

1 assigning personnel who would perform maintenance on the
2 station?

3 A Well, he'd know who was doing it. He knew me. He
4 knows Marc Sobel. He knew when we did anything with the
5 station because his office was all of 20 feet from mine
6 inside my offices.

7 You were there. He had the closed in cubicle
8 that's on our office floor space. He still has some of his
9 stuff there.

10 JUDGE CHACHKIN: What I am curious, if you know,
11 is this arrangement, radio system management and marketing,
12 to what extent is this used by other licensees?

13 THE WITNESS: I understand, to the best of my
14 knowledge, this is the standard boilerplate contract that
15 the law firm of Brown and Schwaninger used with all their
16 clients.

17 JUDGE CHACHKIN: When you say their clients, can
18 you give me numbers, some kind of figure as to what we are
19 talking about as clients, the number of clients that they
20 used this with?

21 THE WITNESS: I once was accidentally sent a
22 client list of Brown and Schwaninger, and I recall it
23 probably had 200, maybe 300, clients on it.

24 How many of those used this contract? I spoke to
25 some of their other clients that I've known over the years

1 and was aware that this contract was used with a number of
2 clients.

3 I had done this after the Commission decimated Mr.
4 Sobel over this contract, amongst other things, and they
5 were understandably very closed mouthed as to whether they
6 had this contract or not.

7 I understand there was a -- I was told that Brown
8 and Schwaninger had basically done the automotive equivalent
9 of a recall on all these contracts and rewrote them and even
10 notified all their clients if they had one of these
11 contracts it needed to be rewrote.

12 JUDGE CHACHKIN: So Brown and Schwaninger was the
13 one who prepared this contract for you, the language?

14 THE WITNESS: One hundred percent prepared by
15 them. They apparently used this with all their clients.

16 JUDGE CHACHKIN: Has the FCC ever said that this
17 type of contract is improper to any of the licensees that
18 you are aware of?

19 MR. KNOWLES-KELLETT: Your Honor, we argued the
20 precedent separately before the Commission, but except for
21 with Judge Frysiak, nobody looked at this contract.

22 There were other cases. There was a Motorola case
23 where they looked at some contracts, and they gave what I
24 would say was mediocre guidance about what was going on. We
25 argued that --

1 Q Okay, Mr. Kay. Please turn to WTB Exhibit 309.

2 MR. KELLER: I am sorry. Which exhibit?

3 MR. SCHAUBLE: 309

4 MR. KELLER: Thank you.

5 THE WITNESS: Yes.

6 BY MR. SCHAUBLE:

7 Q Is it correct that this is another end user
8 license issued in the name of Kevin Hessman, d/b/a Hessman
9 Security?

10 A Right. I told you we got him two licenses for two
11 different repeaters. I believe one was at Lukens, and one
12 was at Santiago. You're looking at the two of them.
13 Between the two of them, they covered the whole area.

14 MR. SCHAUBLE: Your Honor, can we go off the
15 record?

16 JUDGE CHACHKIN: All right. We will go off the
17 record.

18 (Discussion held off the record.)

19 BY MR. SCHAUBLE:

20 Q Mr. Kay, please direct your attention to WTB
21 Exhibit No. 343.

22 A 343. All right.

23 Q Mr. Kay, do you recognize that this is a pleading
24 filed on your behalf in this proceeding?

25 A I believe this was a -- I think we looked at this

1 yesterday or the day before. It's a document prepared by
2 counsel, Brown and Schwaninger, on my behalf.

3 Q Okay. Turn to page 23 of the exhibit.

4 A Yes.

5 Q The affidavit. Is that your signature?

6 A I believe we did this yesterday or the day before.
7 Yes, it is.

8 Q Okay. Mr. Kay, turn to page 4 of the exhibit.

9 A Okay.

10 Q Okay. Now, at the time this pleading was filed,
11 did you believe the Commission was under a misapprehension
12 as to what the relationship was between you and Marc Sobel?

13 A They had listed Marc -- some of Marc Sobel's
14 licenses in the hearing designation order as my licenses. I
15 don't know what I particularly thought, but I was surprised
16 that they had Marc's in there.

17 Q Did you believe the Commission was confused in any
18 way about what relationship -- let me ask the question.

19 Did you believe the Commission had some questions
20 about what the relationship was between yourself and Mr.
21 Sobel?

22 A I'm not a mind reader for what the Commission
23 thought or didn't think, sir.

24 Q Okay. Now, it is correct that this paragraph on
25 page 4 makes the representation that you have no interest in

1 any of the licenses or stations held by Marc Sobel, correct?

2 MR. SHAINIS: Objection. The document will speak
3 for itself. I have no idea where he is going.

4 JUDGE CHACHKIN: If he wants to reaffirm it, I
5 will let him reaffirm it.

6 Is that still a correct statement, that this
7 statement was correct at the time it was written?

8 THE WITNESS: It reads, "As shown by the affidavit
9 of Marc Sobel attached, Exhibit 2 hereto, Kay has no
10 interest in any of the licenses or stations held by Marc
11 Sobel."

12 I think what it says -- I can't read what my
13 lawyer had in his mind as he wrote this. I believe what he
14 was saying is James Kay does not have a legal interest, an
15 ownership interest, in the licenses held by Marc Sobel.

16 BY MR. SCHAUBLE:

17 Q Okay. Now, it is correct that you affirmed that
18 what was in this pleading is true and correct?

19 A I scanned through this document. I saw no obvious
20 errors. I executed the affidavit that was supplied to me by
21 my counsel.

22 Q Okay. In connection with reading the pleading,
23 did you read the affidavit of Marc Sobel that was attached?

24 A I believe that I did.

25 Q Okay. In fact, did you present that affidavit to

1 Marc Sobel for his signature?

2 A Marc Sobel -- I received this in from my counsel.
3 I called Marc Sobel and told him there was an affidavit. He
4 came to my shop. I handed it to him.

5 He gave it a quick glance, asked me one or two
6 questions, which I answered as best as I knew. He signed
7 it, and my affidavit and his were sent back to my counsel, I
8 believe, by fax and by mail. I think it took all of 15 or
9 20 seconds or 30 seconds for Marc to sign his affidavit.

10 Q Now, you knew at this time that you had a
11 management agreement with Marc Sobel with respect to these
12 stations, correct?

13 A Yes, I did.

14 Q And it is correct that you knew at this time that
15 you owned the equipment that was being used with respect to
16 those stations, correct?

17 A Yes, I did.

18 Q You knew it was your customers who were being
19 placed on those stations, correct?

20 A Yes, I did.

21 Q And you knew that you or your company was the one
22 who was billing customers for those stations, correct?

23 A Yes, I did.

24 Q You knew that at that time, you were receiving all
25 the revenue that these stations were generating, correct?

1 A Yes, I did.

2 Q And he knew at this time that you had the option
3 to purchase any of these stations for \$500 each, correct?

4 A That's correct. A future option.

5 Q Okay. Is it correct that you believe it was your
6 understanding at that time that a direct financial stake in
7 something was an interest in something?

8 MR. SHAINIS: Objection. What do you mean by a
9 direct financial stake? Define it.

10 JUDGE CHACHKIN: What is a direct financial stake?

11 MR. SCHAUBLE: Your Honor, it is essentially
12 parroting the witness' own words from his testimony.

13 JUDGE CHACHKIN: Did he use the word direct
14 financial stake?

15 MR. SCHAUBLE: Yes. Yes, he did.

16 JUDGE CHACHKIN: He used the word?

17 MR. SCHAUBLE: Yes.

18 MR. SHAINIS: Where?

19 JUDGE CHACHKIN: Where did he use the word direct
20 financial stake? If he did, we will find out what he means
21 by that. I do not know what it means.

22 MR. SCHAUBLE: It is Exhibit 329, Your Honor.

23 JUDGE CHACHKIN: What page?

24 MR. SCHAUBLE: It begins at the question on page
25 371, Lines 18 through 23.

1 the word interest here, and I do not see where the witness
2 has said anything to the contrary that he regards it as a
3 partnership or ownership interest.

4 If you want to argue that you do not have to be a
5 partner or owner and still have an interest, you can.

6 BY MR. SCHAUBLE:

7 Q Mr. Kay, at this time, what was your understanding
8 of the meaning of the term station?

9 A Can you just try the sentence again? Try the
10 question again, please.

11 Q Okay. At the time of the affidavit, what was your
12 understanding of the meaning of the term station?

13 A Well, FCC licenses are titled Radio Station
14 License. I will use the word station interchangeably with
15 the word license.

16 I think of a repeater as a repeater. If you're
17 trying to equate the word station as meaning hardware, I
18 don't use it that way.

19 Q Mr. Kay, please direct your attention back to
20 Exhibit 340, which is the management agreement, under
21 Recitals.

22 A Yes.

23 Q In the first recital in the first Whereas
24 paragraph, is it correct that the term "the station" is
25 defined therein?

1 JUDGE CHACHKIN: Go ahead with your questions.

2 BY MR. SCHAUBLE:

3 Q Mr. Kay, when did you first inform the Commission
4 in any context that you were managing Marc Sobel's stations?

5 A I don't know --

6 Q Okay.

7 A -- that I did per se as you just described. I
8 don't know that I specifically informed them that hey, I'm
9 managing some stations. I know that we submitted the
10 management agreements in answer to discovery.

11 Q Would that be in approximately the spring of 1995?

12 A More likely March, maybe April, you were asking me
13 to.

14 Further on that, I'd have to examine all the
15 answers to interrogatories and the pleadings that went back
16 and forth between the Bureau and my counsel to see when they
17 specifically stated there were management -- they probably
18 did, but I don't know when it was.

19 Q Is it correct that nowhere in WTB Exhibit No. 43
20 did you --

21 MR. KELLER: Objection to the form of the
22 question. WTB 43 is a heavily redacted document.

23 MR. SCHAUBLE: That is fair enough.

24 MR. KELLER: I mean, if you want to ask him
25 whether it was submitted with this pleading, that is a

1 different question.

2 BY MR. SCHAUBLE:

3 Q Is it correct that a copy of the management
4 agreement was not submitted with WTB Exhibit 343?

5 MR. KELLER: The same objection.

6 THE WITNESS: To the best of my knowledge, it
7 wasn't. My lawyers prepared the whole thing. They said
8 that's it. They prepared it. I don't know.

9 MR. SCHAUBLE: Your Honor, could we take a break
10 at this time? I am just about done.

11 JUDGE CHACHKIN: All right. We will take a five
12 minute break.

13 (Whereupon, a short recess was taken.)

14 JUDGE CHACHKIN: Let's go back on the record.

15 MR. SCHAUBLE: Thank you, Your Honor. Thank you,
16 Mr. Kay. No further questions.

17 JUDGE CHACHKIN: Any cross-examination?

18 MR. SHAINIS: Your Honor, the way the procedure is
19 currently established, I would cross-examine Mr. Kay, and
20 then Mr. Kay would come back and we would present our direct
21 case utilizing Mr. Kay.

22 I would like to offer what I think would expedite
23 matters considerably. Rather than cross-examine Mr. Kay at
24 this point, I will not cross-examine him. I would like when
25 I bring him back for direct, however, since I am not

1 coordinates down here, date of construction," and return it
2 to them. Or, if it's not constructed, so indicate. It's a
3 form letter.

4 Q Mr. Kay, would you please refer to your Exhibit
5 19? And, this is a pleading that was filed, it's Further
6 Answer to Interrogatory 4 of Wireless Telecommunications
7 Bureau's First Set of Interrogatories by James A. Kay, Jr.

8 A Yes.

9 Q After this was submitted, to the best of your
10 knowledge, did the Bureau ever make any follow up request
11 for information?

12 A They did not.

13 (Pause.)

14 CHIEF JUDGE CHACKIN: What are you giving the
15 witness?

16 MR. SCHAUBLE: Volume 329 to 345. Counsel will be
17 directing him to Exhibits 339 and 341.

18 BY MR. SHAINIS:

19 Q Mr. Kay, would you look at Exhibit 339, please,
20 Bureau Exhibit 339, that is?

21 A Yes.

22 Q This is entitled Radio System Management and
23 Marketing Agreement, is that correct?

24 A Yes.

25 Q And, it's dated October 28, 1994, between you and

1 Marc Sobel, is that correct?

2 A Yes.

3 Q Who prepared this document?

4 A The law firm of Brown and Schwaninger.

5 Q Who requested that they prepare it, if you recall?

6 A My best recollection is Marc Sobel.

7 Q Do you know why Marc Sobel requested that they
8 prepare this document?

9 A He had seen several of his licenses appear on a
10 draft of the Hearing Designation Order and wanted to make
11 certain that the arrangement between he and I was legal and
12 proper and reduced to writing, so that it could be
13 scrutinized, if necessary.

14 Q Let me refer you to WTB Exhibit 340. That's also
15 entitled Radio System Management and Marketing Agreement?

16 A Yes.

17 Q This is dated December 30, 1994.

18 A Yes.

19 Q Do you know why this was granted, why there's a
20 difference in dates between the two documents?

21 A It was redone because initially I had -- it was --
22 Marc was the primary driving force behind it. I had not
23 read it sufficiently carefully enough that I had to make a
24 check to exercise the option. Hence, we had to redo it for
25 me to exercise the option.

1 Q Okay.

2 A And, I gave Marc a check on a timely basis.

3 Q Don't you mean that it contained an option?

4 A Yes, to execute the option.

5 Q So, this document, the one that's dated December
6 30, 1994, superseded the document dated October 28, is that
7 correct?

8 A That's correct.

9 Q Was there any other reason for the change, to the
10 best of your knowledge?

11 A Not that I recall.

12 Q Could I refer you, please, to WTB Exhibit 341?

13 A We may have added additional call signs, yes.

14 Q Thank you. So, the marketing agreement dated
15 December 30, 1994, along with the addendum and amendment,
16 also dated December 30, 1994, are those documents still
17 operative?

18 A No.

19 Q And, when did they cease being operative?

20 A A few days ago.

21 Q Pardon me?

22 A A few days ago.

23 Q And, how did they cease being operative?

24 MR. SCHAUBLE: Objection, relevancy.

25 CHIEF JUDGE CHACKIN: Overruled.

1 THE WITNESS: A new agreement was prepared and
2 executed between Mr. Sobel and myself.

3 BY MR. SHAINIS:

4 Q And, what was the reason a new agreement was
5 prepared?

6 MR. SCHAUBLE: Objection, relevance.

7 CHIEF JUDGE CHACKIN: Overruled.

8 THE WITNESS: Because while we believed the
9 initial agreement was perfectly legal in all four corners,
10 the Commission's scrutiny and the ruling that came from the
11 Marc Sobel matter clearly indicated that the agreement may
12 have some problems. So, we have had counsel draft a new
13 agreement which hopefully will be more on all four corners
14 with the Commission's expectations, and we executed the new
15 agreement.

16 MR. SHAINIS: Thank you. Your Honor, can I have a
17 few minutes?

18 CHIEF JUDGE CHACKIN: All right, we'll go off the
19 record.

20 (Whereupon, a short recess was taken.)

21 CHIEF JUDGE CHACKIN: Back on the record.

22 MR. SHAINIS: Thank you. Your Honor, I'd like to
23 have marked for identification as Kay Exhibit 64 a document
24 that consists of six pages and is entitled Amended Radio
25 System Agreement.

1 CHIEF JUDGE CHACKIN: The document described will
2 be marked for identification as Kay Exhibit 64.

3 (The document referred to was
4 marked for identification as
5 Kay Exhibit 64.)

6 MR. SHAINIS: Just a minute and I'll hand them
7 out. I'm handing two to the court reporter.

8 (Pause.)

9 BY MR. SHAINIS:

10 Q Mr. Kay, would you review that and I'll give the
11 Court an opportunity, as well. Mr. Kay, is this the current
12 agreement you have, operating agreement you have with Mr.
13 Sobel?

14 A Yes, it is.

15 Q And, he drafted this agreement?

16 MR. SCHAUBLE: Objection, relevance, Your Honor.
17 This has no relevance to any of the issues in this
18 proceeding.

19 MR. KNOWLES-KELLETT: It doesn't go to the misrep
20 and it doesn't go to the transfer of control and we just
21 don't see where he's headed with this, Your Honor.

22 CHIEF JUDGE CHACKIN: Overruled.

23 MR. KNOWLES-KELLETT: Can we ask what issue it
24 goes to?

25 CHIEF JUDGE CHACKIN: It can be used for possible

1 mitigation of the charges. It is a fact that since these
2 charges have brought here, their attempt did not satisfy the
3 Commission. I agree with you it doesn't have any bearing on
4 the transfer of control issue, as such, but as I say, I
5 think there's mitigation. If the claim is made with the
6 licensee despite everything -- has not done anything,
7 despite the Sobel decision, this is to show that the
8 licensee has taken steps.

9 MR. SHAINIS: That's exactly what it's being used
10 for, Your Honor.

11 CHIEF JUDGE CHACKIN: Overruled.

12 MR. SCHAUBLE: Very well, Your Honor.

13 THE WITNESS: I believe it was prepared by Robert
14 Keller.

15 BY MR. SHAINIS:

16 Q Who requested Mr. Keller to prepare this document?

17 A Mr. Sobel and myself.

18 MR. SHAINIS: Your Honor, I would like this
19 document to be admitted as Kay Exhibit 64.

20 CHIEF JUDGE CHACKIN: Is there an objection? Kay
21 Exhibit 64 is received.

22 MR. KNOWLES-KELLETT: For the record, there was
23 represented no objection, Your Honor.

24 CHIEF JUDGE CHACKIN: That's the only reason I
25 would receive it. Kay Exhibit 64 is received.

1 (The document referred to,
2 having been previously marked
3 for identification as Kay
4 Exhibit 64, was received in
5 evidence.)

6 BY MR. SHAINIS:

7 Q Mr. Kay, you testified earlier concerning the use
8 of loaners by your company, is that correct? Do you recall
9 that testimony?

10 A Yes.

11 Q And, loaners are provided by Lucky's, is that
12 correct? Or, is it Southland?

13 A Primarily, Southland, although occasionally
14 Lucky's has used them, too.

15 Q In addition to Lucky's providing loaners, are
16 there other dealers that you supply service to that utilize
17 loaners?

18 A My company, Lucky's, works in conjunction with a
19 little more than two dozen other dealers who use our
20 systems. And, they use loaners, demos, rentals, all types
21 of uses on our systems.

22 Q All right, loaners, demos, rentals and also talk
23 arounds?

24 A They use talk arounds, and they also have their
25 own in-shop, several of them also have their own in-shop

1 don't.

2 Q There was previous testimony by you that no money
3 was actually paid out under any agreement with Mr. Sobel, to
4 Mr. Sobel, because the level of revenue had not been
5 achieved. That has been included in the record.

6 A That's correct.

7 Q Would you explain why the level of revenue had not
8 been achieved?

9 A For one thing, we were tied up in this, which has
10 certainly depressed the vitality of our company. Our sales
11 efforts have been by and large stagnated by this. It
12 seriously affected our business efforts.

13 Q How about any applications to reconfigure these
14 systems?

15 A Neither myself nor Mr. Sobel have been able to
16 have anything granted since mid-1994. They've held
17 everything.

18 Q The applications that are pending between you and
19 Mr. Sobel, they would have had an impact, had they been
20 granted, on the revenue?

21 A Substantial.

22 MR. SCHAUBLE: Objection, speculative.

23 CHIEF JUDGE CHACKIN: Overruled.

24 THE WITNESS: I would estimate substantial if we'd
25 been able to move forward with UHF trunking, amongst other

1 things. I would have been able to move forward with UHF
2 trunking, additional trunk systems, where Mr. Sobel and I
3 use on 800 MHz.

4 BY MR. SHAINIS:

5 Q Would you describe the type of applications that
6 are pending, just in general terms?

7 MR. SCHAUBLE: Objection, relevance.

8 CHIEF JUDGE CHACKIN: Overruled.

9 THE WITNESS: Modifications to add and delete base
10 stations, to add additional locations, to create new trunk
11 SMRS facilities, to add additional channels and additional
12 channels under the trunks. To add additional locations, add
13 additional frequencies, combine stations together for more
14 efficient operation. Many of our systems are proposed for
15 reconfiguration in the applications that are being held,
16 both for Mr. Sobel and for myself.

17 BY MR. SHAINIS:

18 Q Are there any pending finder preference
19 applications?

20 MR. SCHAUBLE: Objection, relevance.

21 CHIEF JUDGE CHACKIN: Overruled.

22 THE WITNESS: Yes, I have several pending and so
23 does Mr. Sobel.

24 BY MR. SHAINIS:

25 Q The management agreement that you testified about

1 earlier, the one executed in December, along with an
2 addendum to that?

3 A Yes.

4 MR. SCHAUBLE: This is the one with Mr. Sobel?

5 MR. SHAINIS: Yes, I'm sorry, with Mr. Sobel.

6 MR. KELLER: December '94.

7 BY MR. SHAINIS:

8 Q Did you give any instructions to your counsel as
9 to how that management agreement should be drafted?

10 MR. SCHAUBLE: Inquiry -- are you waiving the --

11 MR. SHAINIS: No, I'm asking if he gave
12 instructions. If I asked what the instructions were, then I
13 would be waiving it. I merely asked him if he gave
14 instructions. I don't believe it waived the privilege.

15 CHIEF JUDGE CHACKIN: You're correct. Go ahead.

16 THE WITNESS: No, I didn't.

17 BY MR. SHAINIS:

18 Q Just a moment. Exhibit 340, correct. Would you
19 look at Footnote 5 on page three?

20 A Yes.

21 Q Do you see the sentence that states, "Kay is not a
22 party to the application of Marc Sobel, File No. 415367"?

23 MR. SCHAUBLE: Objection, Your Honor. I don't
24 think this part of the document is in evidence at this
25 point.

1 MR. SHAINIS: Has that been stricken?

2 MR. KELLER: Which part is it?

3 CHIEF JUDGE CHACKIN: Well, in any event, I'll
4 permit the question.

5 BY MR. SHAINIS:

6 Q Is that a true statement?

7 A Yes, it is.

8 Q Now, I want you to look at page four, look at the
9 first two sentences of the last paragraph.

10 A Yes.

11 Q Who drafted this language?

12 A Brown & Schwaninger, probably Curt Brown.

13 Q And, a note on page 23, that there is an affidavit
14 that you signed, how closely did you read this document at
15 the time you signed that affidavit?

16 MR. SCHAUBLE: Objection, Your Honor.

17 CHIEF JUDGE CHACKIN: Overruled. I mean, you
18 charged the man with wilfully misrepresenting facts to the
19 Commission. Isn't he entitled to state the circumstances
20 under which this document was prepared? I just don't
21 understand what's your objection?

22 MR. SCHAUBLE: My objection is to the form of the
23 question, Your Honor.

24 CHIEF JUDGE CHACKIN: Overruled.

25 THE WITNESS: I would have read through it

1 quickly, looking for errors, but not analyzing the meaning
2 of every nuance of every word through it, not even close.

3 BY MR. SHAINIS:

4 Q And, look at the sentence on page four, which
5 says, "Because Kay has no interest in any license or station
6 in common with Marc Sobel," do you see that?

7 A Yes.

8 Q At that time, if you can recollect, what was your
9 understanding of the import of that station?

10 A Since I had no interest in the licenses -- Brown,
11 I believe, used the words licenses and stations
12 interchangeably -- I know I did -- but that I had no
13 ownership interest as in owning a part of this, being a
14 partner, in any licenses that were issued to Marc Sobel.

15 Q So, you were not focusing on the management
16 agreement, is that correct? Did it occur to you when you
17 signed the affidavit and had reviewed this?

18 A I knew it existed. I knew the same counsel had
19 done it, but I wasn't specifically focused on it. I recall
20 a -- that's at this time -- I was aware of the existence and
21 had thought of it at this time. It was not out of mind.

22 Q But, I assume it did not convey to you, and
23 correct me if I'm wrong, an ownership interest?

24 A That's correct. I did not -- I was informed that
25 the management agreement did not constitute an interest.

1 That was my belief.

2 Q And, you had not intention of misleading the
3 Commission or anyone else, is that correct?

4 MR. SCHAUBLE: Objection.

5 CHIEF JUDGE CHACKIN: Overruled.

6 THE WITNESS: None whatsoever.

7 MR. SHAINIS: Thank you. One moment, Your Honor.

8 CHIEF JUDGE CHACKIN: Yes.

9 (Pause.)

10 BY MR. SHAINIS:

11 Q Mr. Kay, there came a time when you first became
12 aware that the Commission may have a problem with the
13 management agreement with Mr. Sobel, is that correct?

14 A Yes.

15 Q When was that? What period of time was that? Can
16 you reflect a date or the year?

17 A It was either '96 or '97 is when I was informed by
18 Mr. Sobel he'd been sent a 308(b) request that inquired
19 about the management agreements.

20 Q And, what was your reaction, if any, to finding
21 out that there might be a problem?

22 A I was surprised.

23 Q Why?

24 A I had been told the management agreements meant
25 the FCC rules on all four corners.

1 MR. KNOWLES-KELLETT: Does that constitute a
2 waiver of the privilege here? In Mr. Kay's deposition, he
3 refused to tell us anything, any communications with
4 counsel, then through the discovery, and Mr. Kay's
5 testifying regarding, you know, keeps saying I was told.

6 MR. SHAINIS: I didn't ask him who told him.

7 MR. KNOWLES-KELLETT: I'd move to strike any
8 testimony on the grounds that it turns out it came from
9 Brown and Schwaninger, because we weren't allowed to
10 discovery. You can't claim the privilege in discovery and
11 then testify to it in the proceeding.

12 CHIEF JUDGE CHACKIN: I'll overrule the objection.
13 You can inquire into that matter, limited to that matter.

14 BY MR. SHAINIS:

15 Q Mr. Kay, when did you, if at all, provide the
16 Bureau with a copy of the management agreement?

17 A It would have been sent to them in discovery.
18 They requested documents. Probably around April, no later
19 than May of 1995. That's when we were basically emptying
20 our files of everything, including management agreements.

21 Q Was the management agreement ever filed with the
22 Commission prior to being provided to the Commission in
23 December?

24 A No, there was no requirement to do so.

25 (Pause.)

1 concerning the nature of the Radio System Management
2 Marketing, it's an interest?

3 (The document referred to,
4 having been previously marked
5 for identification as Bureau
6 Exhibit 345, was received in
7 evidence.)

8 MR. SCHAUBLE: And, also, the prior oral
9 relationship they had.

10 CHIEF JUDGE CHACKIN: And, the oral relationship
11 that was finally put in writing with the agreement, is that
12 right?

13 MR. SCHAUBLE: It is also grounded upon their
14 representations.

15 CHIEF JUDGE CHACKIN: I understand that, but the
16 representation, whether or not it was a false
17 representation, in order to reach that point, you have to
18 make a determination whether this agreement, the oral
19 relationship, constituted an interest in Mr. Kay and Mr.
20 Sobel's stations, right?

21 MR. SCHAUBLE: Kay testified that he owned all of
22 Sobel's stations, so I don't know what you want.

23 CHIEF JUDGE CHACKIN: He testified that he owned
24 all of Mr. Sobel's stations?

25 MR. KNOWLES-KELLETT: He owns --

1 MR. KELLER: No, Your Honor.

2 MR. KNOWLES-KELLETT: -- all the physical
3 equipment of the stations.

4 CHIEF JUDGE CHACKIN: That's not the same as an
5 interest. What I'm saying is, to make a determination as to
6 whether there was a misrepresentation, whether the
7 concealment, intent to conceal or deceive the Commission is
8 predicated on a determination of whether this oral
9 relationship, later put in writing, constituted an interest
10 by Mr. Kay and Sobel's stations, isn't that right?

11 MR. SCHAUBLE: Your Honor, we believe we have
12 that. We believe we have very appropriate evidence on that
13 point, also. But, what --

14 CHIEF JUDGE CHACKIN: I understand that. What I'm
15 saying is, how do I make this determination of
16 misrepresentation without getting to the question of whether
17 it constituted an interest or not, and if I make that
18 determination that it did or did not constitute an interest,
19 how do I do so without avoiding evidence concerning the
20 nature of the interest, or the evidence in support of it.

21 MR. SCHAUBLE: Your Honor, we believe at one point
22 in the Sobel proceeding, Mr. Kay was asked, Mr. Kay
23 basically gave his definition of what an interest was, and
24 one of the things, he said a direct financial stake was an
25 interest, and we believe the evidence shows he had a direct

1 financial stake in these stations. As a matter of fact, Mr.
2 Sobel testified that he believes Mr. Kay had a direct
3 financial stake in these stations.

4 CHIEF JUDGE CHACKIN: Well --

5 MR. SCHAUBLE: And, you know, under --
6 broadcasting, when somebody makes a statement which they
7 know is false, that can lead to the conclusion that there's
8 the intent necessary for misrep or lack of candor.

9 CHIEF JUDGE CHACKIN: The question is, what is a
10 false statement? If I remember Mr. Kay and Mr. Sobel
11 testified, they didn't have an ownership interest, that Mr.
12 Kay did not have an ownership interest in Sobel's station.
13 Am I correct? That's what the affidavit said.

14 MR. SCHAUBLE: It didn't use the word ownership.
15 It said interest in Sobel's stations or license.

16 CHIEF JUDGE CHACKIN: Then, they testified that by
17 that, they meant there was no ownership interest. Am I
18 correct?

19 MR. SHAINIS: Yes.

20 MR. SCHAUBLE: In the license, without -- I don't
21 think there was ever any adequate explanation as to why the
22 affidavit said stations or licenses.

23 CHIEF JUDGE CHACKIN: Well, so the question is, we
24 get to the question of, clearly there was no ownership
25 interest. Mr. Kay does not have an ownership interest in

1 Sobel's license. There's no question about that, as far as
2 ownership goes.

3 MR. SCHAUBLE: No current ownership.

4 CHIEF JUDGE CHACKIN: Current ownership. So, the
5 question is whether or not --

6 MR. SCHAUBLE: He owns the equipment.

7 CHIEF JUDGE CHACKIN: -- we're dealing with
8 control, whether or not, under the terms of the management
9 agreement or the earlier oral relationship, whether or not
10 Kay exercised control over Sobel's stations. Isn't that
11 what we're dealing with?

12 MR. SCHAUBLE: I believe that's part of what we're
13 dealing with, Your Honor. There's also the matter that he
14 admitted, that Kay physically owns the equipment.

15 CHIEF JUDGE CHACKIN: I understand, but all that
16 goes to the question of control. I mean, this is not a
17 situation where A concealed ownership of the station, in
18 other words, where A had actually sold B the license or
19 transferred the license, and then the evidence showed that,
20 in fact, or A claimed he didn't transfer the license, and
21 the evidence showed that A, in fact, did transfer the
22 license.

23 He had an agreement, he signed something, here,
24 you have a station. Here, we're dealing with the question
25 of whether control constitutes an interest. Isn't that what

1 we're dealing with here?

2 MR. SCHAUBLE: I think, Your Honor, it would be
3 possible to have an interest in something without it rising
4 to the level of an unauthorized transfer of control. I
5 think, if anything, denial of interest was even broader than
6 if you say denied I controlled Sobel's station.

7 CHIEF JUDGE CHACKIN: Well, but we're talking
8 about interest here, we're talking about control. We're
9 talking about de facto control. He didn't have de jure
10 control, because he didn't own the station. They were owned
11 by Sobel.

12 The question we're dealing with is de facto
13 control and does that constitute an interest.

14 MR. KNOWLES-KELLETT: Well, he had an option to
15 buy --

16 CHIEF JUDGE CHACKIN: Under Intermountain, as you
17 say.

18 MR. KNOWLES-KELLETT: There's a question of de
19 jure control, Your Honor, because he had the option to buy
20 the station for \$100 at any rate.

21 CHIEF JUDGE CHACKIN: Well, he may have an option.
22 The fact you have an option, until you exercise it, you
23 don't have de jure control. An unexercised option is not de
24 jure control.

25 MR. KNOWLES-KELLETT: Okay, I stand corrected,

1 Your Honor.

2 CHIEF JUDGE CHACKIN: So, what we're dealing with
3 is de facto control. Is that right? So, I have to get, in
4 order to find out whether it's a misrepresentation, I have
5 to make a determination whether there's de facto control,
6 don't I?

7 MR. SCHAUBLE: That was stipulated earlier.

8 CHIEF JUDGE CHACKIN: Well, they didn't stipulate
9 it was de facto control.

10 MR. KNOWLES-KELLETT: Transfer of control.

11 MR. KELLER: No.

12 MR. SCHAUBLE: Well, they stipulated that there
13 was a finding --

14 CHIEF JUDGE CHACKIN: You see, Judge Sippel could
15 have made life simple if he'd said determine on the basis of
16 the evidence of whether or not there was de facto control
17 and whether there was a misrepresentation by Kay. But,
18 since he put in a factual issue, it seems to me there's no
19 way you could avoid the question of whether or not the
20 interest constituted de facto control.

21 MR. SCHAUBLE: Your Honor, if you're going to take
22 that view of the issue --

23 CHIEF JUDGE CHACKIN: Well, how else can I take a
24 view? It's de facto control we're talking about, isn't it,
25 whether or not there was an interest? It's not de jure

1 control.

2 MR. SCHAUBLE: We're going for their points of
3 interest, other than de facto control, Your Honor. If I
4 owned 20 percent of a station, I would not have de facto
5 control, however, I would have an interest in that station.

6 CHIEF JUDGE CHACKIN: But, we're not talking about
7 any ownership interest.

8 MR. SCHAUBLE: Twenty percent -- but there are
9 other possible interests than de facto control.

10 CHIEF JUDGE CHACKIN: What?

11 MR. KNOWLES-KELLETT: Well, 20 percent if he was a
12 general partner --

13 CHIEF JUDGE CHACKIN: The question is, what other
14 interests are we talking about in this case besides de facto
15 control?

16 MR. SCHAUBLE: His ownership of the equipment.

17 CHIEF JUDGE CHACKIN: That goes to de facto
18 control, does it not?

19 MR. SCHAUBLE: It would go to de facto control,
20 but we also think it's an interest in and of its own right,
21 also.

22 MR. KNOWLES-KELLETT: Well, option to purchase is
23 also. The fact that he's operating a station is also.

24 CHIEF JUDGE CHACKIN: But, that would also go to
25 de facto control, wouldn't it?

1 MR. SCHAUBLE: What we're trying to say, Your
2 Honor, is we don't believe you have to find de facto control
3 to find an interest. There is something less than de facto
4 control. There could be a cognizable interest in a station.

5 CHIEF JUDGE CHACKIN: Well, how do you define
6 interest?

7 MR. SCHAUBLE: Interest is any kind of ownership
8 or control of the station, in my opinion.

9 CHIEF JUDGE CHACKIN: All right, well, we concede
10 there's no ownership here.

11 MR. SCHAUBLE: Right.

12 CHIEF JUDGE CHACKIN: So, what's left is control.

13 MR. SCHAUBLE: Right, but it doesn't have to be de
14 facto control. De facto control would mean he could
15 exercise anything, you know.

16 CHIEF JUDGE CHACKIN: Well, these are all
17 interesting questions which we'll have to determine during
18 the course of the hearing. I just want to put you on notice
19 of these questions.

20 MR. SHAINIS: Your Honor, I wonder if I might ask
21 a question?

22 CHIEF JUDGE CHACKIN: Yes.

23 MR. SHAINIS: Will the hearing be at the
24 courthouse?

25 CHIEF JUDGE CHACKIN: I'm afraid so.

AMENDED RADIO SYSTEM AGREEMENT

This Amended Radio System Agreement ("Amended Agreement") is entered into and effective as of January 1, 1999, by and between Marc D. Sobel, an individual ("Licensee") and James A. Kay, Jr., an individual ("Reseller").

WHEREAS, the parties have previously entered into a Radio System Management and Marketing Agreement dated December 30, 1994 ("Radio System Agreement");

WHEREAS, it appears that some provisions of the Radio System Agreement do not accurately reflect the understanding and agreement of the parties, nor the actions of the parties both before and after they entered into the Radio System Agreement ;

WHEREAS, it further appears that some provisions in the Radio System Agreement have been interpreted by non-parties thereto as having certain meanings not intended by the parties and as potentially being in violation of Federal Communications Commission ("FCC") policy;

WHEREAS, it is and always has been the intention of the parties to comply with all applicable laws and FCC regulations in this regard;

IT IS NOW THEREFORE AGREED AS FOLLOWS:

1. Replacement of Prior Agreements and Term of Amended Agreement.
 - A. This Amended Agreement supersedes and replaces entirely the Radio System Agreement.
 - B. The initial term of this Amended Agreement shall run from the effective date to December 31, 2003, and shall thereafter automatically renew for successive five (5) year renewal terms unless either party shall notify the other party, in writing, of its intention not to renew at least six (6) months prior to the expiration of the then current initial or renewal term.
2. Licenses Subject to Amended Agreement.
 - A. Licensee holds authority from the FCC to construct and/or operate 800 MHz band mobile radio facilities in and about the Los Angeles Metropolitan Area, as set forth in Schedule 2.A, hereto (the "Subject Stations"). The parties may from time to time modify Schedule 2.A upon mutual agreement. Licensee is the sole and exclusive holder of such authorizations for the Subject Stations, free and clear of all encumbrances, possessing clear and marketable title thereto.

- B. Notwithstanding the foregoing, the parties acknowledge that the authorizations for the Subject Stations are subject to potential revocation by the FCC in WT Docket No. 97-56. Licensee makes no representations or warranties to Reseller regarding the likely outcome of such license revocation proceedings, and Licensee shall not be liable to Reseller nor shall Reseller be responsible to Licensee for any losses, damages, or inability to perform hereunder resulting directly or indirectly from any sanctions imposed on Licensee in connection with WT Docket No. 97-56.
- C. The parties acknowledge that various station authorizations held by Reseller are subject to potential revocation by the FCC in WT Docket No. 94-147. Reseller makes no representations or warranties to Licensee regarding the likely outcome of such license revocation proceedings, and Reseller shall not be liable to Licensee nor shall Licensee be responsible to Reseller for any losses, damages, or inability to perform hereunder resulting directly or indirectly from any sanctions imposed on Licensee in connection with WT Docket No. 94-147.

3. Lease of Channel Capacity.

- A. Licensee hereby grants Reseller the exclusive right to place Reseller's customers on Licensee's system to receive service through the Subject Stations. Reseller shall enjoy exclusivity only with respect to third parties, and this provision shall not preclude Licensee from marketing service directly to end users.
- B. Licensee shall retain the responsibility for and shall oversee and supervise the activation and programming of all customer units. All new service contracts, including those for Reseller's customers, shall be subject to prior approval by Licensee, which such approval shall not be unreasonably withheld. Reseller shall indemnify Licensee and hold Licensee harmless from liability to Reseller's customers in any disputes arising between Reseller and such customers, provided that this provision shall in no way limit Licensee's liability to Reseller for breach of any portion of this Amended Agreement.
- D. In consideration for such access to channel capacity on the Subject Stations, Reseller shall pay to Licensee, on a monthly basis and as to each repeater, the greater of: (a) twenty five percent (25%) of the gross revenue received for service on that repeater, or (b) four hundred fifty dollars (\$450).

4. Equipment and Site Lease.

- A. Reseller shall, at Licensee's election and as directed by Licensee, lease to Licensee base station equipment for the Subject Stations at a monthly rate of two hundred dollars (\$225) per repeater. This lease shall include an obligation on the part of Reseller to provide any and all parts needed to repair or replace any repeater in case of loss or failure, such parts to be of substantially the same quality and reliability as the part being replaced. At Licensee's option and sole discretion, Reseller shall sell to Licensee any base station equipment leased pursuant to this provision (including, but not limited to, currently installed equipment) at the fair market value for such equipment. Reseller shall maintain property and liability insurance on all equipment leased pursuant to this provision.
- B. Nothing in this provision shall prevent Licensee from acquiring its own equipment from a source other than Licensee; provided, however, that Licensee shall, in consultation with Reseller, select equipment that is compatible with Reseller's operations and suitable for Reseller's purposes.
- C. Reseller shall, at Licensee's election and as directed by Licensee, sublease or lease, as the case may be, repeater site and/or antenna space to Licensee for base station equipment for the Subject Stations if the subject repeaters are located at sites that Reseller owns or for which Reseller has a lease. The monthly lease amount shall be one hundred fifty dollars (\$150) per repeater.
- D. Licensee shall at all times have full possession, use, enjoyment, and control over any equipment leased, rented, or borrowed from Reseller or otherwise provided to Licensee by Reseller pursuant to this Amended Agreement. Licensee shall at all times (24 hours per day, 7 days per week) have full access to each and every transmitter site leased or subleased from Reseller pursuant to this Amended Agreement.

5. Installation and Maintenance Services. Licensee shall, at Licensee's sole expense, maintain all repeaters subject to this Amended Agreement in good working order in accordance with generally accepted technical and engineering practices. This shall not prevent Licensee from contracting with Reseller to perform maintenance and repair services, subject to Licensee's direction and supervision, on an as needed basis.

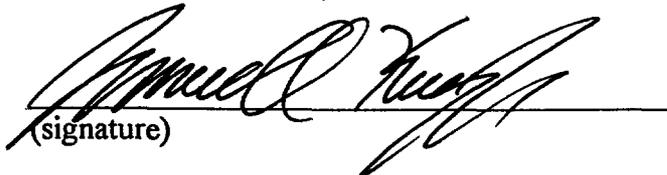
6. Rates and Charges. Rates, fees, and charges for service on the Subject Stations to Reseller's customers shall be determined by Reseller in consultation with and subject to the approval of Licensee.

7. Frequency Coordination and FCC Consulting Services. Licensee shall be solely responsible for all matters relating to frequency coordination, FCC application and licensing, the filing of requisite FCC reports, and any other regulatory matters relating to the construction, maintenance, and operation of the Subject Stations. All reasonable and customary fees and expenses incurred in this regard (including frequency coordination fees, FCC application processing fees, etc.) shall be timely paid by Licensee; provided, however, that Reseller and Licensee shall separately agree on appropriate treatment of any applicable U.S. Forestry Service fees on a case-by-case basis. Licensee shall timely file all required reports and timely comply with all regulatory requirements and shall otherwise maintain the authorizations for the Subject Stations in good order and standing. Nothing in this provision is intended to preclude Licensee from consulting with Reseller and/or engaging Reseller's services and/or assistance with such matters, provided that all such activities shall be directed, supervised, and finally approved by Licensee.
8. Station Policy. Licensee shall retain full responsibility for all matters of policy regarding the Subject Stations, including, but not limited to, setting rates for service, making modifications to station facilities, hiring and firing of any personnel to be employed for the primary purpose of performing functions relating to the Subject Stations, etc. Reseller shall have no authority, rights, powers, or responsibilities with respect to the Subject Stations except those expressly provided for in this Amended Agreement. Nothing in this provision is intended to (a) preclude Licensee from consulting with Reseller and relying on advice from Reseller, provided that the ultimate decisions are to be in the sole discretion of Licensee, (b) preclude Reseller from using Reseller's own employees to perform any function entrusted to Reseller under this Amended Agreement, or (c) give Licensee authority to supervise or direct employees of Reseller except as to matters relating specifically to the Subject Stations or service provided on the Subject Stations. Reseller shall at all reasonable times make available to Licensee any records maintained by Reseller in connection with the Subject Stations, provided that any of Reseller's customer information, including, but not limited to, Reseller's billing records and data, shall not be disclosed by Licensee to any person or entity not a party to this Amended Agreement, except as may be required by governmental authority.
9. Relationship of the Parties. Nothing in this Amended Agreement shall be interpreted as making Reseller an Employee of Licensee or vice versa. Reseller is an independent contractor with respect to all duties performed pursuant to this Amended Agreement.
10. Alienation of Subject Stations.
 - A. During the term of this Amended Agreement, Licensee shall not undertake to sell, transfer, assign any interest in any of the FCC authorizations for the Subject Stations except as provided for herein. For purposes of this provision, an undertaking to cancel an authorization or a failure to timely apply for renewal of an authorization shall be deemed an undertaking to sell, transfer, assign an interest in the license.

- B. Notwithstanding Section 10.A, Licensee may entertain offers or expression of interest and may enter into negotiations looking toward the sale, transfer, or assignment of an interest in an FCC authorization for a Subject Station; provided, however, that if Licensee entertains any bona fide offer, Licensee shall require that the offer be reduced to writing and shall (a) clearly set forth the applicable terms and conditions of the offer, (b) expressly acknowledge this Amended Agreement, including a specific reference to this Section 10. Any such agreement entered into by Licensee shall include a provision whereby the assignee shall assume Licensee's obligations under this Amended Agreement.
- C. Promptly upon receipt of a written bona fide offer as described in Section 10.B, Licensee shall notify Reseller and shall provide a copy of such written bona fide offer to Reseller. Reseller shall have the option, within thirty days of receipt, to acquire the subject license or licenses from Licensee on terms no less favorable to Licensee than those set forth in the written bona fide offer.
11. Entire Agreement and Notification of Parties. This Amended Agreement is the entire agreement between the Parties with respect to the subject matter hereof, making void all previous negotiations and agreements, and may not be changed except by a written instrument signed by the party against whom enforcement of such change is sought.
12. Choice of Law. This Amended Agreement shall be interpreted under the Laws of the State of California.

Agreed to by:

JAMES, A. KAY, JR., RESELLER


(signature)

MARC D. SOBEL, LICENSEE


(signature)

Schedule 2.A
Subject Stations

<u>Call Sign</u>	<u>Location</u>	<u>Frequency</u>
KNBT299	Santiago	851.1125 MHz
WNPY680	Santiago	851.4125 MHz
WNPY680	Oat (temporary)	851.4125 MHz
WNYR424	Lukens	852.1375 MHz
WNYR424	Wilson (temporary)	852.1375 MHz
WNYR424	Hauser (temporary)	852.1375 MHz
WPAD685	Lukens	852.4125 MHz
WPAD685	Hauser (temporary)	852.4125 MHz
WPCZ354	Santiago	853.1375 MHz
WPFH460	Wilson	853.1375 MHz
WNXL471	Hollywood Hills	852.2625 MHz
KRU576	Lukens	852.5125 MHz
KRU576	Hollywood Hills (temporary)	852.5125 MHz
WNWB334	Lukens	854.0375 MHz
WPCG780	Santiago	853.5875 MHz
WPCA891	Snow	854.0375 MHz
WPDB603	Heaps	854.3875 MHz
WPF529	Heaps	852.2625 MHz

MDS
MDS

11-99
Date

JAK
JAK

11/11/99
Date

CERTIFICATE OF SERVICE

I, Robert J. Keller, counsel for Marc D. Sobel d/b/a Air Wave Communications, hereby certify that on this 2nd day of March, 1999, I caused copies of the foregoing *PETITION TO DEFER AND CONSOLIDATE CONSIDERATION* to be sent by facsimile with follow-up by regular mail, to the officials and parties in WT Docket No. 97-56, as follows:

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Robert J. Keller

* Served by hand.