

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.<sup>22</sup>

**E. THE BUREAU'S USE OF IMPROPER AND UNRELIABLE INVESTIGATION METHODS**

**1. Failure to Verify Accusations of Biased Informants**

It is bad enough that Hollingsworth initiated enforcement proceedings and sought to impose severe sanctions on Kay without adequate supporting evidence. What is far worse is the length to which Hollingsworth was willing to go in attempting to buttress his nonexistent case after the fact. In this section it will be shown that Hollingsworth, in his pursuit of Kay, solicited from potential witnesses against Kay sworn statements containing assertions that Hollingsworth knew or should have known were false.

In October of 1994 and again in December of 1994, Hollingsworth traveled to California where he conducted one or more interviews with Harold R. Pick ("Pick"), an FCC Part 90 licensee and a competitor of Kay. Hollingsworth thereafter prepared a written statement based on such interview(s). Attachment 31 is a copy of a January 10, 1995, from Hollingsworth

---

<sup>22</sup> The Bureau erroneously asserts there is "no evidence whatsoever" in support of the charge that the Bureau staff interfered with a criminal investigation of Pick for theft of service from Kay's repeater. *Bureau's Sobel Opposition* at ¶ 23. This is simply not true. Set forth above is clear and fully documented evidence that the police sloughed off a clear case of criminal theft of service after being provided by the Bureau with certain "confidential information" regarding the Bureau's investigation of Kay. *Request* at ¶¶ 69-74. While the causal link may be circumstantial, it is nonetheless compelling. The information relating to just what was communicated between the Bureau and the police is uniquely within the control of the Bureau. Only by a full investigation can the matter be properly evaluated. Moreover, if the Bureau were as innocent in this incident as it claims, why was Kay's complaint regarding this serious matter totally ignored by the Commission's field personnel?

transmitting to Pick "a statement based on our interview with you in October concerning the James Kay matter." Attachment 32 is a copy of the statement as modified and executed by Pick on January 19, 1995. The statement was offered by Pick "under oath in connection with an official proceeding before the Federal Communications Commission." Attachment 32 at p. 1. It is clear from the content of the statement and Hollingsworth's transmittal letter that the proceeding referred to is WT Docket No. 94-147, *i.e.*, the license revocation proceedings against James Kay.

The Pick statement contains the following passage:

Sometime soon after that three of my repeaters were stolen off of Saddle Peak. I put word out to as many people as I could that my repeaters had been stolen, and Dan Magro, of Portable Clinic, a radio shop, called me and said he had bought 3 repeaters very cheaply and they appeared to be mine. I got my repeaters back and reimbursed Magro.

Attachment 32 at p. 3.<sup>23</sup> The above-quoted passage appears to have been part of the original statement as drafted by Hollingsworth.<sup>24</sup> It appears Pick changed only one word in the original draft of the above-quoted passage.<sup>25</sup> Thus, Hollingsworth drafted the passage and asked Pick to swear to it.

The obvious intention of the passage is to imply that the repeaters were stolen by Kay. There is no other reasonable explanation why the incident should be reported in the middle of a statement prepared specifically for the Kay revocation proceeding--a statement containing

---

<sup>23</sup> In the paragraph immediately preceding the quoted passage, it is alleged that Kay made a threatening telephone call to Pick's mother in 1992. The quoted passage then begins with the phrase, "Sometime soon after that ...". This is either a clerical error or Pick is confused as to the dates insofar as the documentary evidence discussed more fully herein establishes that the theft to which Pick refers occurred in June of 1991.

<sup>24</sup> The Bureau attempts to diminish the significance of the matter by characterizing it as merely "a single passage in a paragraph of a witness statement." *Bureau's Sobel Opposition* at ¶ 37. That so-called "single passage," however, falsely accuses Kay of a felony, and Hollingsworth was all too ready to accept it as gospel without any attempt at verification or corroboration.

numerous other assertions and allegations of misconduct by Kay. The quoted passage, in the context in which it was offered,<sup>26</sup> is nothing short of an assertion that Kay committed the felonious act of stealing Pick's repeaters from Saddle Peak. But Pick knew and Hollingsworth should have known that Kay had nothing to do with the theft.

Attachment 33 is a copy of a July 29, 1991 letter from Pick to Terry Fishel, a subordinate of Hollingsworth in the FCC's Gettysburg office. It is clear from this letter that the theft in question occurred on or about July 27, 1991 and that Pick initially suspected Will Martin (of Montebello, CA) and/or Van Williams (of Santa Monica, CA). A few months later Pick learned that the perpetrator was actually one James Allen Beck (of Santa Monica, CA). Beck was charged in connection with the theft and thereafter made a plea arrangement with prosecutors. Attachment 34 is a copy of the transcript of the September 21, 1991 plea hearing in Criminal Case No. SA007943 in Santa Monica Municipal Court. Beck entered a guilty plea to, *inter alia*, a felony charge of receiving stolen property. A condition of the plea arrangement was that Beck make restitution to Pick. Because of his status as a victim in the criminal case, Pick received a "Notice of Sentencing Hearing," advising him of Beck's conviction and notifying him of the sentencing hearing scheduled for October 17, 1991. *See* Attachment 35.<sup>27</sup>

---

<sup>25</sup> An examination of the statement reveals that changes or edits were made either by hand or by typewriter. Even when made by typewriter, however, the modifications are obvious. The only apparent change from the original draft in the quoted passage is in the second sentence where the word "he" has been typed through and the word "I" has been inserted in its place.

<sup>26</sup> The entire statement is replete with allegations and accusations against Kay. The paragraph immediately preceding the quoted passage includes allegations that one of Kay's customers threatened Pick and that Kay made a threatening telephone call to Pick's mother. Immediately following the quoted passage is an assertion that Kay intimidated a Pick customer. The inclusion of the quoted passage at all and certainly its juxtaposition were clearly intended to convey that Kay stole the repeaters.

<sup>27</sup> The notice appears to have a clerical error in that the case number is given as SA007743 rather than SA007943.

As early as October of 1991, and at all times since, Pick has known that the theft of the repeaters from Saddle Peak was perpetrated by James Allen Beck, not by Kay. Even before learning that Beck was the thief, Pick suspected persons other than James Kay, namely, Messrs. Martin and/or Williams. Nevertheless, in October of 1994 Pick made statements to Hollingsworth suggesting that James Kay stole the repeaters. In January of 1995 Pick executed a sworn statement, under penalty of perjury, containing statements intended to implicate James Kay in the theft. Pick thus knowingly made false statements to a government agent in connection with an official investigation, and he later committed perjury by knowingly repeating the statements in writing and under oath. At a minimum Pick's conduct constitutes misrepresentation to and lack of candor with the Commission.

Hollingsworth relied upon the false statements of Harold Pick in building a case against James Kay. Hollingsworth later prepared a written statement, to be sworn to under oath by Pick, in which he included those same false statements. Hollingsworth's reliance on Pick's assertions and his inclusion of Pick's false implications in the written statement were, at best, inexcusably negligent. If Hollingsworth had been seeking the truth, rather than merely accepting without question any and all "dirt" he could find on James Kay, he would have had every reason to be skeptical of Pick's assertions. Hollingsworth knew that Pick and Kay were fierce competitors. There was much regulatory litigation between the two pending before Hollingsworth's office. Hollingsworth thus knew that Pick was a biased witness with a strong incentive to falsely accuse Kay. Further, Pick had previously informed Hollingsworth's Gettysburg office in writing that he suspected persons other than Kay of the theft, *see* Attachment 33, rendering his later gratuitous implication of Kay suspect on its face. Pick was not an informant whose statements Hollingsworth should have accepted at face value. In point of fact, when Hollingsworth prepared

the statement for Pick to sign, he was already on notice that Pick had submitted a false sworn declaration to the Commission supported by falsified documents. *See* Section III.A(2), above, ¶¶ 32-37.

Any competent and open-minded investigator would have questioned and further tested the veracity of the theft allegation before incorporating it into a sworn statement. One might expect even a biased investigator to have at least sought corroboration. With only minimal checking Hollingsworth would have discovered Pick's letter in his own files, and he would also have discovered the police file and the public record of the criminal proceeding that brought James Allen Beck to justice for the offense that Pick was attempting to lay at Kay's feet. But Hollingsworth, assuming *arguendo* he is competent, is certainly not open-minded when it comes to Kay. His litmus test for evidence is not whether it has any basis in fact, but rather whether it paints Kay in a bad light. If it satisfies that threshold, Hollingsworth gives no further consideration to whether the information is reliable; he simply proceeds to use it in an attempt to destroy Kay.

The Bureau urges that the Pick statement is a "meaningless document" because the Bureau had not affirmatively used it and does not intend to call Pick as a witness. *Bureau's Sobel Opposition* at ¶ 38. This entirely misses the point. There is no disputing that the statement was obtained for possible use against Kay; this much is clear from the statement itself and from Hollingsworth's transmittal letter to Pick. We have only the Bureau's unverified word that "Mr. Hollingsworth had Harold Pick swear to the statement in writing, and the Bureau then evaluated the statement and decided not to use it." Absent a full investigation, there is no way of knowing how this and other mistaken, inaccurate, false, and even perjured information collected by Hollingsworth from all the informants against Kay (some of them current hearing witnesses) have been used internally to fuel the Bureau campaign against Kay. In response to Kay's

protestations of innocence and accusations of Bureau misconduct, Hollingsworth can conveniently point to his arsenal of false information about Kay to mollify his superiors and colleagues by demonizing Kay.

The Bureau attempts to deflect responsibility from Hollingsworth, arguing that "[t]he statements in question were sworn to by Pick, not Hollingsworth." *Bureau's Sobel Opposition* at ¶ 39. But this leaves unanswered the question why Hollingsworth was soliciting a sworn statement from an individual who had already been conclusively demonstrated, less than three months earlier, to have submitted a false declaration and forged documents to the Commission. *See* Section II.B.1(b) of this pleading, above. Hollingsworth apparently was the primary investigator against Kay, and Hollingsworth is known to have had direct contact and involvement with virtually every witness and potential witness against Kay, including personal meetings during two trips to California by Hollingsworth. In these circumstances, that the Bureau would so cavalierly dismiss the slovenly manner in which he handled the Pick witness statement is itself confirmation that the Bureau is willing to trample the truth in its quest for Kay's head.

**2. Fraternalization With Witnesses and Failure to Independently Test the Credibility of Multiple Informants**

Hollingsworth went to California in 1994, ostensibly to conduct an impartial investigation of allegations against Kay. He knew that most of the informants he met with were business competitors of Kay, did not like Kay, and that many of them had a past and ongoing regulatory litigation with Kay pending before the Commission. In short, Hollingsworth knew, going in, that he was dealing with informants who were biased. Had he been truly interested in learning the truth, therefore, he would have taken steps to test the veracity and accuracy of the information provided. He would have done so in order to insure the integrity of the Commission's enforcement and investigation procedures.

It is utterly amazing, therefore, that Hollingsworth met with at least four informants and potential witnesses against Kay (Harold Pick, Gerard Pick, Kevin Hessman, and Roy Jensen) in a cozy informal setting over dinner at Pick household. The details regarding this meeting are recounted in the attached transcripts of the depositions of Kevin Hessman and Roy Jensen. Attachments 36 and 37. Rather than interviewing witnesses individually to learn what they knew, Hollingsworth joined them in an informal roundtable in which those present shared gossip about Kay, even including outrageous rumors that Kay was responsible for a murder. Only after this opportunity for the informants to compare notes and synchronize their stories did Hollingsworth perform the follow-up task of preparing witness statements. These are were not the actions of an impartial truth seeker; rather, this was the method employed by a renegade bureaucrat determined to find enough dirt to bring Kay down, regardless of the truthfulness of those bringing him the dirt.

Even if Hollingsworth's investigation training was limited to watching reruns of NYPD Blue, he surely must have known that interviewing witnesses together in a common session compromises the integrity of the information given--particularly when the witnesses have a common interest in attacking the subject of the investigation. It is indeed ironic that the Bureau finds absolutely no problem with this practice, and yet never misses an opportunity to demand that Kay and Sobel be sequestered during official questioning.<sup>28</sup> As will be seen in the following section, however, Hollingsworth brought to this investigation far, far worse than a mere sloppy disregard for the reliability of the information he collected.

---

<sup>28</sup> During depositions of Kay and Sobel in this proceeding, and during both the depositions and the trial of the Sobel proceeding (WT Docket No. 97-56) the Bureau sought to have Kay and Sobel sequestered.

## F. COACHING AND SOLICITING FALSE STATEMENTS FROM POTENTIAL WITNESSES

### 1. The Richard Lewis Witness Statement

Hollingsworth met with Mr. Richard L. Lewis ("Lewis") at the FCC field office in Cerritos, California, in late 1994, probably in December, but possibly in October.<sup>29</sup> Lewis had been Transportation Manager for the Fullerton (California) Elementary School District for ten years from April of 1983 to April of 1993. Following this meeting Hollingsworth<sup>30</sup> prepared a written sworn statement for Lewis. Attachment 38 is a copy of the statement as reviewed and executed by Lewis on February 16, 1995. The statement was offered "under oath in connection with an official proceeding before the Federal Communications Commission,"<sup>31</sup> Attachment 38 at p. 1. Hollingsworth had Lewis "swear under penalty of perjury before a duly licensed notary public that th[e] statement was true and accurate to the best of [his] knowledge and belief." *Id.* at p. 3.

Less than a month after the statement was executed, the Bureau formally identified Lewis as one believed "to have knowledge of instances of deliberate and/or malicious interference" by Kay, *Wireless Telecommunications Bureau's Response to Kay's First Set of Interrogatories* (served on March 8, 1995 in WT Docket No. 94-147) at p. 16, Response 4-1, and "to have direct knowledge of relevant facts relating to instances of abuse of process" by Kay. *Id.* at p. 19, Response 5-1.<sup>32</sup> When that is considered in light of the content of the statement, it is apparent

---

<sup>29</sup> Lewis believes the meeting took place in late January or early February 1995. On information and belief, however, Hollingsworth made two trips to California relating to the Kay investigation and/or hearing, one in October of 1994 and the other in December of 1994. It is therefore most likely that Hollingsworth's meeting with Lewis occurred during the December visit.

<sup>30</sup> On information and belief, Hollingsworth prepared the statement, although it may have been prepared by Anne Marie Wypijewski (of the Bureau's Gettysburg office) or one or more other Bureau staff members under Hollingsworth's direction and supervision.

<sup>31</sup> It is clear from the content of the statement that the proceeding referred to is WT Docket No. 94-147, *i.e.*, the license revocation proceedings against James Kay.

<sup>32</sup> Attachment 39 includes excerpts from the *WTB Interrogatory Responses*, including the pages where references are made to Lewis.

that the Bureau intended to rely on testimony of Lewis against Kay. Hollingsworth suggests through the Lewis statement that: (a) a typical conflict between validly licensed users operating on a shared channel was "deliberate and/or malicious interference" for which Kay was somehow responsible, (b) Kay improperly and without authority or consent converted the School District's license from a "GP" to a GB"; and (c) Kay improperly and without authority or consent converted the School District's license from a community repeater (FB4) to an SMR end user authorization.

As explained in detail below: (a) Lewis had no complaint with Kay and did not initiate communications with the Bureau about Kay; (b) Lewis was not aware of and did not have independent belief of the charges against Kay prior to being "coached" by the Bureau; (c) even now Lewis does not even understand the ostensible significance or consequences to the School Board of the actions attributed to Kay; (d) the allegations in the statement of improper conduct by Kay were not matters known to Lewis but rather information that was provided to him by the Bureau; and (e) Hollingsworth knew or should have known that the information he fed to Lewis and asked Lewis to recite under oath was false and inaccurate.

Attachment 40 is the transcript of the November 7, 1996, deposition of Lewis.<sup>33</sup> Lewis's deposition testimony was given under oath, on the record, and with legal counsel for the School Board present.<sup>34</sup> It reflects follow-up questioning by both counsel for Kay and counsel for the School District to get in-depth clarification of the matters discussed. The transcript therefore represents a much more reliable and detailed account of Lewis's knowledge, understanding, and

---

<sup>33</sup> The deposition was taken in state civil litigation, *James A. Kay, Jr. v. Edward Alan Cooper*, Orange County (California) Superior Court, Case No. 763-538. The attached copy is a "Min-U-Script"® version in which several pages of the original transcript are condensed to fit, in unabridged form, to fit on a single sheet. For purposes of greater precision, therefore, the citation references used herein are to the original transcript page numbers, not the actual Attachment 40 page numbers.

<sup>34</sup> Lewis was not represented by counsel at the Cerritos meeting with Hollingsworth. Attachment 40, Transcript at p. 61.

belief than does the witness statement written for him by Hollingsworth on a purely *ex parte* basis. In every significant respect, Lewis's deposition testimony contradicts the allegations set forth in the statement, and is at complete odds with the impression given by the Hollingsworth-prepared statement and with the Bureau's subsequent under oath<sup>35</sup> representations of Lewis's knowledge.

Lewis was questioned about the facts and circumstances surrounding the preparation of his written statement to the FCC and the matters recounted in it. The statement is the product of a meeting between Lewis, Hollingsworth, and one other gentleman from the FCC whose name Lewis can not remember. Lewis testified as follows:

- Q. I would like to ask you a question about the language and wording of this particular [statement]. Is this something that you did exclusively on your own and wrote out, or did someone else help you write it? What were those reasons?
- A. This was -- I -- it was done through conversation with the FCC.
- Q. Can you recall approximately how many people at the FCC you talked to?
- A. I believe two.
- Q. One was Mr. Hollingsworth?
- A. Yes.
- Q. And the other was?
- A. I have no recollection of the name.
- \* \* \*
- Q. ... Did they write this out for you or type it out for you?

---

<sup>35</sup> In the *WTB Interrogatory Responses* the Bureau asserted that Lewis had "knowledge of instances of deliberate and/or malicious interference" by Kay and "direct knowledge of relevant facts relating to instances of abuse of process" by Kay. Hollingsworth and William H. Kellett, an FCC staff attorney under Hollingsworth's supervision, both "declare[d] under penalty of perjury that the [*WTB Interrogatory Responses*] are true and correct to the best of our information, knowledge, and belief." Attachment 39 at 5.

- A. They typed it out and sent it to me at a later date. I reviewed it and then mailed it back to them with my corrections.

Attachment 40, Transcript at 48.

FCC personnel initiated the contact with Lewis. After a couple telephone conversations, Lewis was asked to meet with Hollingsworth in Cerritos, something he did strictly at the request of the FCC. *Id.* at 59-60. The statement, as written, gives the overall impression of being a sort of complaint made by Lewis to the FCC regarding Kay's actions. But Lewis testified that he does not recall talking to anyone at the FCC regarding this matter prior to the Bureau-initiated contact in 1994, a time *after* he left the School District and was no longer responsible for its communications system. *Id.* at 30. Prior to his departure from the School District in April of 1993, Lewis never discussed the matter with Mr. Edward Alan Cooper, his successor, nor did he direct Cooper to make any complaints or reports to the FCC regarding the matter. *Id.* at 58-59.

The Lewis statement relates that the School District began experiencing a problem with its radios in January of 1992. A company identified in the statement as Hyster (actually Hyster Forklift) was frequently heard on the channel. Motorola, with whom the School District had its repeater service, appeared unable to solve the problem. When Mr. Don Kirk of Newport Radio called on Lewis to sell him some radios, Lewis asked Kirk to look into the problem. Attachment 38 at 1. Kirk investigated and reported back that Hyster appeared to be validly operating on a repeater licensed on the same channel more than 70 miles away, but was overriding the signal of the Motorola repeater the School District was on because it was operating at higher power. *Id.* at 1-2. Lewis was unsuccessful in getting Motorola to solve the problem, so he asked Kirk for further assistance. Kirk then enlisted Kay's assistance. *Id.* at 2. The solution eventually worked out between Lewis, Kirk, and Kay was to have the School District's service transferred from the Motorola community repeater to an SMR station to be owned and operated by Kay at nearby Santiago Peak. *Id.*

By including these facts in the Lewis statement, a declaration prepared for and in connection with the Kay license revocation proceedings, Hollingsworth is attempting to suggest that the problem the School District experienced with Hyster was deliberate and malicious interference and that Kay was somehow responsible.<sup>36</sup> Moreover, the statement implies that Lewis believed as much and reported this to the Commission. But these are false impressions, for Lewis testified as follows regarding the alleged interference:

Q. So you actually did hear the interference that you have discussed with us, correct?

A. Yes.

Q. Did you come to know what the reasons for it were at some point in time?

A. Yes.

Q. What were those reasons?

A. We were told by another individual that there was a -- our frequency had been within only a 75-mile radius

Q. So he didn't lead you to believe, then, that the additional users on the same channel that the school district was on were there unlawfully?

A. No, he did not.

Attachment 40, Transcript at 18-19. The so-called interference that the School District experienced in January of 1992 was actually nothing more than activity on the same channel generated by a legitimate user of a validly licensed repeater located more than 70 miles from the repeater serving the School District, but at greater power. *Id.* at 16-17. Hollingsworth, as a management-level official in the FCC office that issues these licenses, had constructive notice of this fact. He also must have had actual knowledge of it based on his telephone conversations and interview with Lewis. Hollingsworth nonetheless drafted a sworn statement suggesting that the

---

<sup>36</sup> The Bureau specifically identified Lewis as one with "knowledge of instances of deliberate and/or malicious interference" by Kay. *See* footnote 20, *supra*.

Hyster incident was deliberate interference by Kay, and Hollingsworth himself thereafter swore, under oath, that Lewis had actual knowledge of deliberate interference by Kay.

The Lewis statement then has the following passage:

... I got a call from James Kay who said the same things Kirk had told us and said he could take care of the problem. Mr. Kay said that he and Don Kirk owned a repeater we could use but that we would have to change our license to switch from Majeska Peak to his peak. Don Kirk then set it up so we would use their repeater for one year.

The paperwork for the service was handled by a woman named Agnes Pennington. I signed the repeater agreement and later got a new license in the mail. I didn't look at it at the time, but merely put it in the file without noticing it had been changed from a GP (special emergency) to a GB (conventional business) license. I know that when I signed up for the new repeater service I never intended to change the FCC license, and I never authorized Ms. Pennington or Don Kirk to make the change. I did sign the application that switched us from a licensee to end user, but I didn't realize the consequences of what I had signed. I only intended to move the repeater service from one peak to another to clear up the interference problem, and Don Kirk told me that it wouldn't affect the license.

Attachment 38 at 2. Hollingsworth had Lewis state, under oath, that Kay was responsible for (a) changing the School District's license from a GP to a GB without Lewis's knowledge, and (b) improperly converting the School District's license to an end user authorization. If Hollingsworth did not know that both assertions were entirely false, he is unconscionably incompetent.

Agnes Pennington is not a Kay employee or agent. Rather, she is an independent application preparation consultant who handled the School District's licensing before Kay became involved. Kay has never relied on Pennington to obtain agreements or applications on his behalf. If Hollingsworth had simply contacted Pennington, he would have learned this. Kay did not become involved with Lewis or the School District until 1992, after the School District began to hear Hyster on the channel. The change of the license from a GP to a GB occurred before that, apparently in 1991. Attachment 41 is a copy of the School District authorization issued on May 26, 1987. This appears to have been issued a "GP" or Public Safety / Special Emergency Radio Service authorization. Attachment 42 is a series of documents showing that, in August of 1991, Pennington prepared a modification application on behalf of the School District.

As indicated in those documents, Pennington prepared the application as a GP (Public Safety / Special Emergency), but submitted it for frequency coordination to NABER (The National Association of Business and Educational Radio). NABER was not the appropriate frequency coordinator for GP applications. Apparently NABER changed the "GP" to a "GB" before tendering the application to the FCC. The Commission issued the modified authorization as a GB. Attachment 43 is a copy of the modified authorization, bearing the GB indicator. It was issued on November 13, 1991, well before Kay first became involved with the School District. The distinction between "GP" and "GB" would have been of little practical consequence to the School District. Moreover, while Pennington appears to have erred by sending a GP application to NABER, the resulting correction to GB was ironically proper because under applicable regulations the School District was not eligible in the Public Safety or Special Emergency Radio Services.

Clearly, Kay was not responsible for changing the authorization from a GP to a GB. This occurred before Kay's involvement, and this was information in the Commission's files that could have been easily determined by Hollingsworth. Had this been a matter of concern to Lewis, which he had raised in a complaint to the Commission accusing Kay of having improperly made this change, Hollingsworth's failure to ascertain the truth would be merely negligent. But Lewis did *not* initiate a complaint or raise a concern. In fact, he did not even know or understand anything about this matter, or have any concern about it, until coached by Hollingsworth to implicate Kay. Consider the following excerpts from Lewis's deposition testimony:

- Q. On page 2, paragraph 2 [of the Lewis Witness Statement] it indicates that you put it in the file without noticing that it had been changed from a GP, special emergency license, to a GB, conventional business license. Where did you get that particular piece of information?
- A. That was during the conversation with Mr. Hollingsworth.

Q. Did he ever show you any documents to substantiate the fact that it had been a GP, as in Paul, license?

A. Not to my recollection.

Attachment 40, Transcript at 39-40. The deposition transcript also reveals that Lewis did not then, and does not now, even understand the change or its significance. *Id.* at 55-55. In fact, Lewis does not even know whether or not the School District ever had a GP license:

Q. What we're seeking is any information you have as to whether or not the a GP license was ever held by the school district.

A. I don't -- I don't know.

Q. Did you rely upon the information given to you by the FCC, then, in making this statement about the change from GP to the GB?

A. Yes.

*Id.* at 57.

Hollingsworth knew or could easily have determined that the conversion of the School District's license from a GP to a GB had nothing whatsoever to do with Kay, and in fact occurred before Kay even became involved with the School District. He nonetheless suborned from Lewis (a man who was not theretofore aware of the change and had no understanding of its significance) an under oath accusation that Kay had improperly engineered the change without his knowledge. So anxious to smear Kay is Hollingsworth that he has Lewis accusing Kay of (a) something Kay clearly did not do, and (b) something that, in any event, would have been entirely proper if Kay had done it, namely, correcting an improperly issued GP authorization to the proper GB category.

A similar pattern emerges regarding the suggestion that Kay acted improperly in converting the School District's license from a community repeater to an end user license.

Consider the following:

Q. [reading from the Lewis Witness Statement]: "I did sign the application that switched us from a licensee to an end user, but I didn't realize the

consequences of what I had signed." My question here is: What are the consequences you were concerned about at the time you made this statement?

A. What I -- with discussions with the FCC, what was brought to my attention was that the license that we originally had with them. We were a licensee originally and with the license, it was changed to sign over from Modjeska to Santiago. We became an end user at that time.

Q. Was there someone that told you that that was a bad thing that had happened?

A. I don't remember.

Q. Did someone come to you and indicate that you had been in some way snookered out of a license that was very important or valuable?

A. Yes, that was the discussion with the FCC.

Q. Can you recall who it was at the FCC that said that?

A. No, I cannot.

Q. Let me ask you this question. Are you sure it was a conversation that you had with someone at an FCC location?

A. Yes.

Q. How is that?

A. It was -- when I went up to -- met with them at Cerritos.

*Id.* at p. 50-51.

Once again we see that Lewis had no information, knowledge, or even belief of any wrongdoing by Kay, but was rather coached by Hollingsworth to implicate Kay. Hollingsworth was almost certainly the one who fed Lewis the information at the Cerritos meeting, and Hollingsworth later prepared the sworn statement for Lewis. But Hollingsworth knew full well that Kay's conduct was not only proper, it was in fact required by FCC regulation. The School District held a community repeater authorization for Modjeska Peak. Because Motorola, who operated the repeater, was unable or unwilling to resolve the service problems, the School District sought out another solution. Kay was willing to provide them with SMR service from

nearby Santiago Peak. But this meant two things under then-applicable FCC regulations: (1) the School District would not be permitted to maintain its Modjeska Peak authorization because it was discontinuing operations from that site, and (2) the School District would require an end user license in order to legally receive service via Kay's Santiago SMR. Kay therefore did the logical and entirely appropriate thing--he prepared an application to convert the School District's community repeater license to an end user authorization. Attachment 44 is a copy of Kay's February 17, 1992 letter transmitting the completed application to Lewis for his review and signature. A copy of the completed FCC Form 574 as executed by Lewis is also included. It will be noted that Kay advised Lewis to "make a photocopy of the application and keep the copy for your records," Attachment 44 at 1, something he surely would not have done had he been attempting to improperly convert the authorization in some way. The application form is clearly marked "GB" at Item 20 (Radio Service), and it clearly states "CONVERT TO END USER" as one of the purposes of the application. *Id.* at 2.

Contrary to the impression given in the Hollingsworth-prepared written statement, Lewis does not believe he was wronged by Kay:

Q. Do you ... believe that Mr. Kay did anything wrong, improper or unethical in his business dealings with you? ...

A. No.

Attachment 40, Transcript at 56-57. Nevertheless, Hollingsworth told Lewis that Kay had improperly converted the School District authorization from a GP to a GB and from a community repeater license to an end user authorization, information Hollingsworth knew to be patently false. Hollingsworth then prepared a written statement containing the inaccurate information and solicited Lewis's under-oath signature on the statement for the purpose of destroying Kay. Such reprehensible conduct by one who is ostensibly charged with protecting the public interest can not be tolerated.

The fact that the Bureau does not intend to call Lewis as a witness, *Bureau's Sobel Opposition* at ¶ 40, is irrelevant, and the assertion that the Bureau has not used the Lewis statement, *id.*, is impossible of verification absent the investigation sought by Sobel. What is highly relevant, however, is that Hollingsworth, the chief investigator against Kay, was feeding a witness information that he knew or should have known to be false, that the witness had no independent knowledge, understanding, or belief of the matters prior to being so coached, and that Hollingsworth then asked the witness to swear to these matters under oath.<sup>37</sup> The issue here is not the probative value of the Lewis witness statement--it has none. Rather, the issue is that Hollingsworth's willingness to suborn such false sworn statements is compelling evidence of the bad faith with which the Kay revocation has been and continues to be prosecuted.

The Bureau argues as follows:

Mr. Lewis testified ... that he believed his written statement was true and correct. ... 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.

*Bureau's Sobel Opposition* at ¶ 40. Kay does not doubt Lewis's good faith, but there is no denying that his statement contained false assertions that were fed to him by Hollingsworth. Lewis's candor is not the issue--but the inaccuracies in his statement, and the way they came to be there, are evidence of bad faith on the part of Hollingsworth and the Bureau.

The Bureau tries to skirt the issue by claiming that it "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." *Bureau's Sobel Opposition* at ¶ 40. The Bureau of course offers no support for this self-serving assertion, but if it is true, the Bureau has

---

<sup>37</sup> The relevance of the Lewis statement is magnified by the facts that (a) Hollingsworth instigated and advocated the proceedings against Kay, and (b) Hollingsworth had direct contact with virtually every other complainant, informant, potential witness (including current hearing witnesses) against Kay, including personal meetings during two trips to California.

improperly withheld such information from Kay in discovery in WT Docket No. 94-147. Nor did the Bureau indicate any such information in the recent *WTB Statement*. Either there is no such information, in which case the Bureau has misrepresented the facts once again, or there is such information but the Bureau knows that disclosing it would show it also to be inaccurate, unreliable, and possibly perjured. This is simply another indication that the Bureau's interest is not in finding the truth and doing justice, but rather in sandbagging Kay.

Notwithstanding its retreat from using Lewis as a witness, and whether or not it has "other" information, the fact remains that the Bureau, by the sworn declaration of two of its attorneys, including Hollingsworth, represented that Lewis had information regarding intentional interference and abuse of process by Kay. *Request* at ¶ 86. His deposition made clear, however, that he had no such information beyond the false coaching he received from Hollingsworth. To this the Bureau's limp response is: "the Bureau's [interrogatory] answers were designed to put Kay on notice as to the universe of allegations against him." *Bureau's Sobel Opposition* at ¶ 40. But that is not the way the Bureau characterized its response at the time. The Bureau expressly stated, and two of its staff, including Hollingsworth, so swore under penalty of perjury, that Richard Lewis was "believed to have knowledge of instances of deliberate and/or malicious interference," *Wireless Telecommunications Bureau's Response to Kay's First Set of Interrogatories* (served on March 8, 1995 in WT Docket No. 94-147) at p. 16, Response 4-1, and "direct knowledge of relevant facts relating to instances of abuse of process." *Id.* at p. 19, Response 5-1.<sup>38</sup> Hollingsworth was the one who met with Lewis in Cerritos, so he must have known that Lewis had no such knowledge beyond that fed to Lewis by Hollingsworth. If the Bureau knew that Lewis lacked the attributed knowledge, then its interrogatory responses were

---

<sup>38</sup> The Bureau also falsely certified that Lewis had knowledge of abuse of process by Kay.

perjured.<sup>39</sup> If the Bureau is claiming that it learned later that Lewis lacked the attributed knowledge (hence, its decision not to use him as a witness), then the Bureau has failed to keep its interrogatory responses current. In either event, the bad faith toward Kay is obvious.

## 2. Unreliability of the Other Witnesses

Hollingsworth was the chief pre-designation investigator of Kay. He drafted the *HDO* that was ultimately adopted, he flew to California at least twice to interview witnesses, and he prepared written sworn statements for those he interviewed. We have seen that he makes no effort to verify information that could very easily be tested, resulting in his acceptance as true information that he should know to be false. *See* Section II.E.1, above. We have also seen that he employs investigation techniques that destroy the reliability and the integrity of the information collected. *See* Section II.E.2, above. We have even seen that he is willing to go so far as to prompt and coach witnesses to provide information that he knows to be false. *See* Section II.F.1, above.

Four of the key witnesses to be presented against Kay (Christopher Killian, Kevin Hessman, Roy Jensen, and Carla Pfeifer) are known to have been interviewed by Hollingsworth and to have provided him with witness statements similar to those given by Pick, Lewis, and others. Kay has conclusively demonstrated the inaccuracy and, in some cases, even intentional perjury contained in those witness statements that he has been able to obtain. Kay firmly believes that he would be able to make a similar showing as to most, if not all, of the witness statements in the Bureau's possession. These are witnesses used by Hollingsworth to justify the *HDO* in the first instance, and these are witnesses on whom the Bureau still intends to rely at hearing.

---

<sup>39</sup> Inconsistently, the Bureau is now prosecuting a misrepresentation issue against Kay and seeks revocation as a sanction. Yet the Bureau believes that it, with impunity, can misrepresent to the Commission, to the Presiding Judge, and to the other parties to suit its own strategic litigation purposes. Equity demands that the Bureau not place itself above the law it seeks to impose on Kay.

It is ludicrous to move forward to a hearing in these circumstances. It has been overwhelmingly demonstrated that Hollingsworth's techniques were flawed, his impartiality compromised, and his integrity nonexistent, at least insofar as Kay is concerned. Hollingsworth has potentially contaminated the entire body of evidence against Kay. The Bureau, however, will not even acknowledge that there is a problem, much less investigate it. But this is not a matter as to which the Commission may simply accept the Bureau's assurance that all is well. This is a very serious problem that must be brought to light and examined by an impartial third party. Keeping these matters swept under the rug condemns Kay to a total deprivation of due process and denies him any hope whatsoever of getting a fair trial.

### **III. RELIEF REQUESTED**

#### **A. PRIMARY REQUESTS FOR RELIEF**

##### **1. Request for Investigation**

Kay asks the Commission to conduct an investigation into the facts and circumstances surrounding the apparent irregularities, improprieties, and illegalities in connection with the pre-designation investigation, the designation, and the prosecution of the captioned proceeding.<sup>40</sup>

Section 403 of the Communications Act of 1934, as amended, 47 U.S.C. § 403, gives the Commission the requisite statutory authority to conduct the requested investigation. Further, Section 1.1 of the Commission's Rules provides:

The Commission may on its own motion or petition of any interested party hold such proceedings as it may deem necessary from time to time in connection with the investigation of any matter which it has power to investigate under the law, or for the purpose of obtaining information necessary or helpful in the determination of its policies, the carrying out of its duties or the formulation or amendment of its rules and regulations. For such purposes it may subpoena witnesses and require the production of evidence. Procedures to be followed by the Commission shall, unless specifically prescribed in this

---

<sup>40</sup> A similar investigation was requested in the *Revised Request for Inquiry and Investigation* submitted by Marc Sobel d/b/a Airwave Communications on February 27, 1998, in connection with WT Docket No. 97-56. The Commission may find it appropriate and efficient to consolidate the two investigations insofar as they share many common issues.

part, be such as in the opinion of the Commission will best serve the purposes of such proceeding.

47 C.F.R. § 1.1. In these circumstances, the Commission would be derelict if it did not invoke these powers.

## 2. *Sua Sponte* Reconsideration of the Hearing Designation Order

Kay requests that the Commission, on its own motion, reconsider and set aside the *Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture* (“*HDO*”), 10 FCC Rcd 2062 (1994). In a situation such as this, where there is *prima facie* evidence of irregularities, improprieties, and even potential illegalities in the pre-designation phases of a hearing proceeding, common sense as well as procedural due process considerations demand that the *status quo ante* be restored.

Setting aside the *HDO* is further justified because, had the Commission been presented with all the relevant facts and circumstances in December of 1994, it likely would not have adopted the *HDO*. The presentation of the *HDO* on inadequate or improper grounds, or based on improper collateral motivations, is an abuse of Commission process in addition to an affront to the due process rights of the accused. Kay respectfully submits that there is *prima facie* evidence that at least some members of the Bureau staff are responsible for just such an abuse of process in this case. At worst, they were for some inexplicable reason, compelled to use the weight and authority of their official office to harass Kay. Giving them the benefit of the doubt, they were perhaps blinded by an erroneous belief that Kay was the Devil Incarnate, and determined that even procedurally improper means were justified by the ends. In either case, they caused the Commission to adopt an *HDO* that, had it been properly and impartially briefed, it would not have adopted.

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. The *HDO* provides an excellent example of the degree of responsibility that rests with the Bureau in this regard.

Hollingsworth, then Deputy Chief of the Licensing Division of the Private Radio Bureau (which later became the Wireless Telecommunications Bureau) drafted the *HDO* and recommended it to his superiors within the Private Radio Bureau in September of 1994. The Commission later adopted the *HDO* following Hollingsworth's draft, word for word, even down to a misstatement of the name of Kay's legal counsel at the time.<sup>41</sup>

The Commission may have adopted the *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. The Bureau thus abused the trust placed in it by the Commission. Of course, the Commission is ultimately responsible. The injury suffered by Kay (and from which he seeks relief) is just as real whether it was done by the Bureau acting as an agent for the Commission, or by the Commission acting directly.

---

<sup>41</sup> The Hollingsworth memorandum incorrectly named Kay's counsel as "Dennis K. Brown," Attachment 1 at p. 5, ¶ 13, although the correct name is "Dennis C. Brown." The error was duplicated in the *HDO*.

A further reason to set aside the HDO is to facilitate a resolution of this matter without a further expenditure of resources or needless litigation. While Kay firmly denies the false charges against him, he is nonetheless desirous of settling this matter through negotiation with Commission staff. A settlement would benefit both parties and would serve the public interest. It would lead to a prompt conclusion of this matter which otherwise is likely to remain in litigation in hearing, on Commission review, and in subsequent appeal and other potential forms of judicial review for years to come even if the Bureau were to prevail on one or more of the designated issues. This is an unnecessary diversion of Commission staff and resources. In its current posture, however, any settlement of the case is difficult.<sup>42</sup> The ability to negotiate a settlement would be facilitated by restoring this matter to pre-hearing status.

**B. ALTERNATIVE REQUESTS FOR RELIEF**

**1. Stay of Proceedings Pending Investigation**

If the Commission does not set aside the *HDO*, Kay respectfully asks that all aspects of the proceeding be stayed pending completion of the investigation into this matter. To force Kay into a crucible resulting from a clearly improper investigation and based in large part on potentially tainted witnesses and evidence offends the common sense concept of fairness and violates the legal requirements of due process.

---

<sup>42</sup> Section 1.93(b) of the Commission's Rules and Regulations provides in pertinent part: "Consent orders may not be negotiated with respect to matters which involve a party's basic statutory qualifications to hold a license." 47 C.F.R. § 1.93(b). In normal circumstances it is understandable that the Commission would be reluctant to relax this requirement where it has reason to question the basic qualifications of a licensee. In this case, however, there is more reason to question the integrity of the pre-designation investigation that resulted in the challenge to Kay's qualifications. Neither the applicable law, the public interest, nor the Commission's enforcement policies would be adversely affected by withdrawing this matter from hearing status; indeed, restoration to pre-designation status is actually required in order to avoid or remedy violations of the law.

The courts have held that a stay is justified if the movant shows that: (1) it is likely to prevail on the merits of subsequent review; (2) it will suffer irreparable harm in the absence of a stay; (3) a stay will not injure other parties; and (4) a stay is in the public interest. *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). When the second, third and fourth factors strongly favor interim relief, a tribunal "may exercise its discretion to grant a stay if the movant has made a substantial case on the merits." *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). The analysis involves a balancing of these issues; thus, a stay may be justified by a showing of high probability of success and some injury, or vice versa. See *CUOMO v. United States Regulatory Commission*, 772 F.2d 972, 974 (D.C. Cir. 1985).

In this case, there is a strong showing on both probability of success and irreparable injury. Based on the showing made in the following portions of this pleading, there is substantial evidence of impropriety and potential illegality in connection with the pre-designation investigation of Kay, and there are substantial questions whether the resulting designation and prosecution of the hearing violate Kay's due process rights under the Communications Act, the Administrative Procedure Act, and the United States Constitution. This detailed showing is adequate to satisfy the probability of success element.

The irreparable injury to Kay in proceeding to hearing prior to an investigation and resolution of these matters is undeniable. The potential tangible injury in terms of the expense involved in mounting a defense and the potential loss of licenses and livelihood is substantial. But the potential intangible injury to Kay's due process rights is not quantifiable and definitely irreparable. Kay has rights, conferred by statute and the Constitution, to have this proceeding