

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC

In the Matter of )  
) )  
**MARC SOBEL** ) WT DOCKET NO. 97-56  
) )  
Applicant for Certain Part 90 Authorizations )  
in the Los Angeles Area and Requestor Of )  
Certain Finder's Preferences )  
) )  
**MARC SOBEL AND MARC SOBEL** )  
**D/B/A AIR WAVE COMMUNICATIONS** )  
) )  
Licensees of Certain Part 90 Stations in the )  
Los Angeles Area )

**RECEIVED**  
**MAR 11 1999**  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

To: The Commission

**WIRELESS TELECOMMUNICATIONS BUREAU'S CONSOLIDATED  
OPPOSITION TO MOTION FOR LEAVE TO SUBMIT PETITION AND  
PETITION TO DEFER AND CONSOLIDATE CONSIDERATION**

1. The Chief, Wireless Telecommunications Bureau, by his attorneys, now opposes the "Motion for Leave to Submit Petition" and the "Petition to Defer and Consolidate Consideration" filed by Marc Sobel (Sobel) on March 2, 1999.<sup>1</sup>

2. Sobel's motion is styled as a request to have consideration of his appeal of the *Initial Decision*, 12 FCC Rcd 22879 (ALJ 1997) in this proceeding deferred and considered together

<sup>1</sup> This pleading is timely filed. Although the certificate of service on the pleading originally indicated that Bureau counsel in Gettysburg was served by facsimile, counsel for Sobel has acknowledged that such service did not take place. See letter dated March 9, 1999 from Robert J. Keller, Esq. to John I. Riffer, Esq. Moreover, Tuesday March

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with any exceptions that may be filed in WT Docket No. 94-147, the James A. Kay, Jr. (Kay) proceeding. Sobel's motion also implicitly contains two additional requests for relief: a petition to reopen the record to consider additional evidence, and further argument in the nature of supplemental exceptions. Sobel's proposal to further delay the consideration of his exceptions is little more than a desperate attempt to postpone the day when his licenses may be revoked. His implicit attempts to reopen the record and to supplement his exceptions wholly fail to comply with the Commission's rules and procedural requirements and must be rejected. Indeed, the Commission should expedite consideration of Sobel's exceptions because its ruling would assist resolution of certain issues in WT Docket No. 94-147.

3. The issues originally designated in this proceeding were as follows:

- (a) To determine whether Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications have willfully and/or repeatedly violated § 310(d) of the Communications Act of 1934, as amended, by engaging in unauthorized transfers of control of their respective stations to James A. Kay, Jr.;
- (b) To determine, in light of the evidence adduced pursuant to the foregoing issue, whether Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications are qualified to be and remain Commission licensees;
- (c) To determine whether the above-captioned applications filed by Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications should be granted.
- (d) To determine whether the above-captioned licenses held by Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications should be revoked.

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9, 1999 was a holiday under Section 1.4(e)(1) of the Commission's Rules because the Commission closed early due to the bad weather, and therefore is not one of the three business days allowed under Section 1.4(j) of the Rules.

By Memorandum Opinion and Order, FCC 97M-82 (released May 8, 1997), the Presiding Judge added the following issues against Sobel:

(a) To determine whether Marc Sobel misrepresented material facts or lacked candor in his affidavit of January 24, 1995.

(b) To determine, based upon the evidence adduced pursuant to the foregoing issues, whether Marc Sobel is basically qualified to be and remain a Commission licensee.

In the *Initial Decision* in this proceeding, Administrative Law Judge John Frysiak concluded that there had been an unauthorized transfer of control of Sobel's stations to Kay and that Sobel had misrepresented facts and lacked candor to the Commission. Accordingly, Judge Frysiak revoked all of Sobel's licenses. Both Sobel and Kay, who intervened in this proceeding, filed exceptions to the *Initial Decision*. After the *Initial Decision* in this proceeding, the following issues were added in WT Docket No. 94-147, a proceeding to determine whether Kay's licenses should be revoked:

To determine, based upon the findings and conclusions reached in WT Docket No. 97-56 concerning James A. Kay, Jr.'s (Kay) participation in an unauthorized transfer of control, whether Kay is basically qualified to be a Commission licensee.

To determine whether James A. Kay, Jr. misrepresented facts or lacked candor in the "Motion to Enlarge, Change, or Delete Issues" filed by Kay on January 12, 1995 and January 25, 1995.

To determine whether in light of the evidence adduced under the aforementioned added issues whether James A. Kay, Jr. is qualified to hold a Commission license.

Memorandum Opinion and Order, FCC 98M-15 (released February 2, 1998). The hearing in the Kay proceeding took place during December 1998 and January 1999. Both Sobel and Kay testified during that hearing with respect to the issues designated in the Kay proceeding.

5. Sobel argues that the testimony in the Kay proceeding should be considered in the Sobel proceeding. In this regard, Sobel is petitioning the Commission to reopen the record long after the record was closed in this case to take additional evidence into account. “A petition to reopen the record after the close of the hearing must show first that it relies on newly discovered evidence that could not, through the exercise of due diligence, have been discovered earlier, and, second, that the new evidence, if proven, would effect the ultimate disposition of the proceeding.” *Coast TV*, 11 FCC Rcd 4074, 4075 (1996). Sobel’s request does not meet that standard. Most of Sobel’s and Kay’s testimony in the Kay proceeding is repetitive of testimony they offered in the Sobel proceeding. None of the evidence in the Kay proceeding is “newly discovered” because both Sobel and Kay knew the underlying facts at the time of the Sobel proceeding and could have testified to those facts in this proceeding. Virtually the only new development that came out of the Kay hearing was the fact that Sobel and Kay modified their agreement in January 1999. Such an action, which occurred over a year after the *Initial Decision*, comes far too late to have any meaningful impact on the decision in this case. The FCC has ruled that parties may not wait until after an adverse initial decision, and then try to present evidence that could have been presented earlier.<sup>2</sup> In *Colorado Radio Corp. v. FCC*, 118

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<sup>2</sup> See e.g., *Evergreen Broadcasting Co.*, 7 FCC Rcd 6601 (1992).

F.2d 24, 26 (D.C. Cir. 1941), the D.C. Circuit noted:

We cannot allow the applicant to sit back and hope that a decision will be in its favor and, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.

Thus, Mr. Sobel's attempt to parry with additional evidence presented in another proceeding should not be countenanced.<sup>3</sup>

6. Sobel's motion also extensively advances his reasons why Sobel believes the *Initial Decision* was in error. As such, it is a transparent attempt to exceed the page and time limitations on exceptions contained in Sections 1.276 and 1.277 of the Commission's Rules. Since the filing of exceptions, Sobel has filed four additional pleadings in which he has attempted to argue or sought leave to reargue his case: a "Revised Request for Inquiry and Investigation" dated March 2, 1998; two motions for leave to supplement exceptions on May 28, 1998 and October 2, 1998; and the instant pleading. While Sobel appears to believe that the Commission's procedural rules do not apply to him because he is faced with revocation (Sobel Motion, p. 4 n.6), Sobel has had more than an adequate opportunity to argue his case. The Commission's procedural rules are designed to expedite the orderly resolution of cases. They apply in revocation cases, just as in any other case.

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<sup>3</sup> At the time of Judge Frysiak's Sobel decision, Judge Sippel was the Presiding Judge in the Kay proceeding. Judge Sippel added issues to the Kay proceeding relating to Judge Frysiak's Initial Decision in the Sobel proceeding. Judge Sippel specifically added issues such that the Sobel issues would not be relitigated. *Memorandum Opinion and Order*, FCC 98M-15 (released February 2, 1998) at 2.

7. It is time for the Commission to expeditiously decide this case. More than a year ago, Judge Frysiak found Sobel unqualified to be a Commission licensee. The Judge held that Sobel engaged in an unauthorized transfer of control of 800 MHz stations, and that Mr. Sobel misrepresented facts to the Commission and misled the Commission regarding his relationship with Kay. Sobel's appeal of the Initial Decision has been pending for more than a year.<sup>4</sup> In the interim, Sobel has remained the licensee of the licenses in question. It comes as no surprise that Sobel would advocate further delay in his proceeding to avoid revocation. This delay is inappropriate. If Sobel is not qualified to remain a Commission licensee, the sooner his licenses are revoked, the better the public interest will be served. If it is somehow determined that Sobel is qualified, the sooner that determination is made, the sooner his applications can be processed and he can go forward with his business. Moreover, a decision in this case would also be helpful in the Kay case. The issues in the Kay case require a determination of the effect of the unauthorized transfer of control found by Judge Frysiak and the submission of the Sobel affidavit on Mr. Kay's qualifications to be a licensee. The Commission's decision with respect to the Sobel issues would aid Judge Chachkin's efforts to rule appropriately in the Kay case. In the Kay case, Judge Chachkin has indicated that it would be useful to have a ruling from the Commission on the unauthorized transfer of control issue. Kay Tr. 767. Moreover, since the misrepresentation/lack of candor issue specified against Kay involves the same pleading as the misrepresentation/lack of candor issue in this case, a ruling on that issue would also assist Judge Chachkin.

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<sup>4</sup> Mr. Sobel filed Exceptions to the *Initial Decision* on January 12, 1998.

8. Accordingly, the Bureau asks the Commission to deny Sobel's "Motion for Leave to Submit Petition" and "Petition to Defer and Consolidate Consideration."

Respectfully submitted,

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March 11, 1999

CERTIFICATE OF SERVICE

I, Michelle Mebane, a Staff Assistant, Enforcement and Consumer Information Division, Wireless Telecommunications Bureau, certify that I have, on this 11th day of March, 1999, caused to be sent by first class mail (unless otherwise noted), copies of the foregoing "Wireless Telecommunications Bureau's Opposition to Motion for Leave to Submit Petition and Opposition to Petition to Defer and Consolidate Consideration" to:

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