their customers without holding any licenses of their own. They do this by marketing services and/or reselling airtime on repeaters licensed to other operators. Tr. 1739-1740.

165. Consistent with the fact that Kay is operating as a reseller of airtime on Sobel's 800 MHz repeaters, the customers on Sobel's 800 MHz repeaters are Kay's (not Sobel's) customers. Sobel nonetheless remains fully aware of who are the customers. Sobel typically does the account activations and deactivatons. Tr. 1741, 1744. Sobel has unrestricted access to the customer contracts. Tr. 1741. Repeater service agreements are fairly standard, and Sobel is familiar with the structure. Tr. 1741.

166. In the fall of 1994, Sobel became aware of a draft hearing designation order in the Kay proceeding. Kay had obtained the draft through a FOIA request and he informed Sobel of it. Tr. 1751-1752. The draft *HDO* contained the following language:

> Information available to the Commission also includes that James A. Kay, Jr. has done business under a number of assumed names. We believe that these names include some or all of the following: Air Wave Communications ... [and] Marc Sobel dba Airwave Communications.

Kay Ex. 5 at p. 2, ¶ 4. Air Wave Communications is a name under which Marc Sobel does business. Tr. 1152-1153, 1752.

167. Sobel was surprised upon learning of this language suggesting that he was nothing more than an alias of James Kay. Tr. 1752-1754. As Sobel explained:

> I was surprised, because, as you can see, I'm a real person. I'm not an alias of James Kay, clearly. My business is my business. Air Wave Communications, he has nothing to do with it. He's not a partner, he's not part of the d/b/a and it was just an absolute surprise and a little bit of anger that they should include my name in their process of the *HDO* against James Kay. In other words, I thought it was entirely unfair and inappropriate.

Tr. 1753. Kay Ex. 6 is a letter, dated December 6, 1994, which Sobel wrote to Gary Stanford of Bureau staff in Gettysburg. The purpose of this letter was to correct the apparent misbelief of the Commission that Sobel was a fictitious name being used by Kay rather than a real, separate individual. Tr. 1557-1559. In the letter, Sobel advised the Commission:

> I would like to assure you that I am an Independent Two Way Radio Dealer. I am not an employee of Mr. Kay's or of any of Mr. Kay's companies. I am not related to Mr. Kay in any way. I have my own office and business telephone numbers. I advertise under my own company name in the Yellow Pages. My business tax registration and resale tax permits go back to 1978—long before I began conducting any business whatsoever with Mr. Kay.

Kay Ex. 6 at p.1. Sobel closed the letter with the following invitation: "Should you need further assistance ... in this matter, please call me at your earliest convenience." *Id.* at p. 2. Neither Stanford nor anyone else from the Commission ever responded to Sobel's letter. Tr. 1559.

168. After learning of the draft *HDO*, Sobel asked Brown and Schwaninger to prepare a written agreement to document the relationship between him and Kay. The purpose of drafting such a written agreement was "to clarify our separateness, our positions as two businesses, and our relationship in my stations that [Kay] managed." Tr. 1761. Sobel was not in any way dissatisfied with Kay's performance under the pre-existing oral arrangement. He had no reason to distrust Kay, and he had no desire to modify the relationship. Tr. 1764. Indeed, the parties did not change their relationship after the agreement was placed in writing—the written agreement was simply intended to clarify their position on paper. *Id.*

169. WTB Ex. 339 is a copy of the written management agreement between Sobel and Kay as executed on October 28, 1994. Brown and Schwaninger did not provide Kay and Sobel with preliminary drafts of the agreement; rather, it was their understanding this was a standard boilerplate agreement used by Brown and Schwaninger with all their clients. Tr. 1246, 1763. In fact, Kay had been advised by Brown and Schwaninger that "the management agreements met the FCC rules on all four corners." Tr. 2445.

170. Paragraph VIII of the written management agreement expressly provides:

> Supervision by Licensee: Licensee shall retain ultimate supervision and control of the operation of the Stations. Licensee shall have unlimited access to all transmitting facilities of the Station, shall be able to enter the transmitting facilities and discontinue any and all transmissions which are not in compliance with FCC Rules and shall be able to direct any control point operator employed by Agent to discontinue any and all transmissions which are not in compliance

> with FCC Rules. All contracts entered into with end users of the Stations' services shall be presented to the Licensee, either by original proposed contract or copy thereof, before such contracts go into effect, and Licensee shall have the right to reject any such contract within five (5) days of presentation, however, such rejection shall be reasonable and based on the mutual interests of the parties. Licensee shall have the right to locate the Stations' transmitting facilities at any place of Licensee's choosing, provided, however, that after the original construction of the transmitting facilities of the Stations is completed and/or following execution of this agreement, Licensee shall give sixty (60) days notice to Agent of any future relocation of any of the Stations. Such relocation shall only occur if it is in the best interest of both Parties.

WTB Ex. 339at p. p. 5, ¶ VIII.

171. WTB Ex. 340 is a copy of a virtually identical replacement agreement executed on December 30, 1994. The agreement was re-executed because Kay had initially neglected to pay Sobel a $100 fee to effectuate an option provision in the written agreement, and in order to expand the list of call signs covered by the agreement. WTB Ex. 228 at pp. 110-111; WTB Ex. 341. The agreement gives Kay an option to acquire any one of the Sobel stations for $500. Sobel and Kay both understood an option to be a "future" right that may or may not ever be exercised. Tr. 1303, 1744-1745. In fact, Kay has never exercised the option provision. Tr. 1746. Prior to the written agreement, the parties had an understanding that Kay would have either an option or a right of first refusal. Tr. 1745-1746. Kay required this protection because he would be writing five year service contracts to resell service on the stations and needed to be assured of continued access to the channel capacity. WTB Ex. 229 at pp. 365-366.

172. Prior to the written agreement, the parties also had a long-standing understanding that if the stations were ever sold, Kay would share in the proceeds to compensate him for work he had done and expenses he had incurred in clearing the channels. Tr. 1747. All of the frequencies subject to the management agreement were, at the time they were acquired by Sobel, encumbered by other users, *i.e.*, there were other licensees authorized to share use of the channels. Tr. 1747-1748. The process of "clearing" channels, researching the status of co-channel licenses, obtaining cancellation of inactive stations, negotiating assignments or

cancellations of other licenses, *etc.*, involved a great deal of work that Kay was in a better position to undertake. Tr. 1748.

173. Sobel was not, in any event, generally in the mode of selling stations. Tr. 1749. On the rare occasion when one of the management agreement stations was sold, the parties did not follow the specific terms of the option provision even after the written agreement was executed. For example, on one occasion Kay negotiated a deal with a third party whereby Sobel received $20,000 from the sale of one of the channels, event though under the literal terms of the written agreement Kay could have exercised his $500 option and diverted the additional monies to himself. Tr. 1746. On another occasion, Kay approached Sobel with an offer he had received from a third party to acquire all of the management agreement stations for $1.5 Million. Sobel turned down the proposal and decided to keep the stations. Tr. 1749. This was at a time when Kay needed the money and could have exercised his option to acquire each of the stations for only $500, but he instead went along with Sobel's desire to retain the stations. *Id.*

174. Under the oral arrangement between, Kay provided the equipment, but it was being leased to Sobel for use in the management agreement stations. Indeed, it was in large measure to compensate Kay for the provision of this equipment that it was agreed that Kay would receive the initial $600 in revenue each month. The written agreement, moreover, expressly provides: "Agent [*i.e.*, Kay] shall lease to Licensee [*i.e.*, Sobel] all equipment necessary to construct and operate the Stations. All rents to be collected by Agent for lease of equipment to Licensee shall be deemed by the Parties to be a portion of Agent's compensation for services described herein." WTB Ex. 340 at p. 3, ¶ IV.

175. The written management agreement prepared by Brown and Schwaninger is no longer in effect, having been replaced by a revised agreement drafted by Kay's current regulatory counsel. Tr. 2370-2377; Kay Ex. 64. Kay explained that the new agreement was prepared and executed

> [b]ecause while we believed the initial agreement was perfectly legal on all four corners, the Commission's scrutiny and the ruling that came from the Marc Sobel matter clearly indicated that the agreement may have some problems. So, we have had counsel draft a new agreement which hopefully will be more on all four corners with the Commission's expectations, and we executed the new agreement.

Tr. 2371.

G. Misrepresentation and Lack of Candor Issue

176. On or about January 25, 1995, Brown and Schwaninger, acting on Kay's behalf, submitted in the above-captioned proceeding a pleading entitled "Motion to Enlarge, Change or Delete Issues." WTB Ex. 343. That pleading included the following statement:

> James A. Kay, Jr. is an individual. Marc Sobel is a different individual. Kay does not do business in the name of Marc Sobel or use Sobel's name in any way. ... Kay has no interest in any of the licenses or stations held by Marc Sobel. Marc Sobel has no interest in any of the licenses or stations authorized to Kay or any business entity in which Kay holds an interest. Because Kay has no interest in any license or station in common with Marc Sobel and because Sobel was not named as party to the instant proceeding, the Commission should either change the [*HDO*] to delete the reference to the stations identified as stations 154 through 164 in Appendix A, or should dismiss the [*HDO*] with respect to those stations.

WTB Ex. 343 at pp. 4-5. This was the sole reference to Sobel in the entire sixteen page pleading that addressed numerous other matters. *Id.* Kay executed a general supporting affidavit whereby he "declare[d] under penalty of perjury ... that the ... Motion to Enlarge, Change, or Delete Issues is true and correct." *Id.* at p. 23. Kay explained that he scanned through the document and saw no obvious errors and therefore executed the affidavit that had been supplied to him by his legal counsel. Tr. 1301. He did "not analyz[e] the meaning of every nuance of every word through it, not even close." Tr. 2443-2444.

177. Kay believes that when his attorneys wrote in the pleading that he had no "interest" in Sobel's licenses, they meant that "James Kay does not have a legal interest, an ownership interest, in the licenses held by Marc Sobel." Tr. 1301. Kay understood the language denying an interest in Sobel's licenses or stations to mean that Kay "had no ownership interest as in owning a part of this, being a partner, in any licenses that were issued to Marc Sobel."

Tr. 2444. Insofar as the pleading stated that Kay did not have an interest in any "license or station" authorized to Sobel, Kay has always used the two words (station and license) interchangeably, noting that FCC licenses are titled Radio Station License. Tr. 1314. He used the terms interchangeably and he believes Dennis Brown, who wrote the pleading, did also. Tr. 2444.

178. Kay was obviously aware of the management agreement at the time he executed the affidavit, but he also knew the management agreement had been prepared by the same attorneys who drafted the pleading and the affidavit. Tr. 2444. Kay was specifically advised, by counsel, that, in fact, that the management agreement did not constitute an interest. Tr. 2444-2445. In any event, there was not a great correlation between the management agreement and the motion for which the affidavit was executed. One objective of the motion was to have stations licensed to Sobel removed from the *HDO*, but this was not its primary purpose and, indeed, only one paragraph in the sixteen page pleading was devoted to this matter. WTB Ex. 343. Moreover, most of the management agreement stations were not even affected by the *HDO*. Only two of the eleven Sobel call signs listed in Appendix A to the *HDO* were subject to the management agreement. Compare *HDO*, Appendix A, items 154-164, and WTB Ex. 341 pp. 1 & 837. The other nine stations included in the *HDO* had no connection to Kay whatsoever. *Id.* Conversely, fourteen out of the sixteen management agreement stations were ***not*** listed in the *HDO*. *Id.*

179. In approximately March 1995, Kay produced to the Bureau, in response to a discovery request copies of various agreements relating to stations he managed. Tr. 1312. The Presiding Judge and the Commission may take official notice that the documents were produced on March 24, 1995. *Kay's Responses to Wireless Telecommunications Bureau's First Request for Documents* in this proceeding. Included among these were the management agreements with Sobel (WTB Exs. 339-341).

IV. PROPOSED CONCLUSIONS OF LAW

A. Preliminary Legal Matters

(1) The Burdens of Proceeding and Proof

180. This is a Title III license revocation proceeding. Kay has no burdens as to any issue. In accordance with Section 312(d) of the Communications Act, 47 U.S.C. § 312(d), the burden of proceeding and the burden of proof as to all issues are on the Bureau. *HDO* at ¶ 15; *Order* (FCC 98M-30; March 12, 1998). Accordingly, the burden is on the Bureau in this case to prove the allegations of alleged wrongdoing and to justify the sanctions sought. Kay need not prove his innocence, nor is it up to Kay to refute a partial, but incomplete, showing by the Bureau. If the Bureau's evidentiary presentation is lacking in any respect, no adverse inference may be drawn against Kay as the result of any "significant silences". *See WMOZ, Inc.*, 1 Rad. Reg. 2d (P&F) 801 at ¶ 15 (1964). The Bureau has been investigating Kay since sometime well before 1994—the 308(b) Request having been issued in January 1994—and this case was designated for hearing more than four years ago. The Bureau has had ample opportunity to investigate, inspect, depose, interrogate, *etc.*, and has had more than ample opportunity to present evidence and witnesses. Kay therefore need not apologize for insisting that the Bureau be held stringently responsible for meeting the burdens of proceeding and of proof imposed upon it by statute. As shall be demonstrated below, however, the Bureau has failed to carry its burden.[23]

[23] Obviously, since the burden does not shift to Kay unless and until the Bureau satisfies its burden of proof, Kay's conclusions in these proposed findings and conclusions will be necessarily limited to his anticipation of what the Bureau intends to recommend. To the extent the Bureau attempts to rehabilitate its failure to carry its burden in its proposed findings of fact and conclusions of law, Kay reserves the right to respond accordingly in his reply findings and conclusions.

(2) The Standard of Proof

181. The Bureau must prove its case by a "clear and convincing" standard of proof. *Sea Island Broadcasting Corp. v. FCC*, 627 F.2d 240 (D.C. Cir. 1980) (clear and convincing standard of proof applied to FCC revocation proceedings potentially affecting the licensee's livelihood). Kay is a small businessman who depends on his land mobile radio business as his sole source of livelihood. Kay respectfully submits that the "clear and convincing" standard adopted in *Sea Island* applies in FCC revocation cases involving potential loss of livelihood notwithstanding the Supreme Court decision in *Steadman v. SEC*, 450 U.S. 91 (1981). *See, e.g.*, *Lewel Broadcasting, Inc.*, 86 F.C.C.2d 896, 913-914 ¶ 32 (1981) (recognizing, with only a "*cf.*" to *Steadman*, that *Sea Island* "holds that where a loss of livelihood is involved, the revocation of an FCC license must be proved by 'clear and convincing' evidence"); *Silver Star Communications-Albany, Inc.*, 3 F.C.C.R. 6342, 6350 n.18 (recognizing, after *Steadman*, that the clear and convincing standard may be proper in some circumstances); *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 395 n.1 (Scalia, J.) (assuming without deciding, and with only a "*cf.*" to *Steadman*, that the Commission's application of a "clear, precise, and indisputable" standard of proof was valid).

B. Section 308(b) Issue

182. This issue is "[t]o determine whether James A. Kay, Jr. has violated Section 308(b) of the Act and/or Section 1.17 of the Commission's Rules, by failing to provide information requested in his responses to Commission inquiries." *HDO* at ¶ 10(a). Section 308(b) of the Communications Act provides, in pertinent part:

> The Commission, at any time after the filing of [an] original application and during the term of any ... license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such ... statement of fact shall be signed by the applicant and/or licensee in any manner or form, including by electronic means, as the Commission may prescribe by regulation.

47 U.S.C. § 308(b). Section 1.17 of the Commission's Rules and Regulations provides:

> The Commission or its representatives may, in writing, require from any applicant, permittee or licensee written statements of fact relevant to a determination whether an application should be granted or denied, or to a determination whether a license should be revoked, or to some other matter within the jurisdiction of the Commission. No applicant, permittee or licensee shall in any response to Commission correspondence or inquiry or in any application, pleading, report or any other written statement submitted to the Commission, make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission.

47 C.F.R. § 1.17.

183. There was no evidence adduced at hearing that Kay made any misrepresentation or willful material omission in responding to the 308(b) Request. Moreover, Kay did not simply ignore or refuse to respond to the 308(b) Request; rather, he provided information and his communications counsel timely interposed a number of legal objections to the request. After the case was designated for hearing, in the course of discovery, Kay provided the Bureau with all of the information that had been sought in the 308(b) Request.[24] The essence of this issue, therefore, is whether Kay should be disqualified or otherwise sanctioned because his pre-hearing responses contained legal objections.

184. A review of the sparse precedent reveals no previous Commission case in which a licensee has been disqualified solely on the basis of its failure to respond to requests for information by the Commission's staff in an informal context (*i.e.*, not pursuant to a formal subpoena or a discovery request in a designated hearing). The Bureau cites three cases as being relevant to the Section 308(b) Issue, Wireless Telecommunications Bureau's Trial Brief at p. 16,

[24] Subject to the proper exercise of his right to interpose and be heard on legal objections, Kay complied with all discovery demands made at hearing by the Bureau as modified by the Presiding Judge. He did so after the Presiding Judge made an affirmative determination "that the Bureau will exercise care in disclosing the information to third parties," and also directed the parties to "discuss terms of a limited and narrowly tailored protective order which will not unduly burden or impede the Bureau's preparation for trial." *Memorandum Opinion and Order* (FCC 95M-77; released March 22, 1995).

¶ 30.A (filed July 29, 1998), but as discussed below, the cases do not warrant the penalties sought by the Bureau.

185. In *Carol Music, Inc.*, 37 F.C.C. 37, 3 Rad. Reg. 2d (P&F) 477 (1964), a broadcast licensee was disqualified primarily for its failure to comply with the terms of its authorization, making bad faith promises and representations in its renewal application, and for unlawfully relinquishing control over portions of its programming. *Id.* at ¶ 3. The Commission went on to find: "Respondent also failed and refused to file with the Commission copies of contracts, agreements and other information required to be filed by statute and rule, and thereby concealed information relevant to its operations required by the Commission," *id.*, but it is clear that (a) the information withheld by the licensee, which later was developed in hearing, turned out to be extremely incriminating, and (b) the licensee's disqualification was based on the underlying violations and noncompliance, and not exclusively or even primarily on the licensee's failure to provide the requested information. Moreover, a fair reading of the *Carol Music* decision, including the Initial Decision associated with it, shows that the licensee's refusal to provide the information was based on a determined and continuous effort to conceal the violations from the Commission. This is in sharp contrast to Kay's situation in which (a) his pre-hearing responses were accompanied by *bona fide* legal objections; (b) there were extenuating circumstances preventing a complete and timely response; (c) he subsequently produced all of the material requested during discovery; and (d) the full evidence later developed at hearing did not reveal any instances of serious transgressions.

186. The Bureau's reliance on *Faith Center, Inc.*, 9 F.C.C.2d 756 (Rev. Bd.) 82 F.C.C.2d 1, 48 Rad. Reg. 2d (P&F) 709 (1980), *aff'd sub nom. Faith Center, Inc. v. FCC*, 679 F.2d 261 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983), is equally misplaced, if not more so. In *Faith Center*, the licensee's renewal application, which had been designated for hearing, was dismissed for numerous and repeated refusals to comply with discovery requests and valid

discovery orders of the Presiding Judge, even after numerous objections had been ruled on and rejected by the Presiding Judge, the Review Board, and the Commission. We have nothing approaching that in this case. Kay, through counsel, interposed legal objections to the production of some of the information requested by Bureau staff in an informal investigation prior to designation. The Bureau responded by seeking and obtaining, on an *ex parte* basis, a hearing designation order seeking revocation of Kay's licenses. Kay has fully complied with all valid discovery requests and orders during the course of the hearing, and all of the information sought in the initial 308(b) Request that it is within Kay's power to produce has been provided to the Bureau.

187. The Bureau also relies on *Warren L. Percival*, 8 F.C.C.2d 333 (1967). In that case a Citizens Band licensee, who had apparently obtained his authorization using a false name, refused, on asserted Constitutional grounds, to respond to a Commission inquiry whether he had been convicted of a crime. The license was summarily revoked after the licensee failed to timely respond to an order to show cause. In this case, Kay timely responded to the order to show cause (*i.e.*, the *HDO*), and has provided all of the requested information.

188. The applicable precedent does not, therefore, support the draconian sanctions sought by the Bureau. The record amply reveals, moreover, extensive extenuating circumstances that substantially mitigate any adverse reflection that might be attributed to Kay's pre-designation treatment of the 308(b) Request. The request was received by Kay only two weeks after the Northridge earthquake, a devastating natural disaster that did substantial damage to his business and his personal residence. He was understandably preoccupied with earthquake recovery, and left the details of dealing with the 308(b) Request to his Washington, D.C. communications counsel. Several of Kay's employees and even one of his local attorneys testified as to the effect the earthquake had on Kay's state of mind. He was distracted, preoccupied, and had difficulty focusing his attention. In other words, Kay behaved as any

person would who has just gone through a serious natural disaster and had his life turned upside down. Clearly he did not exercise the degree of oversight, much less anything approaching detailed supervision, over his communications counsel as he might have under different circumstances.

189. The earthquake also directly affected Kay's literal and physical ability to respond to the 308(b) Request. His offices were a shambles. Computer damage prevented him from having complete access to computer records. Indeed, the record reflects that it took Kay's staff two to three months to manually reconstruct the computer database. Kay also did not have extensive personal availability or access to staff support in the weeks and months immediately following the earthquake.

199. The findings establish that Kay did not have the computer capability to provide the Bureau the information it sought. In this regard, the program Kay utilized did not keep the information in the configuration the Bureau wanted. After designation, Kay modified the program to provide the Bureau with the requested information. It is questionable whether Kay had to go to these extremes prior to designation or, for that matter, even after designation. The Commission has no prescribed format for how licensees must maintain loading records, and may therefore not fault Kay because the records he maintained in his normal business practice did not satisfy the Bureau's *ad hoc* expectations and demands.

200. On top of all this, Kay had serious and well-founded concerns about the confidentiality of the data being sought by the Bureau. This was an extremely broad request, and rather than explaining the nature of any particular inquiry, complaint, or alleged violation and asking for focused information relating to that, Kay was being asked blindly to provide virtually every detail regarding the operation of his business. This included extremely sensitive information such as his entire customer list (which would be commercially devastating for Kay if it fell into competitors' hands) and details regarding the technical configuration of each of his

customers' systems (which raised serious concerns for safety in addition to liability and financial exposure). When Kay requested confidential treatment of the information to be provided, rather than, consistent with Kay's past experience, routinely agreeing, the Bureau started feeding him legal technicalities about the Freedom of Information Act. This only heightened Kay's concerns since, insofar as he knew, it was his competitors who were complaining to the FCC, Kay was well aware that they knew how to use FOIA to their advantage. His competitors had already received copies of the 308(b) Request and were using it to defame him in the local marketplace, and Kay had no doubt that they would use their best efforts to gain further information about the investigation.

201. In this contest, even assuming good faith on the part of the Bureau, Kay was legitimately concerned that any information he produced in response to the 308(b) Request would find its way into the hands of his competitors. But Kay was then presented with reason to question the Bureau's good faith. When, out of deference to and in furtherance of Kay's confidentiality concerns, Kay's legal counsel placed copyright notices on correspondence relating to the 308(b) Request, the Bureau immediately responded by demanding that Kay supply 50 copies of his response. Kay's counsel repeatedly challenged this request—specifically explaining that it heightened Kay's confidentiality concerns and suspicion—but the Bureau ignored these objections and let the demand for 50 copies stand until after the formal date for response to the 308(b) Request had passed. Only then, after counsel for Kay expressly rejected the demand and instead supplied only the number of copies required by the Commission's Rules, did the Bureau unilaterally drop the demand without providing any explanation for its initial request or subsequent withdrawal.

202. In the midst of all of this came the incident in which Anne Marie Wypijewski contacted Gail Thompson of the Thompson Tree Service. Having denied his confidentiality, then having demanded 50 copies of the most highly confidential information about Kay's business,

the Bureau then rejected one of Kay's finder's preference requests on highly questionable grounds, and before informing Kay of that action, counseled Mrs. Thompson, on an *ex parte* basis, how to take advantage of that action to Kay's detriment. We may never know what the Bureau's intentions were in this regard, because the Bureau has declined every opportunity to present its side of the factual story. But it ultimately does not matter, because the issue here is Kay's state of mind. From Kay's point of view, given all else that was occurring at that time, namely, April 1994, there was no other way for him to interpret Ms. Wypijewski's actions than as the ultimate expression of bad faith on the part of the Bureau. Kay had every reason to distrust his competitors' intentions and be suspicious of the Bureau's good faith.

203. It is clear from the foregoing that Kay did not respond to the 308(b) Request to the Bureau's satisfaction. It is safe to assume that had Kay been focused and/or represented by other counsel, these matters would have been handled differently. Under the circumstances, however, Kay's degree of responsiveness was understandably affected by the Bureau's actions. That factor, the effects of the earthquake, and the virtual impossibility of responding due to Kay's computer and manpower limitations combine to mitigate any adverse conclusion under this issue. Furthermore, Kay ***did*** ultimately provide all the material requested by the Bureau. Given that no licensee has ever been disqualified for failing to provide information in response to an informal staff request, there is no basis for sanctioning Kay here. Accordingly, a fair review of the record adduced at hearing and the applicable precedent points to resolution of this issue in Kay's favor.

C. Construction and Operation Issue

204. This issue is "[t]o determine if Kay has willfully or repeatedly violated any of the Commission's construction and operation requirements in violation of Sections 90.155, 90.157, 90.313, 90.623, 90.627, 90.631, and 90.633 of the Commission's Rules." *HDO* at ¶ 10(c). The reference to 90.627 of the Rules is no longer relevant to the Construction and Operation Issue.

See MO&O 98M-94. The issue may be treated in two parts: (1) whether Kay failed to timely construct and/or permanently discontinued operation of one or more authorized stations; and (2) whether Kay violated applicable loading requirements. In either case, however, the focus of this issue is not simply whether Kay at some time or another failed to comply with one or more rule provisions, but whether he engaged in willful or repeated violation of the specific rules listed in the issue.

(1) Timely Construction and/or Permanent Discontinuance

205. *Timely Construction.* At all times and to the extent relevant to this case, Section 90.155 required that conventional stations "must be placed in operation within eight (8) months from the date of grant or the authorization cancels automatically and must be returned to the Commission." 47 C.F.R. § 90.155(a) (1994);[25] *accord* 47 C.F.R. § 90.633(c)-(d) (1994). Section 90.631(e) required that "licensees of trunked facilities must complete construction within one year," 47 C.F.R. § 90.631(e) (1994), and Section 90.631(f) provided for automatic cancellation if this construction deadline is not met, 47 C.F.R. § 90.631(f) (1994).

206. *Permanent Discontinuance.* At all times and to the extent relevant to this case, Section 90.157 of the Rules provided:

> A station license shall cancel automatically upon permanent discontinuance of operations. Unless stated otherwise in this part or in a station authorization, for the purposes of this section, any station which has not operated for one year or more is considered to have been permanently discontinued.

47 C.F.R. § 90.157 (1994); accord 47 C.F.R. § 90.631(f) (1994) (specifying a shorter time for some 800 and 900 MHz trunked system licenses).

[25] The regulatory provisions relied upon are as codified in the 1994 edition of the Code of Federal Regulations, revised as of October 1, 1994. There have been many amendments and revisions to the rules since the *HDO*, and, to the extent possible references to the rules in this pleading will be to the regulations in effect as of the release date of the *HDO*, *i.e.*, December 13, 1994.

207. As a preliminary matter, Kay submits that it is not possible to willfully or repeatedly violate these regulatory provisions. Rather than affirmatively requiring any particular action on the part of a licensee, they simply prescribe the regulatory consequence of a licensee's failure to take certain actions. Specifically, if a licensee fails to timely construct a station, or if a licensee permanently deconstructs or discontinues operation of a station, the station authorization automatically cancels. Whether or not this automatic regulatory sanction applied to any of Kay's stations is already the subject of a separate issue, namely, the "Automatic Cancellation Issue." *HDO* at ¶ 10(h). Any further consideration of whether Kay "willfully or repeatedly" violated the Commission's construction requirements rules is unnecessary.[26]

208. For the limited purposes of this proceeding, the parties have stipulated that, as to each site annotated as "Not in operation" in the "Comments" column of Attachment A to Kay's May 11, 1995, *Amended Responses to Wireless Telecommunications Bureau's First Set of Interrogatories* (WTB Ex. 290), that facility was either not timely constructed or operation of that facility had been permanently discontinued as of May 11, 1995. Tr. 1232. The Bureau presented no evidence that any authorized facilities other than those specifically covered by this stipulation were not timely constructed or that operation of any such facilities has been permanently discontinued. Moreover, the Bureau has not demonstrated any improper conduct or nefarious motive in connection with the facilities specifically covered by the stipulation. Accordingly, the record does not support any adverse conclusion against Kay in this regard, nor

[26] Theoretically, a willful and repeated failure to timely surrender an authorization that has automatically expired due to a failure to timely construct or to permanent discontinuance, if done knowingly and with deceptive intent, might be construed as a form of spectrum warehousing, but it is not apparent from the *HDO* that this is what the Commission had in mind when it designated the Construction and Operation Issue, and the Bureau clearly has not presented evidence to support such a conclusion as to Kay.

does the record warrant any sanction other than that separately considered under the Automatic Cancellation Issue.[27]

(2) System Loading

209. *UHF (470-512 MHz) Systems.* At all times and to the extent relevant to this case, Section 90.313 of the Rules provided, in pertinent part:

> 90.313 – Frequency loading criteria.
>
> (a) Except as provided for in paragraph (b), the maximum channel loading on frequencies in the 470-512 MHz band is as follows: ...
>
> (2) 70 units in the Industrial Radio Services (except business).
>
> (3) 90 units in the Business Radio Service. ...
>
> (b) If a licensee has exclusive use of a frequency, then the loading standards in paragraph (a) may be exceeded. If it is a shared channel, the loading standards can be exceeded upon submission of a signed statement by all those sharing the channel agreeing to the increase.
>
> (c) A unit is defined as a mobile transmitter-receiver. Loading standards will be applied in terms of the number of units actually in use or to be placed in use within 8 months following authorization. A licensee will be required to show that an assigned frequency pair is at full capacity before it may be assigned a second or additional frequency pair. Channel capacity may be reached either by the requirements of a single licensee or by several users sharing a channel. Until a channel is loaded to capacity it will be available for assignment to other users in the same area. ... Following authorization, the licensee shall notify the Commission either during or at the close of the 8-month period of the number of units in operation. ...

47 C.F.R. § 90.313 (1994).

210. Section 90.313 merely sets forth general loading standards and criteria for UHF systems, and it is therefore not clear how one "violates" the rule. The Bureau, therefore, attempts to bootstrap this to another rule, Section 90.135(a)(5), that was not specifically mentioned or

[27] Kay does not concede the Automatic Cancellation Issue as worded, *HDO* at ¶ 10(h), because the failure to timely construct and/or the permanent discontinuance of operation does not in itself constitute a violation of any rule or regulation. Kay is certainly willing to cooperate with the Bureau, after the hearing, to determine which authorizations, if any, should be purged from the Commission's database as a result of this stipulation.

invoked in the *HDO*. Section 90.135(a)(5), as effective at the time of the *HDO*, required licensees of 470-512 MHz systems and of 800 MHz conventional systems to modify their licenses to reflect changes in the number of mobile units if the number of mobiles is less than that required to maintain exclusive use of the channel (*i.e.*, 90 units per channel in the case of UHF channels in the business service and 70 units per channel in the case of 800 MHz Conventional SMR (GX) channels). 47 C.F.R. § 90.135(a)(5) (1994).

211. Apart from the fact that the alleged violation of Section 90.135(a)(5) of the Rules is beyond the scope of the *HDO* and should therefore not be further considered,[28] the Bureau has not proved a violation. To show a violation of Section 90.135(a)(5), the Bureau would have to demonstrate: (a) that Kay held one or more subject authorizations that were beyond their eight month construction period;[29] (b) that Kay, in fact, had exclusive status on the channel;[30] (c) that Kay's actual loading on the channel had permanently[31] dropped below the level required to maintain exclusivity; and (d) that Kay had failed to modify the subject license within a reasonable period of time. The Bureau, exclusive steward of the burdens of proceeding and proof in this proceeding, made no such showing.

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[28] *The Telephone Co., Inc.*, 41 Rad. Reg. 2d (P&F) 611, 616-617 (1977).

[29] Section 90.135 clearly would not apply to stations within their initial eight month construction period. Section 90.313(c) requires the licensee, "[f]ollowing authorization, [to] notify the Commission either during or at the close of the 8-month period of the number of units in operation." 47 C.F.R. § 90.313(c) (1994).

[30] Section 90.313(c) provides: "Channel capacity may be reached either by the requirements of a single licensee or by several users sharing a channel." 47 C.F.R. § 90.313(c) (1994).

[31] A rule of reason must apply. Licensees providing commercial service to unaffiliated third parties either as UHF private carriers or as 800 MHz SMRs will obviously experience and ebb and flow of demand for service. That loading may momentarily drop below a specified level surely must not be construed as immediately and irrevocably decimating the scope of the licensee's authorization. This is, of course, an academic point insofar as the Bureau did not demonstrate that Kay's loading was ***ever*** below the threshold, much less that any such shortfall was permanent or of a sufficiently long time to reasonably justify destroying any exclusive status.

212. *800 MHz Trunked Systems*. At all times and to the extent relevant to this case, Section 90.631 of the Rules provided, in pertinent part:

> 90.631 – Trunked system loading, construction and authorization requirements.
>
> (a) Trunked systems will be authorized on the basis of a loading criterion of 100 mobile stations per channel. For purposes of determining compliance with trunked system loading requirements under this subpart, the term "mobile station" includes vehicular and portable mobile units and control stations.
>
> (b) Each applicant for a trunked system shall certify that a minimum of 70 mobiles for each channel authorized will be placed in operation within five years of the initial license grant. ... [I]f at the end of five years a trunked system is not loaded to the prescribed levels and all channels in the licensee's category are assigned in the system's geographic area, authorization for trunked channels not loaded to 70 mobile stations cancels automatically at a rate that allows the licensee to retain one channel for every 100 mobiles loaded, plus one additional channel. ... A licensee that has authorized channels cancelled due to failure to meet the above loading requirements will not be authorized to obtain additional channels to expand that same system for a period of six months from the date of cancellation.
>
> (c) Except as provided in (d) below, an applicant seeking to expand a trunked system by requesting additional channels from the Commission, or through intercategory sharing, or through an assignment must have a loading level of 70 mobiles per channel on the existing system that is the subject of the expansion request. ...

47 C.F.R. § 90.631 (1994).

213. It is respectfully submitted that this rule does not apply to the 800 MHz trunked systems licensed to Kay. Section 90.631 clearly addresses newly authorized trunked systems, using primarily blocks of channels from the SMR Category trunked pools. It is in this context of issuing a new license for theretofore unassigned and unused channels that Section 90.631 prescribes a "build-out" period of five years during which the licensee is required to load the system to prescribed levels. By contrast, the 800 MHz Trunked SMR (YX) systems licensed to Kay were already fully loaded when he obtained them. The Commission may take official notice of the fact that each 800 MHz Trunked SMR (YX) authorization held by Kay was obtained by converting existing conventional system authorizations consisting of General Category channels

(and some Business Category and Industrial/Land Transportation Category channels authorized pursuant to intercategory sharing). Section 90.615 of the Rules, as in effect at the time of designation, expressly provided:

> A licensee of a station in the General Category authorized to operate in the conventional mode may apply to operate instead in the trunked mode. A licensee applying to convert its station from the conventional to the trunked mode may apply for a number of channels not to exceed one more channel that its current loading warrants.

47 C.F.R. § 90.615(b)(1) (1994). Thus, the Commission already made the determination that Kay's trunked systems were adequately loaded as part of its determination to issue the Trunked SMR (YX) authorizations to him. Kay respectfully submits that Section 90.631 was never intended to apply to such converted systems that were already loaded *ab initio*.

214. Without conceding the applicability of Section 90.631, the record nonetheless reflects that, as of November 1995, based solely on Kay's computer-maintained billing records, Kay's Trunked SMR (YX) systems were loaded to well over the 70 mobile per channel standard required to retain the channels. The Bureau has offered no evidence that Kay's trunked systems were not adequately loaded at any other relevant time. Accordingly, the Bureau has made no showing warranting an adverse finding against Kay under Section 90.631.

800 MHz Conventional Systems. As in effect at the time of the *HDO*, Section 90.633 provided, in pertinent part:

> 90.633 – Conventional systems loading requirements.
>
> (a) Conventional systems of communication will be authorized on the basis of a minimum loading criteria of seventy (70) mobile stations for each channel authorized.
>
> (b) A channel will not be assigned to additional licensees when it is loaded to 70 mobile stations. Where a licensee does not load a channel to 70 mobiles the channel will be available for assignment to other licensees. All authorizations for conventional systems are issued subject to this potential channel sharing condition. ...

(e) A licensee may apply for additional frequency pairs if its authorized conventional channel(s) is occupied to 70 mobiles. Applications may be considered for additional channels in areas where spectrum is still available and not applied for, even if the already authorized channel(s) is not loaded to 70 mobile units, upon an appropriate demonstration of need.

47 C.F.R. § 90.633 (1994).

215. It is not clear what part of this rule, if any, Kay is accused of violating. Subsection (a) simply recites the loading criterion (70 mobiles per channel) applicable to 800 MHz conventional channels. Subsection (b) merely provides that a conventional channel will be subject to sharing (*i.e.*, available for assignment to multiple licensee's in the same area) until it is loaded to 70 mobile units. Subsection (e) establishes that an application for one or more additional frequency pairs is conditioned on any conventional channels already authorized to the applicant being occupied to 70 mobile units. Even if existing conventional channels are not fully loaded, subsection (e) provides that additional channels may be awarded "upon and appropriate demonstration of need."

216. This rule governs the acceptance, processing, and grant or denial of applications—it simply states when applications may be granted and when they may not. As such, this provision is not susceptible to willful or repeated violation. Upon submission of an application that is subject to Section 90.633(e), the Commission must determine either that the existing channels authorized to the applicant are adequately loaded, referring not simply to loading by the applicant, but rather to loading by ***all*** licensees sharing the channel,[32] or that there has been an "appropriate demonstration of need" notwithstanding the loading on existing channels.

[32] This means all other stations within 70 miles of the proposed location (105 miles in the case of Mt. Lukens, Mt. Wilson (CA), Sierra Peak, and Santiago Peak, see 47 C.F.R. § 90.621, as well as applicant's own stations within 40 miles of the proposed location.

217. To the extent Kay holds conventional channel authorizations, he does so because Commission staff in the past made this determination and granted his application in each case. The Bureau has presented no evidence regarding those applications. It has not shown which applications, if any, Kay filed that were subject to subsection (e). The Bureau has not presented evidence of what other conventional channels were, at the time of any such application, licensed to Kay in the same area, nor has it presented any evidence of the occupancy on such channels (by Kay and other licensees) at the time of such application. Finally, the Bureau has offered no evidence that any "appropriate demonstration of need" in lieu of loading[33] presented by Kay was, at the time of such application, improper or inadequate.[34]

218. *800 MHz Conventional Channel Applications by 800 MHz Trunked System Licensees.* As in effect at the time of the *HDO*, Section 90.623 provided, in pertinent part:

> (a) The maximum number of frequency pairs that may be assigned to a licensee for operation in the conventional mode in a given area is five (5).
>
> ...
>
> (d) No licensee will be authorized frequencies for a conventional system if that licensee is operating an unloaded trunked system or has an application pending for a trunked system to serve multiple subscribers within 64 km (40 miles) of the requested conventional system.

47 C.F.R. § 90.623.[35] This does not appear to be a regulation susceptible to violation by an

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[33] An example of just such an alternative demonstration of need is a "package" application which simultaneously proposes service to a sufficient number of mobiles to fully load the new channel. Kay stated that he frequently used this approach and the record corroborates his testimony.

[34] Moreover, even assuming the Bureau had even attempted to offer such evidence, the Commission does not have the statutory authority to revisit these application processing determinations years after the fact. Section 1.108 of the Commission's Rules provides that "[t]he Commission may, on its own motion, set aside any action made or taken by it within 30 days from the date of public notice of such action ...." 47 C.F.R. § 1.108.

[35] Kay respectfully submits that subsections (b) through (c) of this rule have no possible applicability to this proceeding. Section 90.623(b) governs applications to operate a conventional system to provide facilities for use by a single eligible. Section 90.623(c) sets forth additional channel criteria for non-SMR licensees. There is no evidence in the record that Kay was even arguably involved in any application subject to either provision.

applicant or licensee, much less a willful or repeated violation. It is an application processing rule. It sets conditions as to when applications are acceptable and authorizations may issue, and when they are not and may not. If an application is submitted that is determined to be out of compliance with Section 90.623, the remedy is denial of the application.

219. Even making the absurd assumption that it was the intention of the Commission to reexamine retroactively in this proceeding the propriety of each and every application filed by Kay and each and every authorization issued to Kay at any time in the past, the Bureau has not met its burden. A determination adverse to Kay under Section 90.623(a) would require a finding that Kay already held authority for five conventional channels within 40 miles of a location he proposed in an application for a sixth conventional channel.[36] The Bureau presented no such evidence. A determination adverse to Kay under subsection (a) of Section 90.623 would require a showing that (a) Kay made an application for a conventional channel, (b) at a time when he held an authorization for a trunked system which was not fully loaded, and (c) which was located within 40 miles of the proposed conventional channel. No such evidence was adduced, and no such showing exists in the record.

[36] It is questionable whether subsection (a) of Section 90.623 was ever intended to apply to SMR operators who provide service on a commercial basis to multiple users. The rule precludes the assignment of more than five "channel pairs". Prior to October 1992, SMR licensees did not receive authorizations for "channel pairs" but rather only for the repeater base station license. The other half of the "channel pairs," *i.e.*, the authorization for the mobile transmitters, was licensed separately to one or more end users. *See, generally, End User and Mobile Licensing Information*, PR Docket No. 92-78, Report and Order, 7 F.C.C.R. 6344 (1992).

D. Multiple Applications Issue

220. This issue is "[t]o determine whether James A. Kay, Jr. has abused the Commission's processes by filing applications in multiple names in order to avoid compliance with the Commission's channel sharing and recovery provisions in violation of Sections 90.623 and 90.629. *HDO* at ¶ 10(d). Section 90.629 is no longer at issue in this proceeding. *See MO&O 98M-94*.

221. The remaining inquiry under this issue appears to be whether Kay was the undisclosed real party in interest in one or more applications that Section 90.623 precluded him from filing in his own name. After having investigating Kay for more than five years, and after extensive discovery, the Bureau proffered that "the evidence will show that Kay convinced and/or coerced Carla Pfeifer, Roy Jensen, Kevin Hessman, and Vincent Cordaro to sign applications where Kay was in fact the real party in interest." *Wireless Telecommunications Bureau's Trial Brief* at p. 6 (filed July 29, 1998). The Bureau's pre-trial promise was not satisfied by its hearing performance. The Bureau has utterly failed to meet its burden of showing that Kay was the real party in interest in any of these applications, and has not, in any event, demonstrated that Section 90.623 would have precluded Kay from submitting any one of the questioned applications in his own name.

222. Kay never did anything to conceal his involvement in any of these applications. In many cases, of course, the Bureau has seen fit not to introduce the application forms themselves into the record, but where they have done so it is seen that, in most cases, Kay's name is prominently disclosed as the preparer on the FCC application forms. The record shows that Kay assisted Hessman and Jensen in obtaining end user authorizations so they could use Kay's system for activities beyond the scope of their Southland employment. Far from being improper, this was actually required by the rules applicable at the time. The record further shows that Kay assisted a social friend, Carla Pfeifer, in obtaining an SMR license—Kay testified he could have

applied for this facility in his own name at the time had he so desired—that she concedes she viewed as a "business opportunity" for herself. Similarly, Kay assisted Cordaro in obtaining licenses to support Cordaro's extracurricular entrepreneurial endeavors. In none of these cases, nor in any other case, has the Bureau refuted Kay's showing that these applicants, not Kay, were the real party in interest in the applications and licenses. Moreover, the Bureau has made absolutely no showing whatsoever that Kay in any way ever attempted to conceal his involvement in the applications, or that Kay would have been precluded, by Section 90.623 or otherwise, from filing the same or substantially similar applications in his own name. In short, this issue presents simply one more area in which the Bureau has abdicated its burdens of proceeding and proof.

E. Interference Issue

223. This issue is "[t]o determine whether James A. Kay, Jr. willfully or maliciously interfered with the radio communications of other systems, in violation of Sections 333 of the Act." *HDO* at ¶ 10(e).

224. Section 333 of the Communications Act of 1934, as amended, provides: "No person shall willfully or maliciously interfere with or cause interference to any radio communications of any station licensed or authorized by or under this Act or operated by the United States Government." 47 U.S.C. § 333. A sanctionable violation of this statutory provision requires a demonstration that "an actual intent to interfere with or to obstruct" the communications of others, *i.e.*, it requires a showing of "an intent to violate the law". *Capitol Radiotelephone, Inc.*, 11 F.C.C.R. 2335, 2 Communications Reg. (P&F) 928 at ¶¶ 13-14. The legislative history of Section 333 explicitly states that it fills a statutory void in the Communications Act against "willful or malicious interference." H.R. Rep. No., 316, 101st Cong. 1st Sess. 8 (1989). The provision prohibits "intentional jamming, deliberate transmissions

on top of the transmissions of authorized operators already using specific frequencies in order to obstruct their communications.... *Id.*

225. There is absolutely nothing in the record to establish that a violation of this provision even occurred, much less that it was the result of willful or malicious conduct by Kay. There is no showing as to what licensed station allegedly was interfered with; no showing of what dates and times the interference allegedly occurred; no showing of the particulars of station operations at the time of the alleged interference—in short, there is no probative evidence regarding any specific incident of interference whatsoever.

226. While the record is inadequate to support any specific findings, it appears that the transmissions about which Doering was complaining were to his operations at Santiago Peak on 854.4875 MHz. If the allegedly interfering signals were transmitted from Kay's system, they would have come from Kay's Trunked SMR (YX) Station WNJA910 at Oat Mountain. As a YX licensee at Oat Mountain, Kay enjoys a 70 mile radius exclusive service area. Oat Mountain is more than 70 miles away from Doering's Santiago Peak location. If Doering were in fact hearing Kay's Oat Mountain transmissions at Santiago Peak—and the record is not adequate to support such a finding—this would not be unlawful interference; it would simply be the facts of radio life. The Commission has explained: "Under our rules, licensees are not guaranteed that they will be able to deliver interference-free service. Our rules only provide that a good quality of service ordinarily can be achieved if SMR stations are separated by 113 km (70 miles)." *Short-Spacing of Specialized Mobile Radio Systems Upon Concurrence from Co-Channel Licensees*, PR Docket No. 90-34, Report and Order, 6 F.C.C.R. 4929, 69 Rad. Reg. 2d (P&F) 968 at ¶ 18 (1991). Such operation of Kay's stations cannot be construed as unlawful interference.

F. Unauthorized Transfer of *De Facto* Control Issue

227. There is no exact formula for determination of whether a transfer of control has occurred; it requires looking beyond questions of ownership and title to determine whether there

are indications that another party determines the basic policies of the station. *See WHDH, Inc.*, 17 F.C.C.2d 856 (1969), *aff'd sub nom. Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). This analysis requires examination of the specific circumstances on a case-by-case basis. In wireless services the Commission has considered the following indicia of control, as first announced in *Intermountain Microwave*:

(1) Does the licensee have unfettered use of all facilities and equipment?
(2) Who controls daily operations?
(3) Who determines and carries out the policy decisions, including preparing and filing applications with the Commission?
(4) Who is in charge of employment, supervision, and dismissal of personnel?
(5) Who is in charge of the payment of financial obligations, including expenses arising out of operations?
(6) Who receives monies and profits from the operation of the facilities?

24 Rad. Reg. (P&F) 983 (1963). *Intermountain Microwave* is not, however, a mechanical check list for an objective determination of control, rather:

> The *Intermountain* factors represent the normal incidents of responsibility for the operation and control of a common carrier facility. ... As such, they generally provide useful guidelines for evaluating real-party-in-interest and transfer of control questions. *We stress, however, that there is no exact formula for determining control and that questions of control turn on the specific circumstances of the case. ... Thus, in applying the Intermountain criteria, we examine the totality of the circumstances.*

La Star Cellular Telephone Company, 9 F.C.C.R. 7108, 7109 (1994) (emphasis added), *citing Data Transmission Co.*, 44 F.C.C.2d 935, 936 (1974). No single factor is controlling; each particular situation is unique and must be carefully evaluated in light of all six factors. *Volunteers in Technical Assistance*, 12 F.C.C.R. 13995 at ¶¶ 13-16 (1997).

228. Analysis of control varies from service to service, and depends on the nature of the particular industry. In the broadcast services, for example, station programming has been a significant area of consideration, *e.g.*, *S.W. Texas Public Broadcasting Council*, 85 F.C.C.2d 713, 715 (1981), while this is not a regulatory concern in common carrier, commercial mobile, and other radio services where the licensee does not provide content. *See Cablecom General,*

Inc., 87 F.C.C.2d 784 (1981). As to SMR and dispatch services, the Commission articulated a concern that licensees be afforded flexibility in structuring their business arrangements:

> As the SMR industry has matured, licensees have inevitably sought to avail themselves of a variety of methods to operate and manage their systems. In this dynamic and developing marketplace we wish to allow maximum flexibility to these entrepreneurs, consistent with the regulatory restraints imposed by the Communications Act. We also wish to assure licensees may employ a variety of options so that they may provide an efficient and effective communications service to the public as quickly as possible. In light of theses policy objectives, and as a general proposition, *we see no reason why SMR licensees should be precluded from hiring third parties to manage their systems provided that that the licensees retain a proprietary interest, either as owner or lessee, in the system's equipment and exercise the supervision the system requires.*

Motorola, Inc. (*Order*, issued 30 July 1985, File Nos. 50705 *et al.*) at ¶ 18.[37] As shown below, application of the *Intermountain Microwave* criteria in the SMR industry in light of *Motorola* leads to the conclusion that there was no unauthorized transfer of *de facto* control of Sobel's stations to Kay.

229. *Does the licensee have unfettered use of all facilities and equipment?* Rather than purchasing equipment for his 800 MHz stations, Sobel entered into an arrangement to lease the equipment from Kay, with Kay's compensation to be paid out of revenues generated from resale of airtime on the channels. There is no rule or regulation prohibiting a licensee from leasing rather than purchasing the equipment used in its station. Indeed, the Commission has expressly stated that, in the SMR service, the licensee may establish its requisite "proprietary interest [in the station equipment] either as owner *or lessee*." *Motorola, Inc.* at ¶ 18 (emphasis added). The *Intermountain Microwave* "guideline of 'unfettered use' adopted [decades] ago in the context of a less sophisticated, 'mom-and-pop' owner, stand-alone microwave system must be construed in light of the current realities ...." *Ellis Thompson Corp.*, Summary Decision of Administrative

[37] Although not officially reported, the *Motorola* decision has become the lead case on the propriety of SMR construction, management, and marketing agreements. A copy of the order is appended hereto for convenient reference.

Law Judge Joseph Chachkin ("*ETC Summary Decision*"), 10 F.C.C.R. 12554, 12556 (ALJ 1995). Even assuming Sobel's decision to lease from Kay warrants scrutiny in light of Kay's additional involvement with the 800 MHz repeaters, the record demonstrates that there were sound business reasons for Sobel to lease from Kay. *Cf. Ellis Thompson Corp.*, 10 F.C.C.R. at 12557 (1995). (approving a licensee's decision to enter into an agreement "of his own free will for prudent financial and competitive reasons"). It is not disputed that Sobel has complete and unrestricted access to the transmitter sites and the equipment used for his 800 MHz repeaters. "[A] licensee's unimpeded access satisfies the 'use' criterion" under *Intermountain Microwave. ETC Summary Decision*, 10 F.C.C.R. at 12557, citing *Brian O'Neill*, 6 F.C.C.R. 2572, 2575 (1991) ("[T]he controlling factor [under the first *Intermountain* factor] is that access is unimpaired.").

230. *Who controls daily operations?* The question whether control of a wireless system has been improperly ceded to a manager typically involves an absentee owner with very little involvement in the day to day affairs of the station. In contrast, Sobel resides in the stations' service areas and is a hands-on owner who has remained actively and fully involved in all aspects of the day to day operations. Kay's functions as a reseller and station manager necessarily involve him in system operations,[38] but the written agreement expressly reserves to Sobel ultimate supervision and control over Kay's actions, WTB Ex. 339at p. p. 5, ¶ VIII,[39] a

[38] Resale arrangements do not transgress Commission policy, in fact, they are encouraged. *See, e.g., Resale and Shared Use of Common Carrier Services and Facilities*, 60 F.C.C.2d 261, 271 (1976), modified on other grounds, 62 F.C.C.2d 588 (1977), *aff'd sub nom. AT&T v. FCC*, 572 F.2d 17 (2d Cir. 1978), *cert. denied*, 439 U.S. 875 (1978); *Cellular Communications Systems*, 86 F.C.C.2d 469, 511, 642 (1981), *modified*, 89 F.C.C.2d 58 (1982), *further modified*, 90 F.C.C.2d 571 (1982); *Petitions for Rule Making Concerning Proposed Changes to the Commission's Cellular Resale Policies*, 7 F.C.C.R. 4006, 4008 (1992).

[39] Although the written agreement was silent as to the term, Sobel nonetheless retained the right to terminate if Kay breached "an implied covenant of good faith and fair dealing [or fails] to perform [his] duties in a workmanlike manner." *ETC Summary Decision*, 10 F.C.C.R. at 12557.

right Sobel has demonstrably exercised. Sobel exercises a degree of oversight, and involvement not usually enjoyed by a facilities-based carrier vis-à-vis its resellers. Sobel constructed and maintains the stations; he is directly involved in setting prices; he is involved in negotiating special deals; he retains veto power over service contracts entered into by Kay; he monitors the systems; he participates in decisions regarding customers' service configurations; he activates and deactivates end users; and he reviews Kay's repeater service contracts at least monthly.

231. *Who determines and carries out the policy decisions, including preparing and filing applications with the Commission?* Kay did much of the frequency coordination and FCC application work, but this was largely a matter of convenience, and it was done at Sobel's request and under his direction, supervision, and approval. Sobel maintained direct contact with the FCC, and Kay became involved only at Sobel's initiation.[40]

232. *Who is in charge of employment, supervision, and dismissal of personnel?* Sobel has no employees. The maintenance and operation of the repeaters is not labor intensive. Kay and Kay's employees, of course, sell service to end users and bill and collect for such services, but they are acting as resellers in this regard. They are not station employees. It is hardly unusual and entirely appropriate for Sobel to contract services to a third-party who, in turn, hires employees—maintenance of the requisite degree of control does not require Sobel to hire and supervise his own employees. *ETC Summary Decision*, 10 F.C.C.R. at 12560.

233. *Who is in charge of the payment of financial obligations, including expenses arising out of operations?* The major expenses relating to Sobel's 800 MHz repeaters are equipment costs and site rental. Sobel made a business decision and entered into a contractual

[40] The Commission recognizes that Part 90 applications are often prepared by persons not affiliated with the applicant, such as equipment salesmen, engineers, *etc.* The application form in use during the time when Sobel's 800 MHz applications were filed, FCC Form 574, specifically seeks the name and contact information of the application preparer separately from that of the licensee. *See, e.g.,* FCC FORM 574 INSTRUCTIONS at 27, Item 37 (August 1989). Most of Sobel's applications in fact reflect that Kay was the preparer.

arrangement in which Kay agreed to assume these expenses and, in compensation, was permitted to retain the first $600 in monthly revenue from each repeater. Accordingly, Sobel arranged to pay the expenses by financing them out of future revenues. This is a legitimate business decision by the parties that should not be second-guessed by the Commission. "As long as the licensee maintains the requisite degree of control ... consistent with its status as a licensee, [the Commission] will not question its business judgment concerning the agreements into which it enters." *Motorola, Inc.* at ¶ 21.

234. *Who receives monies and profits from the operation of the facilities?* The arrangement between Sobel and Kay provides that, after the first $600 in monthly revenue, Kay and Sobel will split the revenue equally. Such a voluntary deferral of distribution of profits by a licensee does not necessarily indicate a lack of control. *See ETC Summary Decision*, 10 F.C.C.R. at 12561-12562. Moreover, a 50/50 split between manager and licensee is not remarkable in the SMR industry. The Commission has, in fact, approved SMR management agreements which provide for the manager retaining 70 to 80 percent of the revenue, or even 100 percent when the management duties are undertaken in contemplation of a purchase of the stations. *Motorola, Inc.* at ¶¶ 3, 8-10. That Kay collects and deposits the revenues from end users is an entirely proper discharge of his role as a reseller.[41]

[41] The Bureau apparently attributes much significance to an option provision in the written agreement whereby Kay may purchase each of Sobel's management agreement stations for $500. The record reflects, however, that at the time the stations were acquired the channels were encumbered (shared with other licensees) and not of great value, and that the parties had not followed the express terms of this provision (Sobel receiving, for example, $20,000 rather than the $500 price) on the rare occasion when a station was sold. This entire question is nonetheless of little import. It is well established that a mere option, until exercised, does not constitute a transfer of control. *Turner Broadcasting System, Inc.*, 101 F.C.C.2d 843, 849 (1985); *Miller Communications, Inc.*, 3 F.C.C.R. 6477, 6479 (Mob. Serv. Div. 1988).

235. The written management agreement was prepared for Kay and Sobel by Washington, D.C. communications counsel, and both individuals were specifically advised that it complied with applicable FCC requirements. If the agreement does, therefore, constitute an unauthorized transfer of *de facto* control of Sobel's stations to Kay, the transgression was entirely unintentional and does not implicate Kay's basic qualifications. An unauthorized transfer of control, in and of itself, is not grounds for disqualification unless coupled with an intent to deceive or other disqualifying conduct. *E.g.*, *Deer Lodge Broadcasting, Inc.*, 86 F.C.C.2d 1066, 49 Rad. Reg. 2d (P&F) 1317 at ¶¶ 63-67 (1981); *Blue Ribbon Broadcasting, Inc.*, 90 F.C.C.2d 1023, 51 Rad. Reg. 2d (P&F) 1474 at ¶¶ 7-9 (Rev. Bd. 1982); *Silver Star Communications - Albany, Inc.*, 3 F.C.C.R. 6342 at ¶¶ 52-58 (Rev. Bd. 1988), *aff'd* 6 F.C.C.R. 6905, 70 Rad. Reg. 2d (P&F) 18 at ¶¶ 13-20 (1991); *Roy M. Speer*, 11 F.C.C.R. 18393 at ¶ 88 (1996). While this principal evolved in broadcast cases, it applies equally in the wireless services. *Brian L. O'Neill*, 6 F.C.C.R. 2572, 69 Rad. Reg. 2d (P&F) 129 at ¶ 30 (1991); *Century Cellunet of Jackson MSA Limited Partnership*, 6 F.C.C.R. 6150, 70 Rad. Reg. 2d (P&F) 214 at ¶ 8 (1991); *Catherine L. Waddill*, 8 FCC 2710, 72 Rad. Reg. 2d (P&F) 500 at ¶ 19 (1993).

236. The Commission's usual response to unauthorized transfers is to require them to be undone. *E.g.*, *Ellis Thompson*, 3 F.C.C.R. 3962 (Mob. Serv. Div. 1988) (cellular application granted conditioned on removal from an agreement a paragraph potentially conferring control on a third party), *affirmed on recon.*, 4 F.C.C.R. 2599 (Com. Car. Bur. 1989), *affirmed on review sub nom. Ellis Thompson Corp.*, 7 F.C.C.R. 3932 (1992), *reversed on other grounds sub nom. Telephone and Data Systems, Inc. v. FCC*, 19 F.3d 42 (D.C. Cir. 1994); *Petroleum V. Nasby Corp.*, 10 F.C.C.R. 6029 (Rev. Bd. 1995), *recon. granted in part*, 10 F.C.C.R. 9964 (Rev. Bd. 1995) (renewal and belated approval of an unauthorized transfer of control issued subject to a divestiture condition), *remanded on other grounds*, 11 F.C.C.R. 3494 (1996). When a sanction has been imposed, it is typically a forfeiture, not license revocation. *E.g.*, *Rasa Communications*

Corp., 11 F.C.C.R. 13243 (1996); *Kenneth B. Ulbricht* (DA 96-2193; released December 31, 1996); *Galesburg Broadcasting Co.*, 6 F.C.C.R. 2210 (1991); *The Hinton Telephone Co.*, 6 F.C.C.R. 7002 (1991), *forfeiture reduced*, 7 F.C.C.R. 6643 (1992). *See also*, *Forfeiture Policy Statement*, 12 F.C.C.R. 17087 (1997).

G. Misrepresentation and Lack of Candor Issue

237. Misrepresentation is a false statement of material fact, while lack of candor is a concealment, evasion, or other failure to disclose a material fact. *Fox River Broadcasting, Inc.*, 93 FCC2d 127, 129, (1983). "A necessary and essential element of both misrepresentation and lack of candor is intent to deceive." *Trinity Broadcasting of Florida, Inc.*, 10 F.C.C.R. 12020, 12063 (1995). *See also Weyburn Broadcasting Limited Partnership v. FCC*, 984 F.2d 1220, 1232 (D.C. Cir. 1993); *Garden State Broadcasting Limited Partnership v. FCC*, 996 F.2d 386, 393 (D.C. Cir. 1993); *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 F.C.C.2d 1179, 1196 (1986); *Fox Television Stations, Inc.*, 10 F.C.C.R. 8452, 8478 (1995); *Swan Creek Communications v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994); *Abacus Broadcasting Corp.*, 8 F.C.C.R. 5110, 5112 (Rev. Bd. 1993); *Pinelands, Inc.*, 7 F.C.C.R. 6058, 6065 (1992). Inaccuracy due to carelessness, exaggeration, faulty recollection, *etc.*, do not suggest the deceptive intent normally required for disqualification. *See MCI Telecommunications Corp.*, 3 F.C.C.R. 509, 512 (1988), *citing Kaye-Smith Enterprises*, 71 F.C.C.2d 1402, 1415 (1979); *Standard Broadcasting, Inc.*, 7 F.C.C.R. 8571, 8574 (Rev. Bd. 1992). Indeed, it is the "willingness to deceive" that is most significant. *FCC v. WOKO, Inc.*, 329 U.S. 223, 227 (1946).

238. The evidence adduced at hearing does not reveal that there was even a false statement of material fact, much less any intent to deceive. The essence of the misrepresentation charge is that Kay's January 1995 verification of a pleading stating that he had no "interest" in any of Sobel's FCC "stations or licenses" was inconsistent with the resale/management

agreement as to Sobel's 800 MHz stations and was, in fact, designed to conceal that arrangement. The record coupled with common sense, however, does not support this theory.

239. The statement itself, *i.e.*, that Kay has no "interest" in any of Sobel's licenses was not false or inaccurate. Kay testified as to how he understood the meaning of the word "interest" as used in the January 1995 pleading. He understood it to mean an "ownership" interest in which he had a direct interest as a licensee. He did not consider the management agreement with Sobel to give him an "interest" in the license any more than he considered his management agreements with community repeater licensees[42] to give him an interest in their licenses. In Kay's mind, he had an "interest" in stations in which he was the licensee or had a direct ownership interest in the licensee in the form of stock, partnership interest, *etc.*

240. Apparently aware of this critical problem, the Bureau has also focused on the fact that the statement in question did not simply disclaim an interest in Sobel's licenses, but stated that Kay had no interest in Sobel's "stations or licenses". The Bureau's theory is that Kay has an "interest" in the "stations" because he owns the equipment which he leases to Sobel, and because Kay stands to share in the revenues generated by the stations. But both Sobel and Kay testified that they deemed these words interchangeable, noting that the Commission issues to them

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[42] A "community repeater" is a form of "multiple licensing" and has been explained by the Commission as follows:

> The most common arrangement is that of an equipment supplier who sets up a repeater and leases time for its use to various licensees. Each user of such a "community repeater" must be specifically authorized to use it by the FCC. These licensees enter into a contract with the equipment supplier, who has the right (by virtue of ownership) to limit how the repeater will be used. This system (where the equipment supplier is not licensed but all of the users are) is called "multiple licensing". A fee is paid (usually monthly) to the equipment supplier by the licensee, which covers the cost of the equipment, its maintenance, the cost of antenna space and any other necessary utilities. The equipment supplier's profit is derived from the rental of the equipment.

Creation of An Additional Personal Radio Service, Notice of Inquiry, PR Docket No. 79-140, 72 F.C.C. 2d 453 (1979).

documents labeled at "Radio Station Licenses". Indeed, the Bureau's theory is not logically consistent. What is controlling here is what was in Kay's mind when he signed the affidavit. If, in Kay's mind, there was the fine distinction between "station" and "license" that the Bureau now suggests, Kay could have simply asked his attorneys to edit the language to delete the word "station". That he did not do so is further evidence that his mind at the time was focused on the station "licenses," not the station "equipment."

241. A finding of misrepresentation or lack of candor requires substantially more than such linguistic nitpicking. Kay has testified as to what he meant by the word "interest" and the phrase "stations or licenses," and his explanation is entirely reasonable and credible. At best, there is no inconsistency between the challenged Kay statement and the facts. At worst, however, the Bureau is attempting to rest an entire charge of misrepresentation and lack of candor on arguable interpretations of words of potentially ambiguous meaning. In *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 11 Communications Reg. (P&F) 1186 (D.C. Cir. 1998), the Court specifically rejected this approach. At issue there was whether a broadcast licensee lacked candor with the Commission in describing its hiring practices in connection with an EEO review by stating that a background in classical music was a "requirement" for certain positions when, in fact, some positions were occasionally filled by individuals with no such background. The Court stated:

> There remains the $25,000 forfeiture for the station's lack of candor. The Commission insists that substantial evidence supports its finding. But the only evidence is two pleadings in which the Church's counsel described classical music training as a "requirement." The Commission relies on the AMERICAN HERITAGE DICTIONARY (New College Ed. 1976), which defines "requirement" as "[T]hat which is required; something needed" or "[S]omething obligatory; a prerequisite." *Id.* at 1105. But WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1981 ed.) gives the word "requirement" more leeway, defining it: "something that is *wanted or* needed" or "something *called for or* demanded." *Id.* at 1929 (emphasis added.) We are not exalting one dictionary over another, but simply pointing out that the Commission has overstated the word's clarity. The Church's explanation for its use of the word "required" jibes with common understanding of the term. It is unremarkable to call a particular criterion a "requirement" even if you must sometimes bend it to fill a job opening. Particularly since

> the Church immediately clarified its position when questioned, it is an intolerable stretch to call its use of an ambiguous word an "intent to deceive." We are not surprised that the Commission could not point us to a single case where we have affirmed a finding of lack of candor on such slim facts. We vacate both the lack of candor determination and the $25,000 forfeiture.

Id. at Sec. III of opinion. (emphases in original). The same analysis obtains in this case with respect to the use of the word "interest". If legitimate disagreement as to the meaning of ambiguous words will not justify a modest forfeiture, it certainly will not support disqualification of a licensee and destruction of his livelihood.

242. Even assuming a case could be made that Kay's statement was in any way not consistent with the facts, the record amply demonstrates that there was no intent to deceive. Sobel and Kay happily operated under an oral agreement for at least two years before the written agreement was executed. It was only after Sobel saw an advance draft of the *HDO* and learned that the Commission was operating under the false impression that Sobel was a mere fictitious alias being used by Kay that he insisted on having the management arrangement reduced to writing. If it had been the intention of Kay and Sobel to conceal their business arrangement, they certainly would not have put it in writing at a time when they both knew Kay's affairs were being intensely investigated.

243. At the time Kay executed the affidavit, he was advised by legal counsel that the management agreement did not constitute an "interest." Kay's reliance on legal counsel defeats the suggestion that he acted with deceptive intent. Although the Commission is reluctant to excuse violations based on the alleged failures of counsel, *see, e.g., Hillebrand Broadcasting, Inc.*, 1 F.C.C.R. 419, 420 n.6 (1986), the Commission is equally reluctant to impute a disqualifying lack of candor where there has been good faith reliance on advice of counsel. *See WEBR, Inc. v. FCC*, 420 F.2d 158, 167-68 (D.C. Cir. 1969) (good faith reliance on counsel is relevant to determining who is acting with candor); *Broadcast Associates of Colorado*, 104

FCC2d 16 (1986) (applicant who improperly certified application on advice of counsel not disqualified); *Video Marketing Network, Inc.*, 10 F.C.C.R. 7611 (1995); *Fox Television Stations.*

244. In *Rainbow Broadcasting Co.*, 13 Communications Reg. (P&F) 62 (1998), the Commission was confronted with the issue whether a violation of the *ex parte* rules by legal counsel should be attributed to the licensee and, if so, what impact that should have on the licensee's basic qualifications. The Commission opined as follows:

> Although applicants are bound by the acts of their agents, *see Carol Sue Bowman*, 6 FCC Rcd 4723 ¶4 (1991); *Hillebrand Broadcasting Corp.*, 1 FCC Rcd 419, 420 n. 6 (1986), and it is axiomatic that they are responsible for knowing and complying with the Commission's rules, these principles do not warrant disqualification of the applicant here. There is no doubt that the violations actually occurred and are attributable to Rainbow. Nevertheless, the applicant's knowledge of the misconduct is a highly relevant factor in determining whether disqualification is appropriate. *Centel Corp.*, 8 FCC Rcd 6162 (1993), *petition for review dismissed sub nom. American Message Centers v. FCC*, No. 93-1550 (D. C. Cir. Feb. 28, 1994), *rehearing denied* (May 25, 1994) (carrier not disqualified, despite multiple *ex parte* violations, where two of the violations were inadvertent and unintentional, and others involved reasonable belief contacts were permissible); *see also Voice of Reason, Inc.*, 37 FCC 2d 686, 709 (Rev. Bd. 1972), *recon. denied*, 39 FCC 2d 847, rev. denied, FCC 74-476, released May 8, 1974. Significantly, even where intentional *ex parte* misconduct has been found, the Commission has declined to disqualify applicants where, as here, the incidents were isolated events in the course of a long proceeding. *See Pepper Schultz*, 4 FCC Rcd 6393, 6403 (Rev. Bd. 1989), and cases cited therein, *rev. denied*, 5 FCC Rcd 3273 (1990); *see also Desert Empire Television Corp.*, 88 FCC 2d 1413, 1417 (1982) (imposing only modest monetary forfeiture where licensee engaged in willful and repeated *ex parte* communications on at least three separate occasions). The applicant's conduct here is far less egregious. ... [T]he present record and Commission precedent do not warrant disqualification of Rainbow or denial of its applications. We, however, issue an admonishment to Rainbow to exercise caution in complying with the *ex parte* rules.

Id. ¶ 18 (underlined emphasis added).

245. Kay did far more than merely rely on advice of counsel—Kay's attorneys actually wrote both of the documents that form the basis of the alleged misrepresentation and lack of candor. Brown & Schwaninger drafted the management agreement that Sobel and Kay executed in October 1994 and re-executed in December 1995. Brown & Schwaninger also wrote the affidavit that Sobel, at their request, executed on January 24, 1995, less than a month after re-executing the agreement. Here, there has been no showing that Kay intended to deceive the

Commission by executing the affidavit. To the contrary, it was certainly reasonable for Kay to assume that his own legal counsel would not ask him to sign, under oath, a statement that was factually at odds with another document the same attorney had also prepared for his signature. Indeed, a finding of deceptive intent would require the fantastic conclusion that Kay's own legal counsel knowingly asked him to commit perjury, and the Bureau has presented absolutely no evidence to that effect.

V. ULTIMATE CONCLUSION

246. In view of the foregoing, Kay respectfully submits that the Basic Qualifying Issues, the Cease and Desist Issue, and the Forfeiture Issue, as well as all other issues,[43] should be resolved Kay's favor.

Respectfully submitted this 10th day of May, 1999

JAMES A. KAY, JR.

By: _____

Robert J. Keller
Law Office of Robert J. Keller, P.C.
4200 Wisconsin Avenue, N.W.
Suite 106 - Box 233
Washington, D.C. 20016-2157

Telephone: 301-320-5355
Facsimile: 301-229-6875
Email: rjk@telcomlaw.com

By: Aaron P. Shainis

Aaron P. Shainis
Shainis and Peltzman, Chartered
1901 L Street, N.W. - Suite 290
Washington, D.C. 20036

Telephone: 202-293-0011
Facsimile: 202-293-0810

[43] *See* footnote 27, above.