel to introduce any of this evidence at hearing, and

¹ In the hearing, however, Sobel was seeking to introduce this evidence as an indication of his good faith. He was not there seeking an investigation of the Bureau's conduct nor seeking any sort of redress for harm done to him by virtue of Bureau misconduct.

the Bureau may not now argue that this is a matter appropriately addressed in the context of the hearing proceeding.

4. The Bureau pretends to be incapable of grasping the extremely important distinction between Sobel's defense against false charges in the hearing proceeding, and his affirmative attempt to seek redress for wrongs done to him. In the hearing, to the extent Sobel attempted to introduce some of the evidence also presented in the *Request*, he was doing so in an attempt to demonstrate that he had acted in good faith and not with deceptive intent. In other words, the subject matter was relevant in the hearing solely for defensive reasons. The *Request* is offered in an entirely different context. Sobel is now affirmatively charging the Bureau with numerous instances of misconduct and he is asking that these be fully investigated. Sobel also intends to separately ask the Commission to remedy the harm done to him by the Bureau's misconduct. Absent timely and satisfactory resolution of this matter by the Commission, Sobel will seek any and all appropriate judicial remedies, including, but not limited to, monetary damages. This is clearly a matter that is properly addressed outside the context of the hearing proceeding itself.

B. Sobel is Adversely Affected by the Bureau's Misconduct.

5. The Bureau urges dismissal of the *Request* on the grounds that all but one of the matters asserted in Parts III and IV of the *Request* relate primarily to the James A. Kay, Jr. ("Kay") proceeding (WT Docket No. 94-147) rather than the Sobel proceeding. *Opposition* at ¶¶ 8-9. The Bureau's objection is misplaced. While it is true that most of the disputes referenced in Part III of the *Request* involve Kay rather than Sobel, that is not the point. Sobel is not urging any particular resolution on the merits of those disputes, and whether he has standing in them is therefore not relevant. Sobel points to those disputes simply as examples of the discrimination against him. Each matter discussed is a situation in which a Commission licensee has been

conclusively demonstrated (in some cases has admitted under oath) to have engaged in conduct similar to or far worse than that which allegedly prompted the Bureau's investigation and prosecution of Sobel. The Bureau has nonetheless not sought to impose sanctions on these parties, and in many cases has even afforded them favorable treatment. The parties receiving this favorable treatment, moreover, are complainants, informants, and/or witnesses against Kay. To suggest that Sobel may not point to such blatant examples of discriminatory treatment merely because the disputes involve Kay rather than Sobel is absurd. Indeed, that Kay is the adverse party in these cases actually further supports Sobel's contention that the motive for the disparate treatment of Sobel vis-à-vis these other parties is the Bureau's improper bias against Kay.²

6. Similarly, the information presented in Section IV of the *Request* is offered by Sobel not insofar as it relates to the merits of Kay's proceeding, but rather as evidence in support of Sobel's claim of discrimination. The crux of the charge is that Sobel, a friend and business associate of Kay, has been singled out for adverse discriminatory treatment vis-à-vis Kay's enemies because of the Bureau's improper bias against Kay. Evidence that the Bureau has acted improperly and unlawfully in its prosecution of the Kay proceeding is thus directly relevant and material to Sobel's charge of improperly selective prosecution.

² The Bureau suggests that it may be an *ex parte* violation for Sobel not to have served the *Request* on the parties to these various disputes. Sobel finds the Bureau's sudden interest in compliance with the *ex parte* rules duplicitous insofar as one of the parties it now defends, Harold Pick, has *never*--not even once--served copies of his pleadings in these or other contested matters on Sobel or Kay, and the Bureau has consistently ignored his infractions. Moreover, Sobel does not consider the *Request* an *ex parte* communication on the subject disputes insofar as (a) Sobel does not seek any particular resolution on the merits, and (b) Sobel merely cites the disputes as evidence, providing copies of pleadings that have already been filed and served on the parties. Nevertheless, out of an abundance of caution, Sobel will served copies of the *Request* and this *Reply to Opposition* on each of the parties to those disputes.

C. Sobel Should Be Afforded Party Status in the Investigation.

7. The Bureau objects to Sobel's *Request* that he be made a party to the requested investigation and that he be afforded an opportunity for discovery. *Opposition* at ¶ 11. While it may be true that normally the Commission is the only party to a Section 403 investigation, the Commission nonetheless has the discretion to confer party status if it so chooses. The cases cited by the Bureau³ are not applicable because they involve investigations initiated by the Commission into possible improper conduct by licensees or carriers subject to its regulatory authority. In this instance a private party is asking the Commission to initiate an investigation of demonstrated improper conduct by its own staff. Moreover, it may become necessary for Sobel to seek formal relief, including monetary damages, directly from the Commission as a prerequisite to seeking judicial relief.⁴ In these circumstances it would be entirely proper and prudent to afford Sobel party status.

II. IMPROPRIETY AND BAD FAITH IN THE SOBEL PROCEEDING

A. Predesignation Investigation and Irregularities

(1) Unreasonable Delay

8. The Bureau denies any impropriety in its predesignation investigation of Sobel, going so far as to unabashedly assert that its prolonged and unexplained freeze on the processing of Sobel's applications was somehow justified by the Communications Act. The Bureau reasons as follows:

[I]n light of the questions before the Bureau about [Sobel's] qualifications, the Bureau had a statutory duty not to grant his filings. If the Commission is for any reason unable to

³ *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 (1979).

⁴ If Sobel decides to seek relief pursuant to the Federal Tort Claims Act, for example, he must seek compensation from the Commission before filing a claim in court. 28 U.S.C. § 2675(a), (b).

make the required findings that an applicant has the necessary qualifications to be a Commission licensee, Section 309(e) of the Communications Act ... precludes granting the application.

Opposition at ¶ 14. This is a conveniently self-serving misinterpretation of the applicable statutory provision. Section 309(e) actually states:

If ... a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding [that a grant of the application is in the public interest] *it shall formally designate the application for hearing* on the ground or reasons then obtaining and *shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue* but not including issues or requirements phrased generally.

47 U.S.C. § 309(e) (emphasis added). Thus, the Bureau actually violated the very statute it now attempts to hide behind. Section 309(e) does not authorize the Bureau to simply not act on applications about which it has questions; rather, it requires the Commission to formally designate such applications for hearing. And Section 309(e) does not authorize the Bureau to ignore an applicant's repeated inquiries as to the nature of any problems with its pending applications; rather, it requires that the Commission specify with particularity the reasons for its inability to grant applications.

9. The Bureau's inaction on Sobel's applications was tantamount to a denial of those applications without the hearing guaranteed by Section 309(e). *See Environmental Defense Fund v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970). Indeed, it was because of this unreasonable delay that Sobel was forced to seek judicial relief. The Bureau states that "[t]he court denied Sobel's petition after the Commission explained that a staff recommendation ... was pending before the Commission." *Opposition* at ¶ 5. The Bureau tries to make this sound as if the court indicated a lack of merit to Sobel's charge of delay, but that is not the case. The court would not have ordered the Commission to respond to Sobel's mandamus petition in the first instance had it not found Sobel's petition to raise a legitimate claim. Order, Case No. 96-1361 (December 27, 1996).

And when the court did deny Sobel's petition, it did so without prejudice and in express reliance on the Commission's representation that it "anticipate[s] ... action . . . soon." *In re Marc D. Sobel*, 1997 U.S. App. Lexis 5986 (February 27, 1997).

(2) False Statement in *Kay HDO*

10. The Bureau claims that the Commission, in *WT Docket No. 94-147, James A. Kay, Jr., Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture ("Kay HDO")*, 10 FCC Rcd 2062 at ¶ 2 (1994), "noted concern about Kay's relationship to licenses issued to ... Sobel," *Opposition* at ¶ 4, and attempts to bootstrap a prior misrepresentation in its Section 308(b) request to Sobel: "At the time of [the *Kay HDO*], 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." *Opposition* at ¶ 15. The Bureau is engaging in revisionist history, and its self-serving statements contradict the Commission's own plain language. The Commission stated in the *Kay HDO*: "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 some or all of the following: Air Wave Communications [and] Marc Sobel dba Airwave Communications." *Kay HDO*, 10 FCC Rcd at ¶ 3.⁵ In the order that deleted the Sobel licenses from the *Kay HDO*, the Commission explained that the Sobel licenses initially "were included because information indicated that Kay may have conducted business under a number of names." *James A. Kay, Jr.* (FCC 96-200), 11 FCC Rcd at ¶ 2.

⁵ Some of the names listed were in fact trade names used by Kay or entities owned by Kay and through which he did business, e.g., Buddy Corp., Southland Communications, and Oat Trunking. There is no indication in the *Kay HDO* that the Commission did not consider *all* of the listed names, including Sobel, to be Kay aliases or companies owned by Kay.

11. The Commission's actions, in addition to its words, also serve to refute the Bureau's belated effort to claim that the Commission was suspicious of an unauthorized transfer of control as early as December of 1994. Nowhere in the *Kay HDO* does the Commission make any mention of a transfer of control. The Commission did not include any transfer of control or real party-in-interest issues in the *Kay HDO*. The reason is that the Commission did not believe there had been a transfer of control from Sobel to Kay; rather, it believed that Kay was using "Marc Sobel" and/or "Airwave Communications" as fictitious aliases.

B. Seeking Revocation in Bad Faith and Without Sufficient Grounds

(1) Insufficient Grounds for Seeking Revocation

12. The Bureau recommended to the Commission the institution of license revocation proceedings against Sobel without sufficient grounds--the wrongs alleged in the *WT Docket No. 97-56, Marc D. Sobel, Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing and for Forfeiture* ("*Sobel HDO*"), 12 FCC Rcd 3298 (February 12, 1997), even if true, did not warrant license revocation. *Request* at ¶¶ 16-18. The Bureau absurdly argues that Sobel's position is defeated because the presiding judge ultimately concluded that revocation was warranted. *Opposition* at ¶ 16. The Bureau conveniently ignores the fact that the presiding judge based his conclusions not solely on the unauthorized transfer of control issue, but also on the candor issue which was not part of the *Sobel HDO*.

13. In any event, the Bureau misconstrues Sobel's argument. According to the Bureau, "Sobel ... argue[s] that the Bureau did not ... 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." *Id.* at ¶ 18. This actually confuses two separate aspects of Sobel's complaint. Even if the Bureau truly believed Sobel had engaged in an unauthorized transfer of control--and there is reason to doubt that it did--the most compelling manifestation of the Bureau's bad faith is that

it sought license revocation on that ground alone. The Bureau does not even acknowledge, much less address, Sobel's two key points in this regard: (1) the *Sobel HDO* sought license disqualification and revocation as the penalty for an alleged unauthorized transfer of control, contrary to established Commission precedent that this is not a revocable offense, and (2) one week after this defect was noted by Sobel, the Bureau's sought the addition of a candor issue on the basis of a declaration it had in its files for more than two years. The ultimate ruling of the presiding judge is not relevant. The issue here is whether the proceedings were initiated in good faith. The lack of a legally sufficient basis for the harsh sanction sought by the Bureau is certainly an indication of bad faith.

(2) The Bureau's Responsibility

14. Repeatedly in the *Opposition* the Bureau attempts to avoid responsibility for the harsh and legally unjustified remedy sought in the *Sobel HDO* on the dual grounds that (a) the Commission, not the Bureau, adopted the *Sobel HDO*, and (b) the presiding judge's ultimate conclusions somehow preclude any examination of the initiation of the proceeding. *E.g.*, *Opposition* at ¶¶ 16, 18. As discussed above, the ALJ's ultimate imposition of revocation does not retroactively justify the bad faith initiation of the proceeding. The *Sobel HDO* sought revocation solely on the basis of an unauthorized transfer of control, Commission precedent consistently holds that this is not a revocable offense, *see* ¶¶ 12-14, *supra*, and the ALJ's ultimate conclusion was based on the later-added candor issue.

15. It is equally inappropriate, moreover, for the Bureau to attempt to hid behind the apron of mother Commission. The Bureau recommended the *Sobel HDO* to the Commission. It is disingenuous for the Bureau to suggest that the Commission gave considerable independent judgment to the details of the *Sobel HDO*. The Commission relies heavily on the recommendations of its subordinate bureaus. Indeed, the primary reason there are various

bureaus is because the Commission could not possibly have the time and specific expertise to independently assess and evaluate the various matters that come before it. It thus appoints bureaus that, in addition to taking certain actions on delegated authority, recommend other actions to the Commission itself.

16. The *Kay HDO* provides an excellent example of the degree of responsibility that rests with the Bureau in this regard. W. Riley Hollingsworth ("Hollingsworth"), then Deputy Chief of the Licensing Division of the Private Radio Bureau (which later became the Wireless Telecommunications Bureau) drafted the *Kay HDO* and recommended it to his superiors within the Private Radio Bureau in September of 1994. *Request at Exhibits JK-5 & MDS-1*. The Commission later adopted the *Kay HDO* following Hollingsworth's draft, word for word, even down to a misstatement of the name of Kay's legal counsel at the time. Thus, Hollingsworth, who was then not even a high ranking Bureau official, but rather only a deputy division chief, had his recommendation adopted by the Commission without a single change. By the time of the *Sobel HDO*, Hollingsworth was Assistant Chief of the Wireless Telecommunications Bureau, and thus presumably entitled to even more deference from the Commission.

17. The Commission may have adopted the *Sobel HDO* in name and as a matter of formality, but this does not relieve the Bureau of responsibility. As the Bureau itself so eloquently argued in the Sobel hearing proceeding: "If the Commission cannot believe and rely on its licensees' reports, it cannot maintain the integrity of its processes." *Wireless Telecommunications Bureau's Proposed Findings of Fact and Conclusions of Law at ¶ 89* (filed in WT Docket No. 97-56 on September 25, 1997), *citing Tri-State Broadcasting Co.*, 5 FCC Rcd 1156, 1173 (Rev. Bd. 1990). The same is no less true of the representations made by the staff of the operating bureaus to the Commission. Indeed, it is more so true, because the Commission undoubtedly places a higher degree of trust in the recommendations of its own staff.

18. The Bureau is responsible for the *Sobel HDO* and the bad faith behind its adoption. That the Bureau may have been able to abuse the trust placed in it by the Commission does not change that fact. In the end analysis, however, it does not matter. The injury suffered by Sobel as a result (and for which he intends to seek compensation--from a judicial forum if necessary) is just as real whether it was done by the Bureau acting as an agent for the Commission, or by the Commission acting directly.

C. The Bureau's Failure to Inform Sobel of its Concern

19. Another compelling indication of the Bureau's bad faith and malice toward Sobel was its steadfast refusal to advise him of any concerns and afford him an opportunity to resolve them informally. Instead, the Bureau froze processing on all of Sobel's applications, and ignored his repeated inquiries into the matter. When Sobel sought judicial relief for the unlawful delay, the Bureau retaliated with the harshest of enforcement penalties at its disposal. *Request* at ¶¶ 4-12. The Bureau claims that it did adequately advise Sobel, *Opposition* at ¶ 17, but its contention has both factual and legal problems.

20. Factually, the Bureau fails to address the false statements, inconsistencies, backpedaling, and obfuscation that characterized its so-called communications with Sobel prior to designation. First, the *Kay HDO* falsely characterized Sobel as a fictitious alias of Kay. Assuming this was the result of an honest mistake, the Bureau certainly knew it was inaccurate as early as January of 1995 when Kay filed pleadings noting the error. Yet the Bureau made no effort to correct the record until a year later, and then only because it suited the Bureau's own litigation strategy. The Bureau's two Section 308(b) letters to Sobel made the fantastic statement that the Commission, in adopting the *Kay HDO*, believed that Sobel's licenses were in fact controlled by Kay. This statement was inconsistent with any reasonable interpretation of the *Kay HDO*. Between the two Section 308(b) requests, counsel for Sobel informally advised the Bureau

that there was a written management agreement between Sobel and Kay and that a copy of it had been produced to the Bureau in discovery in the Kay proceeding.

21. Legally, the Bureau conveniently ignores its obligation under Section 9(b) of the Administrative Procedure Act ("APA") to apprise a licensee of the alleged misconduct and to afford an opportunity to come into compliance before instituting license revocation proceedings. 5 U.S.C. § 558(c). The Bureau then makes the following fantastic statement: "[B]ecause the Bureau believed the agreement was evidence of a flagrant transfer of control, the Bureau is unaware of any truthful representation Sobel could have made that would have eliminated the need for an evidentiary hearing." *Opposition* at ¶ 17. The obligation imposed by Section 9(b) of the APA is not conditioned on the Bureau's unilateral and subjective assessment of whether the licensee might be able to make an adequate response. Moreover, Section 9(b) requires not only notice, but also an opportunity to come into compliance prior to the initiation of revocation proceedings. The Bureau, however, kept Sobel at a distance and in the dark while it quietly constructed its regulatory gallows. This was unlawful, for the APA neither contemplates nor countenances star chamber executions.⁶

III. DISCRIMINATORY TREATMENT OF SOBEL VIS-À-VIS KAY'S ENEMIES

30. The Bureau has improperly discriminated against Sobel, a friend and associate of Kay, vis-à-vis those who are enemies of Kay, *Request* at ¶¶ 22-24. Sobel offered four specific, documented examples of informants, complainants, and/or witnesses against Kay whom the Bureau has given discriminatorily favorable treatment compared to Sobel. *Id.* at ¶¶ 25-53. The

⁶ The usual response of Commission enforcement personnel to a perceived violation is to issue a notice of violation affording the licensee an opportunity to explain and correct its conduct. In Sobel's experience, even in situations as serious as unlicensed operation or interference to other stations, this is the practice. Why this typical procedure would not also be followed for a suspected unauthorized transfer of control--not a revocable offense--is still a mystery to Sobel.

Bureau disputes Sobel's standing to present most of these examples on the grounds that the underlying disputes involved Kay rather than Sobel. *Opposition* at ¶¶ 8-9, 20. The Bureau's objection on this score is far off base. Sobel is not seeking to advance any personal interest in the merits of the cited matters, nor is he arguing the merits of those disputes; rather, he is offering the Bureau's actions and inaction in the referenced cases as evidence of discrimination against Sobel. The fact that Kay is the opposing party in most of the disputes actually supports Sobel's position insofar as it is the Bureau's bias against Kay that motivates its discrimination against Sobel, a friend and associate of Kay. The Bureau utterly fails to refute this compelling evidence of improperly motivated and unlawful discrimination.

A. Harold Pick

(1) Unlawful and Untimely Reinstatement of Expired Authorizations

31. Harold Pick is an informant and complainant against Kay, and one whom the Bureau knows is one of Kay's fiercest competitors and enemies. Sobel demonstrated that the Bureau reinstated two of Pick's expired and purged authorizations that had been properly canceled as the result of bankruptcy seizures, long after the statutory period for setting aside or reconsidering its actions, very likely as the result of improper *ex parte* communications by Pick to Bureau staff. *Request* at ¶¶ 26-31. The Bureau does not squarely address this serious allegation.

32. The Bureau first offers the insipid retort that Pick is not on the Bureau's witness list and that his credibility is not at issue. *Opposition* at ¶ 20. This is far wide of the mark. While Pick certainly would not make a credible witness, that is hardly the point. He has assisted the

Bureau as a complainant and informant against Kay.⁷ It is reasonable to question, therefore, whether the Bureau's improper reinstatement of his authorizations was not motivated by his "assistance" in the Bureau's campaign against Kay.

33. The Bureau brands Sobel's charge of improper *ex parte* communication in this matter as "nothing more than sheer speculation." *Id.* at ¶ 20. This is not true. While Sobel can not provide direct proof of an *ex parte* communication, the circumstantial evidence is compelling and the logical conclusion is virtually inescapable. Upon informal inquiry as to the reason for the reinstatement of the licenses in question, Bureau processing staff advised that it was due to a pending appeal by Pick of the bankruptcy court's order. In response to a Freedom of Information Act ("FOIA") request seeking any and all correspondence and documents relating to the reinstatement, the Bureau produced copies of official documents relating to the appeal. Interestingly, these documents included only the filings made with the court by Pick, not any of the responsive filings made by Kay. This information was not provided to the Bureau by Kay or

⁷ Sobel has reliable evidence that was not offered for purposes of his *Request*, but which may be used in a subsequent complaint for compensation, that during the course of the Bureau's investigation of Kay: (1) Pick actively conspired with and/or solicited others, some of whom are current Kay witnesses, to file false complaints and accusations against Kay; (2) Pick solicited improper *ex parte* communications from a Congressional member; (3) Pick personally visited the Bureau's offices at Gettysburg, spending four hours there, immediately following a Congressional visit; (4) Hollingsworth made no fewer than two visits to the Pick home, where he concurrently met with at least two current hearing witnesses against Kay; and (5) Pick made scores upon scores of telephone calls to the Commission's Gettysburg office, in addition to numerous telephone calls to Hollingsworth's home telephone number.

by the bankruptcy trustee (both of whom formally challenged the reinstatements). The logical conclusion, therefore, is that the documents were provided to the Bureau by Pick as part of a plea to have his authorizations reinstated.⁸

34. Finally, the Bureau notes that the subject licenses have since been deleted from the Commission's database and accuses Sobel of withholding this information. *Opposition* at ¶ 20. The untimely deletion of the licenses, however, does not answer Sobel's charge. The deletions cited by the Bureau occurred on October 27, 1997. That hardly changes the fact that the Bureau illegally reinstated the authorizations and then allowed the reinstatements to stand for two full years over the strenuous and formal objections of three separate parties. The Bureau is being less than candid when it claims that "Kay and the trustee have received the relief they sought," *id.*, for the Bureau has never made any effort to advise Kay or the trustee of its action, much less issue a formal ruling on the pending petitions for reconsideration and application for review.

(2) Misrepresentation and Falsification of Documents

35. It is indisputable that in 1993 Pick submitted a blatantly false sworn statement to the Bureau in response to a finder's preference challenge to a station licensed to his father, and that Pick and his father falsified documents and submitted them to the Bureau in support of Pick's perjured statement. Moreover, the Bureau has known about this since October of 1994 but has never taken any action whatsoever against Pick. *Request* at ¶¶ 32-36. In view of the Bureau's

⁸ The only alternative explanation is that the Bureau obtained sought the documents directly from the bankruptcy court. If so, why did it seek only Pick's pleadings and not Kay's responsive pleadings? How would the Bureau have even known about the appeal if Pick had not advised them? And why would the Bureau have sua sponte sought out those documents and then relied on them to reinstate Pick's authorizations long after the statutory deadline? Even if the Commission accepts the incredible position that there were no *ex parte* communications with Pick, it is clear the Bureau was going out of its way--and beyond its statutory authority--to assist Pick in this matter.

determined effort to sanction Sobel for alleged lack of candor, the discrimination is obvious. The Bureau fails to refute Sobel's charge that he is singled out because of his association with Kay, while Pick is given a pass as a reward for assisting the Bureau's case against Kay.

36. The Bureau steps into a time warp and argues that the *Sobel HDO*, issued by the Commission in February of 1997, somehow prevented it from action on conclusive evidence of perjury and forgery by Pick that it has had since October of 1995. *Opposition* at ¶ 21. Moreover, the Bureau is wrong on more than merely the dates. While the *Sobel HDO* may indeed have precluded the Bureau from action on Sobel's pending finder's preference request, that is not the point. Pick is a licensee who was demonstrated to have submitted a false statement (under oath) and forged documents to the Commission. The designation of Sobel's case in no way prevented the Bureau from initiating enforcement action against Pick for this blatant misconduct. Indeed, to quote the Bureau's own words, "the staff is obliged to start an investigation when a sufficient showing of misconduct has been made." *Opposition* at ¶ 14. And, according to the Bureau's own logic, "in light of the questions before [it] ... the Bureau had a statutory duty not to grant [Pick's] filings." *Id.* But the Bureau not only continued to process and grant Pick's applications, it even went out of its way to improperly reinstate authorizations for him. Apparently these "obligation" and "statutory duty" to which the Bureau refers apply only to Sobel and not to Pick.

B. James Doering

37. In a formal complaint pending before the Bureau with no action whatsoever since May of 1997, it was demonstrated that James Doering, another informant and complainant against Kay, had made misrepresentations and falsified documents submitted as part of an assignment of license application he filed with the Commission, but the Bureau has taken no action against him as a result. *Request* at ¶ 37-40. The Bureau states only that "[t]he complaint has not been served upon the defendants because the complaint is undergoing review in the

normal course of business." *Opposition* at ¶ 22. This claim is dubious on its face. The Bureau has not even served the complaint which has been pending for over nine months. This can hardly be considered "the normal course of business." There has been more than ample time for the Bureau to determine whether the complaint is of sufficient substance to warrant its service upon the complainants and a request for an answer. It is not credible that the Bureau could be engaging in any meaningful "review" of the complaint without a formal answer. But, once again, the Bureau's investigatory obligations and statutory duties are applicable only when Kay's friends are accused of wrongdoing--the Bureau has the luxury of never reacting to conclusive evidence of wrongdoing by Kay's enemies.⁹

C. Liberty Paving, Inc.

38. More than a year ago Sobel wrote to the Bureau demonstrating conclusively that a station authorized to Liberty Paving had been abandoned and had been off the air for more than a year. This showing was supported by the sworn testimony of Liberty's principal, Mr. Charles F. Barnett, and the showing was not opposed by Liberty (or at least Sobel was not served with any such opposition). Sobel repeated his request nine months later, but the Bureau continues to take no action. *Request* at ¶¶ 41-42. It also appears that Barnett is attempting to negotiate the possible assignment or cancellation of this defunct authorization in exchange for a monetary payment. *Id.* at ¶ 42. The Bureau has no real answer for this. It states only that "Sobel's request is being reviewed and will be decided in the normal course of business." *Opposition* at ¶ 23. But this is absurd. There is nothing to review. Barnett admitted under oath that the station was long ago

⁹ The Bureau makes the irrelevant assertion that "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." *Opposition* at ¶ 22. Once again, this is irrelevant. The fact is that Doering has assisted the Bureau as an informant and complainant against Kay, and the Bureau now appears to be rewarding him for that assistance by ignoring compelling evidence of improper conduct on his part. This can not be squared with the Bureau's treatment of Sobel.

abandoned, and he has not opposed Sobel's request that it be deleted. It does not take more than a year to resolve such a simple matter. The Bureau's refusal to cancel the Liberty Paving license and delete it from the database, an action mandated by the rules¹⁰ and factually justified by Barnett's own sworn testimony, while allowing Liberty Paving to negotiate for the sale of the invalid authorization, is tantamount to paying Barnett to testify against Kay.

39. In a recent deposition, Barnett admitted under oath that he lied to the Bureau about having made an incriminating recording of Kay, and he further admitted that he told the lie in the hope of having a terminated authorization reinstated by the Bureau. *Request* at ¶ 43. Not only has the Bureau not deleted Barnett's abandoned authorization in accordance with its rules, it continues to hold out Barnett as a credible witness against Kay. The Bureau seeks total disqualification of Sobel for an alleged lack of candor based on disputed interpretations of words in a declaration. Meanwhile, when Barnett admits under oath to having lied in an effort to influence the Bureau's action on a pending matter, the Bureau simply shrugs and yawns. What is the only significant distinction between Sobel and Barnett? The posture vis-à-vis Kay. Sobel is Kay's friend, hence persecution by the Bureau; Barnett is Kay's enemy, hence favored treatment by the Bureau.

¹⁰ Section 90.157 of the Commission's Rules and Regulations (Discontinuance of station operation) provides in pertinent part:

- (a) The license for a station *shall cancel automatically upon permanent discontinuance of operations* and the licensee shall forward the station license to the Commission. ...
- (b) For the purposes of this section, *any station which has not operated for 1 year or more is considered to have been permanently discontinued.*

47 C.F.R. § 90.157 (emphasis added).

D. Christopher C. Killian

40. Christopher Killian, another of the Bureau's informants, complainants, and witnesses against Kay, was conclusively demonstrated by Kay to have set up his wife as a sham in order to obtain authorizations to which he was not entitled. The evidence of this is the sworn testimony of Killian's wife, and Killian has never denied, much less refuted, the charge. Yet, the Bureau has taken no action against Killian--indeed, it continues to rely on him as a witness against Kay--even as it persecutes Sobel for an alleged transfer of control in a management agreement. *Request* at ¶¶ 44-52. Rather than squarely answer this charge of obvious favoritism, the Bureau bemoans the fact that Kay waited until eight months after an assignment of Killian's licenses to Nextel. *Opposition* at ¶ 24. This misses the point. Kay was not challenging the assignment to Nextel as such; rather, he was challenging Killian's overall qualifications as a result of the irrefutable evidence of improper conduct. Kay was seeking disqualification and revocation against Killian, so the timing of the submission is not really relevant. It is suspiciously convenient for the Bureau to defer taking any action on documented and conclusive disqualifying misconduct by Killian--misconduct that Killian has never stepped forward to deny--while continuing to use Killian as a witness against Kay. What effect this has on Killian's credibility is, of course, an issue to be resolved in the Kay proceeding. In this context, however, it is further evidence of favored treatment being afforded to anyone who will take the stand against Kay.

41. The Bureau's objection that it has only been four months since the Kay pleading is an equally inadequate answer to the discriminatory situation represented by this matter. In June of 1996, long before Kay filed his pleading, and well before Killian's assignment of his authorization to Nextel, the Bureau was presented with a finder's preference request by Applied Technology Group, Inc., which contained a showing that Killian's station had not been timely

constructed and that the authorization was no longer valid. *See* FCC Compliance File No. 96F215, *Request at Exhibit CK-1, Petition for Institution of License Revocation Proceedings*, Exhibit 6. The Bureau ultimately dismissed the finder's preference request, but not on its merits, but rather on the procedural grounds that the frequencies involved were no longer subject to the finder's preference program. *Id.* The Bureau nonetheless never followed up on the information presented to it that Killian had never constructed his station. The Bureau later processed and granted the assignment of the authorization to Nextel without demanding the certifications of timely construction typical in such applications. We once again see that the Bureau's claimed "obligation" to *sua sponte* investigate matters upon receipt of information and its claimed "statutory obligation" not to grant applications if it has information preventing the requisite Section 308(a) finding, are things the Bureau applies rigidly to Sobel but conveniently ignores when it comes to Kay's enemies. We also once again see the Bureau ignoring and violating its own rules and its statutory obligations, and thereby permitting a witness against Kay to be unlawfully enriched by the sale of an invalid authorization.

IV. BUREAU MISCONDUCT IN THE KAY PROCEEDING

42. The Bureau demurs to Section IV the *Request* on the grounds that Sobel's allegations of Bureau misconduct in the Kay proceeding should be resolved in the Kay proceeding and are not properly raised here. *Opposition at ¶¶ 8-9, 25.*¹¹ As stated earlier, however, these allegations are offered by Sobel not as they relate directly to the merits of Kay's proceeding, but rather as evidence of Sobel's claim of discrimination. The crux of the charge is that Sobel, a friend and business associate of Kay, has been singled him out for adverse discriminatory treatment vis-à-vis Kay's enemies because of the Bureau's bias against Kay.

¹¹ The Bureau has consistently opposed, on relevancy grounds, every attempt by Kay to conduct discovery into such matters. It is therefore meretricious for the Bureau to object to the presentation of the issues here on the grounds that they should be raised in the Kay proceeding.

Evidence that the Bureau has acted improperly and unlawfully in its prosecution of the Kay proceeding is thus material and relevant to Sobel's charge of improperly selective prosecution.

A. The Bureau's Prejudgment of Kay

43. The Bureau denies that the harsh tone and brutal tone of its initial communication to Kay indicates that it had already prejudged Kay before it sent the Section 308(b) request. *Opposition* at ¶ 24. The Section 308(b) contained language placing Kay's basic qualifications in issue and threatening him with criminal prosecution. The Bureau attempts to understate the significance of this, arguing: "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." *Id.*¹² First, the Bureau offers no evidence to support this statement, *i.e.*, examples of Section 308(b) letters in which the Bureau forcefully questions the qualifications of a licensee and threatens criminal prosecution based solely on complaints, and prior to any attempt to informally communicate with the target regarding the complaints. Second, the letter here in question was not issued by the Enforcement and Consumer Information Division of the Wireless Telecommunications Bureau, but rather by the Licensing Division of the Private Radio Bureau. The letter is atypical, at least in the experience of Kay and Sobel. Third, and most important, the Bureau's response grossly understates the aggressive nature of the letter. The letter did not merely advised Kay that the

¹² Neither of the two 308(b) requests sent by the Bureau to Sobel on January 19, 1996, *Request* at Exhibit MDS-3, Attachment No. 4, and on June 11, 1996, *id.*, Attachment No. 9, contained any such language. This means either that the above-referenced assertion by the Bureau is a misrepresentation, or that the Bureau in fact did not consider Sobel's qualifications to be at issue. This is interesting. The Bureau defends seeking revocation of *all* Sobel's licenses solely and exclusively for an alleged unauthorized transfer of control of *some* of them, and it claims that it believed there was such an unauthorized transfer of control as early as December of 1994 when the *Kay HDO* was adopted. And yet, in January of 1996 and again in June of 1996 the Bureau consciously chose *not* to include in Section 308(b) requests to Sobel language that it now claims it routinely includes "[a]s a matter of standard practice, whenever an investigation could potentially affect a licensee's qualifications."