

105. Kay's license for station WIK329 was granted on September 19, 1990. WTB Ex. 154 p. 1. The license authorizes operation of 90 mobiles on 508.6125 MHz at Oat. WTB Ex. 154 p. 3-4. Kay's license for station WIK330 was granted on September 19, 1990. WTB Ex. 154 p. 5. The license authorizes operation of 90 mobiles on 508.4625 MHz p. Oat. WTB Ex. 154 p. 7-8. Kay's license for station WIK761 was granted on December 14, 1990. WTB Ex. 154 p. 9. The license authorizes operation of 90 mobiles on 508.7125 MHz at Oat. WTB Ex. 154 p. 11-12. Kay's license for station WIK762 was granted on December 14, 1990. WTB Ex. 154 p. 13. The license authorizes operation of 90 mobiles on 508.5125 MHz at Oat. WTB Ex. 154 p. 15-16. Kay is operating a Spillman typed LTR trunked system at Oat. Kay's November 1995, business records list a total of 135 mobiles on the system. WTB Ex. 155 p. 1-2. Of these, several customers discontinued service before November 1995. Cust. No. 1154, JDS Construction, discontinued service on October 31, 1994. WTB Ex. 156 p. 6. Cust. No. 691, Kaiser Foundation Hospitals, discontinued service on March 31, 1994. WTB Ex. 156 p. 7. Cust. No. 789, Metro Towing, Inc., discontinued service on March 31, 1994. WTB Ex. 156 p. 9. Cust. No. 645, Universal Lock & Key, discontinued service on June 30, 1994. WTB Ex. 156 p. 15. The customer records only substantiate a total of 75 mobiles on the frequency as of March 1995 and a total of 88 mobiles on the frequency as of November 1995. WTB Ex. 156 p. 1-16, WTB Ex. 155 p. 1-2.

106. The following chart summarizes the evidence with respect to three of Kay's Spillman type systems:

Call Sign	Grant Date	Mobiles Authorized
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WIH 872	8/14/92	180	
WIK 823	10/27/93	72	
WIJ635	4/19/94	180	
WIK261	3/2/94	180	

Total Authorized		612
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Total Operating:	March 1995	103
	November 1995	112

WIK205	4/21/93	180
WIJ754	4/21/93	180
WIK 878	4/21/93	180
WIL724	3/9/94	180

Total Authorized		720
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Total Operating:	March 1995	75
	November 1995	88

WIK329	9/19/90	90
WIK330	9/19/90	90
WIK761	12/14/90	90
WIK762	12/14/90	90

Total Authorized		360
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Total Operating:	March 1995	75
	November 1995	88

4. Construction/Discontinuance of Operation

107. On May 11, 1995, Kay admitted in an amended response to Bureau interrogatories, WTB Ex. 290, that the following authorized 470-512 MHz repeaters are not in operation:

Call Sign	Location
KNJV843	Signal Hill
WIF759	Reseda

WIH681	Rancho Palos Verdes
WIH872	Signal Hill
WII253	Reseda
	Valancia
	Canyon Country
	Simi Valley
WII695	Signal Hill
WIJ316	Signal Hill
WIJ343	Santa Paula
WIJ362	Newbury Park
WIJ635	Signal Hill
WIJ704	Malibu
WIJ754	Signal Hill
WIJ992	Reseda
WIK205	Signal Hill
WIK208	Santa Paula
WIK261	Signal Hill
WIK303	Signal Hill
WIK376	Newport Beach
	San Bernadino
WIK660	Newberry Park
WIK878	Signal Hill
WIL392	Rancho Palos Verdes
WIL522	Signal Hill
WIL659	Santa Paula
WIL663	Signal Hill
WIL729	Signal Hill
WIL733	Signal Hill
WNQK532	Montrose
WNXC713	Montrose
WPBX246	Montrose
	Sylmar
WPBX247	Northridge
WPBZ518	Upland
	Montrose

108. On May 11, 1995, Kay admitted in an amended response to Bureau interrogatories, WTB Ex. 290, that the following authorized 800 MHz repeaters are not in operation:

WNIZ676	Upland
WNJA910	Newbury Park
WNMT755	Montrose
WNMY773	Corona
	Montrose
WNPJ874	Newbury Park
WNVL794	Corona
	Running Springs
WNVW779	Corona
	Montrose
	Altadena
WNWB268	Running Springs
WNWB332	Corona
	Running Springs
WNWK982	Corona
	Running Springs
WNWN703	Corona
	Running Springs
WNWQ651	Running Springs
WNXB280	Montrose
	Upland
WNXG372	Corona
WNXQ353	Montrose
WNXQ911	Corona
	Running Springs
WNXW327	Corona
	Banning
WNXW549	Corona
WNYR747	Corona
WNZL447	Montrose
WNZZ731	Upland
WPAP683	Corona

109. The Commission conducted an inspection of Kay's stations in the period April to June, 1997. Tr. 1346-47. The summary report of that inspection is WTB Ex. 291. Tr. 1346. With respect to each of the repeaters above, when the inspection was requested, Kay admitted

that the repeater was not constructed. Tr. 1352, WTB Ex. 291.⁴

110. With respect to each station that Kay admitted was not in operation, Kay stipulated for purposes of this proceeding, each can be deemed either not constructed by the construction deadline or to have been permanently discontinued as of that date within the meaning of the rules. Tr. 1232.

D. Willful and Malicious Interference Issue

111. Paul Oei is an electronics engineer employed by the Commission's Los Angeles office. Tr. 1345. He has an electrical engineering degree from Cal State, Los Angeles. *Id.* In May 1992, Mr. Oei and Ben Nakamiyo, another FCC agent, went to Kay's office to investigate a complaint by Jim Doering that Kay was causing interference by rebroadcasting a signal from one repeater on to another frequency. Tr. 1353, 1360-1361. The agents used direction-finding techniques to verify that Kay was broadcasting on the input frequency, 809.4875 MHz. Tr. 1353, 1363-1365. They then visited Kay's office and found a control station (denominated as an FX1 station on a license). Tr. 1353. Normally, a repeater "listens" (that is, receives transmissions) on the mobile frequency and transmits on the base station frequency. Tr. 1378. In this case, Kay's equipment was receiving on the base station frequency but retransmitting on the mobile frequency. *Id.* The agents used two receivers to observe both the base and mobile frequencies. *Id.*

112. Kay claims that the equipment in question was licensed as a control station that is

⁴ In WTB Ex. 291, Kay's admissions are denoted by note 6. *See* WTB Ex. 291 at 19.

authorized to operate on a mobile frequency for the purpose of controlling the base station. Tr. 2485-2486. According to Kay, the equipment created a two-way rebroadcasting path (fixed relay) that linked trunked repeaters at Oat Mountain and Mount Lukens in order to expand coverage. Tr. 2486-2488. Kay holds an authorization for a control station that would allow transmission on 809.4875 MHz for control station purposes (FX1 authorization). Tr. 1368-1369. Kay's office is 15.89 kilometers (fewer than 10 miles) from Oat Mountain. Tr. 1366. It is permissible to link the output from one receiver into the input of additional receivers in order to expand coverage. Tr. 1372. In order to operate in that fashion, however, Kay's equipment would have to be licensed as a fixed relay, not as a control station. Tr. 1379. If Kay was not monitoring, such operation could cause interference to co-channel licensees. *Id.*

113. Kay testified that the station at Oat Mountain had exclusive use of the frequency within seventy miles of the transmitter location. Tr. 2488-2489. Mr. Doering was complaining that Kay's equipment was interfering with his co-channel station, which was located at Santiago Peak. Tr. 1370, 2490. Santiago Peak is 118.62 kilometers (about 73.5 miles) from Oat Mountain. Tr. 1369-1370. Kay considered the operation to be a case of "legal interference," where two stations are operating legally, but still interfere with each other. Tr. 2491.

114. Mr. Roy Jensen, who worked for Kay from 1990 to 1992, (Tr. 1463, 1507), testified that there had been cases of willful interference where one licensee tried to drive another licensee off the channel deliberately so that the former licensee does not have to share the channel. Tr. 1466-1467. On a couple of circumstances, Kay told Mr. Jensen that he had deliberately interfered with other systems. Tr. 1467. As Mr. Jensen understood it, Kay used a

service monitor to block the control channels on a Motorola trunked system. Tr. 1467-1468. On a Motorola trunked system, the system has channels that are dedicated solely for the purpose of managing the system. *Id.* If those channels are blocked, the system would shut down into a “fail safe” mode. Tr. 1468. The Motorola service monitor could be used to “lock on” to the repeater and stops the channel from being used. Tr. 1469. Kay demonstrated this interference technique to Mr. Jensen on one occasion for a short period of time. Tr. 1470. Kay told Mr. Jensen of other instances in which Kay had interfered with communications in this manner. Tr. 1471. Kay recalls showing Mr. Jensen and technicians how such deliberate interference could occur so that the interference could be diagnosed and resolved. Tr. 2518. Kay may have shown Mr. Jensen how jamming occurs, but Kay denied actually jamming anyone. *Id.* He also claimed that a service monitor lacked sufficient power to interfere with a system in the manner described by Mr. Jensen. Tr. 2518-2519. Kay believes it is entirely possible that he dialed up a Motorola trunked system and showed Mr. Jensen what such a system sounds like. Tr. 2519.

E. Abuse of Process Issue

115. This issue requires a determination as to whether Kay “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 addition to Marc Sobel, Carla Pfeifer, Kevin Hessman, Roy Jensen, and Vincent Cordaro testified concerning their relationship with Kay and applications that Kay filed in their names.

1. Carla Pfeifer

116. Carla Pfeifer first met Kay in the mid-1970s when Kay owned a shop selling Citizens' Band radios. Tr. 1538-399. Terry Lee Ragan, who was then Ms. Pfeifer's husband (Tr. 1561), was obtaining Citizens' Band radios from Kay. Tr. 1539. Kay and Ms. Pfeifer became social friends. *Id.* Also, from the early 1980s to the early 1990s, Ms. Pfeifer visited Kay's shop and occasionally helped a customer when the shop was busy. Tr. 1539-1540.

117. According to Ms. Pfeifer, at some point around 1985 or 1986, Kay asked Ms. Pfeifer to let him file an application in her name. Tr. 1541-1542. She agreed. *Id.* Kay explained to her that "he wanted to be able to provide a lot of radio service to a lot of people" but that he could only have so many licenses in his own name. *Id.* Kay and Ms. Pfeifer agreed that he would construct the station and that she would benefit when the "repeater station was filled with users." Tr. 1542.

118. On July 15, 1987, the Commission sent Ms. Pfeifer an inquiry letter pursuant to Section 308(b) of the Act. WTB Ex. 350. The letter sought the status of construction of her station and asked for invoices and other documentation concerning the construction of her station. *Id.* Ms. Pfeifer gave the letter to Kay because they had agreed that Kay would do everything that had to be done with respect to FCC regulations. Tr. 1553. Kay prepared a response for Ms. Pfeifer, dated August 31, 1987. WTB Ex. 299, Tr. 1554. The response first states that the station was constructed on June 8, 1987. WTB Ex. 299. The letter also provided a copy of an invoice and a cancelled check from Ms. Pfeifer. Tr. 1554-56. Kay told Ms. Pfeifer that an invoice and a check were needed in order to prove that construction was taking place. Tr. 1556. Ms. Pfeifer signed a check for \$1,511.87 made payable to Buddy Sales, Kay's company.

WTB Ex. 302, Tr. 1556. Kay also presented Carla with a Buddy Sales invoice purporting to show that Ms. Pfeifer had purchased equipment from Buddy Sales. WTB Ex. 301, Tr. 1555. Both the invoice and the check were submitted to the Commission with the response. WTB Ex. 299. The response states, "I delayed paying this because Mr. James Kay didn't get all the "bugs" out of the repeater until last week. Now that it is working properly I am going to give him a check." *Id.* In fact, at the time the invoice was written, Kay gave Ms. Pfeifer \$1,511.87 in cash (the same amount of money for which Ms. Pfeifer wrote her check). Tr. 1556-1557. Although the lease agreement sent to the Commission required Ms. Pfeifer to pay \$600 a year in site rent, Kay never asked for payment pursuant to this agreement. WTB Ex. 300, pp. 1544-1545. In fact, Ms. Pfeifer and Kay had an oral agreement that Kay would pay all the expenses. Tr. 1577. Kay also prepared other documents sent to the Commission on Ms. Pfeifer's behalf. WTB Exs. 297, 298, 304, Tr. 1557-1558.

119. A form submitted to NABER (a frequency coordinator) in Ms. Pfeifer's name listed the applicant name as Carla Pfeifer DBA Investment Opportunities, and her business as "Investment Consultant." WTB Ex. 295. Kay prepared this form. Tr. 1548. Ms. Pfeifer never had any plans to operate as an investment consultant, and she never told Kay that she wished to operate a business as an investment consultant. *Id.* Kay told Ms. Pfeifer that "we had to have a company name," and he chose the name Investment Opportunities. Tr. 1546.

120. Kay was responsible for placing customers on the station licensed to Ms. Pfeifer. Tr. 1570. Although Ms. Pfeifer asked for reports concerning Kay's efforts to place customers on the station, Kay never provided any such reports. *Id.* Ms. Pfeifer never received any revenues

from the station. Tr. 1569. Ms. Pfeifer was never given any information concerning station expenses, and she has no knowledge as to where the station revenues went. Tr. 1570-1571.

121. Around 1990 or 1991, Ms. Pfeifer received a visit from a Commission agent. Tr. 1565-67. According to Ms. Pfeifer, the agent indicated that the Commission had received a complaint from Kay that the station was operating illegally. Tr. 1566. Prior to that time, Kay and David Pfeifer (Carla's husband at the time), who had worked for Kay, had had a falling out. Tr. 1567-1568. Ms. Pfeifer believes that Kay's complaint was a "retaliation measure" by Kay. Tr. 1568. Subsequently, Ms. Pfeifer agreed to assign the license in her name to A1A Repeater (owned by Barney Peterson, who had no relationship to Kay). Tr. 1581-1583, Kay Ex. 2. The date on the FCC Form 1046 authorizing the assignment to A1A Repeater is October 22, 1990. Tr. 1588-1589. Ms. Pfeifer wanted to rid herself of the license because she "just wanted to be completely free and clear of Mr. James Kay." Tr. 1587.

122. Ms. Pfeifer questioned whether some of the signatures on documents submitted to the FCC -- which purport to be her signature -- are in fact her signatures. Tr. 1554, 1558, 1559-1560, 1578, 1600. She does not know who signed her name to those documents. Tr. 1584-1585. Kay denies signing Ms. Pfeifer's name to any of those documents. Tr. 2434-2437.

123. Kay explained that he could have acquired Ms. Pfeifer's station by filing what was called a "packaged" SMR user application, in which an application for an SMR operator filed an application for a base station application along with sufficient end user applications to show that the new stations will be granted into a fully loaded environment. Tr. 2432-2433. For example, if there were 30 mobiles already in use in an area, an applicant could have applied for

an SMR base station without reference to his other facilities if he also had end user applications filed showing use of 40 mobiles in connection with the base station.

2. Roy Jensen

124. Roy Jensen came to work at Southland Communications (the portion of Kay's business that sold two-way radios) in the spring of 1990. Tr. 1463. Mr. Jensen had started work at a company called Portable Clinic in November 1989. Tr. 1463. Approximately three to six months later, that company merged with Kay's company. Tr. 1464. There was then a dispute between the owner of Portable Clinic and Kay, and Mr. Jensen stayed on to work for Southland. *Id.* After a relatively short time, Mr. Jensen became General Manager of Southland. *Id.* In that capacity, he dealt with the sales staff and oversaw most things that were not technical in nature. *Id.* He was the manager in Kay's absence. *Id.*

125. While working at Southland, Kay presented Mr. Jensen with a Commission application and asked him to sign the application. Tr. 1480. Mr. Jensen understood that Kay expected him to sign the application. *Id.* The date of Mr. Jensen's signature on the application is August 20, 1990. WTB Ex. 306, p. 1, Tr. 1486. The application requested authority to operate 37 mobiles on 809.1875 MHz. WTB Ex. 306, pp. 1, 3. The application contains the representation that "Applicant operates a financial investment services company. Radios to be used by company employees to coordinate company activities." WTB Ex. 306, p. 1. In fact, Consolidated Financial Holdings was a "dba" that Mr. Jensen registered in the late 1980s or early 1990s in connection with some proposed business ventures that he proposed, but never pursued. Tr. 1478-1479.

126. Consolidated Financial Holdings never obtained any radios. Tr. 1484-1485. Mr. Jensen never indicated to Kay that he wished to operate 37 mobiles on an SMR station, the number that Kay had proposed in the Jensen application.. Tr. 1488. The Commission granted Mr. Jensen an end user license with the call sign WNUG662. WTB Ex. 307. In a letter dated September 4, 1992, Mr. Jensen was listed as an end user having nine mobiles on SMR station WNYJ329. WTB Ex. 315, p. 1.

127. Kay explained that during the first year Kay worked with Mr. Jensen, they used to talk about outside businesses. Tr. 2520. Kay testified that Mr. Jensen “wanted to have his hand in business in some fashion.” *Id.* Kay was uncertain whether he or Mr. Jensen brought up the idea of Mr. Jensen doing SMRs and repeaters. *Id.* According to Kay, Mr. Jensen wanted free use of radios for “outside things” Mr. Jensen was doing, although Kay didn’t “know everything that he was doing.” Tr. 2520-2521. Kay “prepared a license for the man so he could use our radios on his own time.” Tr. 2521.

128. Mr. Jensen left Southland’s employment on May 4, 1992. Kay Ex. 1, Tr. 1506-1507. According to Mr. Jensen, Kay told him that he was “laid off.” Tr. 1507. However, Kay testified before an Administrative Law Judge of the California Unemployment Insurance Appeals Board that Mr. Jensen was informed that he was “let go” because Kay was dissatisfied with his work. Kay Ex. 1, p. 3. The Administrative Law Judge concluded, “Apparently believing that the real reasons for his being out of work would disqualify him for unemployment benefits, the claimant attempted to hide the complete circumstances surrounding his discharge from the Department.” Kay Ex. 1, pp. 4-5. As a result, Mr. Jensen was disqualified for benefits

for ten weeks. Kay Ex. 1, p. 5.

3. Kevin Hessman

129. Kevin Hessman worked for Southland Communications from May 1990 until October 1993. Tr. 1796-1797. His duties included purchasing, maintaining the warehouse and the inventory, and writing up service tickets for repair work. Tr. 1797.

130. According to Mr. Hessman, a few months after he began working at Southland, Roy Jensen and Kay approached him and asked him to sign some FCC forms. Tr. 1798. Mr. Jensen told Mr. Hessman that "it was basically something to help [Kay] with the business, and everyone else did it, and it was no big deal." *Id.* Mr. Hessman recalls that the forms he signed were blank, although he is not certain. Tr. 1799. Mr. Hessman then received two licenses in the name of Hessman Security. WTB Exs. 308, 309, Tr. 1798, 1800. Mr. Hessman had no idea what the licenses were for. Tr. 1801. He was never told anything about the licenses. Tr. 1802. When Mr. Hessman received the licenses, he asked Kay if he wanted copies, and Kay replied that he had all the paperwork he needed. Tr. 1802. The licenses were end user licenses authorizing the use of mobiles on stations licensed to Kay. Tr. 1295, 1299. One license authorized the use of 73 mobiles, and the other license authorized the use of 24 mobiles. WTB Exs. 308, 309.

131. Kay explains that, in 1992, either Mr. Hessman or Mr. Jensen asked him if they could use radios in connection with volunteer work for the Los Angeles volunteer fire department. Tr. 1295. Kay approved that use. *Id.* Kay recall selecting two channels, having the applications prepared, and Mr. Hessman signed the applications. Tr. 1296. Kay does not recall whether he knew anything more at the time than that they "needed a couple good channels to go

do something with involving security.” Tr. 1297. According to Kay, Messrs. Hessman and Jensen were required to have their own end user licenses in order to use Southland’s radios other than in connection with company business. Tr. 1298.

132. Mr. Jensen was aware of other circumstances in which employees of Kay signed applications purporting to use radios for outside businesses when they had no outside businesses. Tr. 1495. He identified Mr. Hessman as an example of somebody who received a license in that manner. Tr. 1496. Mr. Hessman did recall that while employed at Southland, he used Southland radios once or twice in connection with some volunteer work for the Los Angeles Police Department. Tr. 1803-1805. Mr. Jensen recalls participating with Mr. Hessman in a group affiliated with the Los Angeles Police Department, but he does not recall using Southland radios in connection with that activity. Tr. 1521-1522.

133. Mr. Hessman’s employment at Southland was terminated on October 12, 1993. Kay Ex. 7. According to Mr. Hessman, Kay first told him that he was being fired because Kay was cutting back on personnel, but when Mr. Hessman asked for a written statement to that effect, Kay then gave other reasons. Tr. 1810. When Mr. Hessman applied for unemployment compensation, an Administrative Law Judge of the California Unemployment Insurance Appeals Board found that Mr. Hessman falsely stated that he had been laid off when in fact he had been fired. Kay Ex. 7. The reason Kay gave the unemployment office for terminating Mr. Hessman was his attitude towards other employees. Tr. 1294. In fact, Kay’s real motivation for firing Mr. Hessman was his belief that Messrs. Hessman and Jensen had conspired to embarrass him or get him sanctioned in court by endorsing a check Mr. Jensen provided him without Kay’s

knowledge. Tr. 1293-1294. Kay admits he could not prove Mr. Hessman's involvement. Tr. 1293-1294. Kay believes Mr. Hessman's attitude towards other employees "very nicely gave me a justifiable firing" Tr. 1294.

4. Vincent Cordaro

134. Vincent Cordaro worked for Southland Communications from 1991 to 1995. Tr. 1818. From 1983 to 1991, Mr. Cordaro was the owner of Mobile Radio Service Station, a business that serviced, sold, and installed two-way radios. Tr. 1819. Kay purchased that business, and Mr. Cordaro then came to work for Kay. *Id.* For the first year, Mr. Cordaro worked as Service Manager. Tr. 1818. In that capacity, he was responsible for the technicians that repaired radios and installed equipment. *Id.* After that first year, Mr. Cordaro became Sales Manager and General Manager. *Id.* In that capacity, he was responsible for overseeing the operations of the sales team and Southland's day-to-day functions. Tr. 1819.

135. Mr. Cordaro testified that he signed FCC application forms at Kay's request. Tr. 1822. Mr. Cordaro signed the forms, which were completed, and then left the forms with Kay. Tr. 1823. Kay never explained to Mr. Cordaro why he was asking Mr. Cordaro to sign application forms. *Id.*

136. At some point, Mr. Cordaro asked Kay for a list of licenses that was in his name. Tr. 1825. In response, Kay provided Mr. Cordaro with a list of applications and licenses in Cordaro's name. *Id.*, WTB Ex. 319. Kay listed an SMR base station on Rasnow Peak on frequency 852.4875 MHz, an end user license application to use that base station, a pending application for a new SMR base station on 851.4125 MHz, and an application for an end user

license to use 17 mobiles and controls on Kay's SMR WNXS753 at Santiago Peak. WTB Ex. 319. Prior to receiving the list, Mr. Cordaro testified that he had never had any agreements or discussions with Kay concerning a business arrangement related to SMR stations. Tr. 1827-1828. Mr. Cordaro did not recall what year he received the list from Kay, but he originally testified that it could have received the document around the time he signed a management agreement, in 1994. Tr. 1825-1826. In fact, the pending application for an SMR base station at Santiago Peak referred to in the list had been granted on September 30, 1992. WTB Ex. 317, Tr. 1924-25. The Commission also eliminated end user licensing (with very limited exceptions) in 1992. Tr. 1906. Mr. Cordaro may have received the list in 1992. Tr. 1924.

137. Kay explained that Mr. Cordaro wanted "to be more involved and possibly become an owner of the company." Tr. 1268. Kay testified that he helped Mr. Cordaro obtain the Rasnow Peak station that Mr. Cordaro operated. Tr. 1270. Kay recalled that he and Mr. Cordaro discussed the tax advantages of running a business enterprise such as an SMR station. Tr. 1276. Kay does not recall whether he approached Cordaro with the idea of applying for an SMR station or *vice versa*. *Id.* Kay understood that Mr. Cordaro was involved in a company called VSC Enterprises that did some publishing and that Mr. Cordaro and Rudy Catania installed antennas and satellite dishes. Tr. 1269. When asked whether he knew if Mr. Cordaro was providing services on the side relating to two-way radios, Kay replied that apart from the Rasnow Peak license, "What all Vince was doing I don't know. I heard bits and pieces of things he was doing, but it wasn't my concern. I had no indication it was adversely affecting me, so I didn't stick my nose into it." Tr. 1270.

138. Mr. Cordaro and Kay signed a written management agreement in November 1994 relating to the Rasnow Peak SMR station (call sign WNXR890). WTB Ex. 322. According to Mr. Cordaro, Kay presented him with this document and requested that Mr. Cordaro sign the document. Tr. 1846. Kay told Mr. Cordaro that the purpose of the document was to assist Kay in his FCC litigation. Tr. 1848. On or around December 30, 1994, they signed a second management agreement that allowed Kay another opportunity to pay the \$100 option fee contemplated by page 4 of the agreement. WTB Ex. 323, Tr. 1274, 1849. Mr. Cordaro was not told why it was necessary to have another version of the same document. Tr. 1849. Kay claims that prior to the written management agreement, he and Mr. Cordaro had an oral agreement under which Kay provided the equipment needed to build the station, received the first \$500-\$600 a month in revenues, paid the expenses, and marketed the station. Tr. 1274-1275, 1277-1278. Mr. Cordaro denied having any type of agreement with Kay prior to the written management agreement. Tr. 1847-1848. According to Mr. Cordaro, except for the \$100 option fee he was entitled to under the written management agreement (WTB Ex. 324), he never received any payments in connection with the agreement. Tr. 1847. He never asked for or received any reports concerning the revenue the station was generating. *Id.*

139. Mr. Cordaro does not know if the base station for Santiago Peak licensed in his name was ever constructed. WTB Ex. 317, Tr. 1829. He does not know if the station at Rasnow Peak licensed in his name was ever constructed. WTB Ex. 319, Tr. 1830. Kay testified that Mr. Cordaro went to Rasnow Peak in November 1993 to inspect the equipment (or what remained of it) after a fire. Tr. 1279. Mr. Cordaro recalled going to Rasnow Peak after that fire, but he

described the purpose of the visit as delivering some documents to the site owner for Kay. Tr.

1831. Mr. Cordaro denied ever performing any maintenance on equipment at Rasnow Peak. *Id.*

140. On November 21, 1992, Mr. Cordaro signed an FCC Form 1046, which authorizes the assignment of a license. WTB Ex. 321, p. 3, Tr. 1850-51. Kay asked Mr. Cordaro to execute the assignment form. Tr. 1851. Kay made Mr. Cordaro understand that he was supposed to sign blank FCC forms that Kay presented to him. Tr. 1853. Mr. Cordaro testified that the rest of the Form 1046 was not filled out when he signed it. Tr. 1850. Ms. Ashauer notarized the assignment of authorization form. WTB Ex. 321, p. 4. While Ms. Ashauer has no memory of executing this particular notary form (Tr. 1987), she believes she would not have executed the notary form if the FCC Form 1046 had not been completely filled out. Tr. 1988. She explained that the California notary rules “prohibit signing and notarizing any form that is not complete.” Tr. 1989. The acknowledgement Ms. Ashauer signed states that she knew Mr. Cordaro and that it was Mr. Cordaro’s signature on the document. WTB Ex. 321, p. 4, Tr. 1991. The acknowledgement makes no reference to the completeness or accuracy of the underlying form. WTB Ex. 321, p. 4.

141. Kay signed the application to assign WNXR890 to himself on April 24, 1994. WTB Ex. 321, p. 1, Tr. 1289. When asked why Mr. Cordaro signed the authorization form in November 1992, but the assignment application was not filed until after April 24, 1994, Kay said that “it got lost in the shuffle” Tr. 1290. While he does not recall discussing the filing of the assignment application with Mr. Cordaro in 1994, he stated, “I’m sure I did.” Tr. 1290-1291. Mr. Cordaro, on the other hand, states that he first learned that an application had been filed to

assign his license to Kay in 1995, after he left Southland. Tr. 1855. He learned of the assignment application from Barney Peterson, another two-way radio dealer. *Id.* Mr. Cordaro signed and sent to the Commission a letter dated April 14, 1995 in which he objected to the assignment.⁵ WTB Ex. 325, Tr. 1855-1856. The letter states, “Although the referenced filing may include an assignment of authorization signed by me, it was filed under false pretenses.” WTB Ex. 325.

142. Mr. Cordaro also was issued, on November 16, 1992, an end user license, call sign WPBB695, in his name d/b/a VSC Enterprises to operate 64 mobiles. WTB Ex. 316. This end user license authorized the use of mobiles in connection with WNXR890. WTB Ex. 316, Tr. 1836. Although Mr. Cordaro did some publishing and computer consulting work under that name, the business never had any occasion to use radios. Tr. 1837. Mr. Cordaro never indicated to Kay that he had an interest or desire to have VSC Enterprises use radios. Tr. 1837-1838. Kay likely prepared that application. Tr. 1282. Kay believes that 64 mobiles may have represented the loading left available on the channel. Tr. 1283. Kay testified that Cordaro “could share his station with other users if he chose to do so,” and the 64 units “provided an adequate quantity for placing customers on there.” Tr. 1283-1284.

143. Jim Doering filed a petition against another end user application filed in Cordaro’s name alleging that Kay was the real-party-in-interest behind Cordaro’s application. WTB Ex. 351, pp. 1-2. The law firm of Brown & Schwaninger filed a responsive letter in the name of both Cordaro and Kay. WTB Ex. 351, p. 1. Kay stated that he put Cordaro in touch

⁵ Although Mr. Cordaro does not recall writing or sending the letter (Tr. 1856), he admits the document is his signature (Tr. 1855), and the letter contains a date stamp indicating that the letter was received by the Commission’s Gettysburg facility. WTB Ex. 325.

with Brown & Schwaninger and that he paid the fees incurred in filing the opposition because Kay was having a strong disagreement with Doering. Tr. 1288-1289. Mr. Cordaro testified that he never had any discussions with anyone at Brown & Schwaninger and that he never authorized that firm to act as his counsel. Tr. 1841-1842. Mr. Cordaro does not recall whether he reviewed the letter when he signed an accompanying affidavit. Tr. 1843. Mr. Cordaro had in his possession a draft of this letter that he received from Kay. Tr. 1914-1915.

144. The Brown & Schwaninger letter states:

Separate and apart from his work for Kay, as fully disclosed in Cordaro's application, Cordaro also operates a radio communications consulting company. A copy of Cordaro's fictitious name filing with the State of California is attached as Exhibit I hereto, demonstrating the authenticity of Cordaro's separate business activities.

WTB Ex. 351, p. 2. In fact, that was not a true statement when it was made in September 1992. Tr. 1843. The letter also stated, "On the date of the filing of Cordaro's application, 17 mobile unit slots were available. He desires to operate that many mobile units and he requested authority for them in his application." WTB Ex. 351, p. 3. In fact, Mr. Cordaro never had an intention to operate 17 mobile units, and he never expressed such a desire or intention to Kay. Tr. 1844. Except for the SMR stations Kay was managing, Kay denied knowledge of Mr. Cordaro's other business activities relating to two-way radio. Tr. 1270.

145. Mr. Cordaro left Kay's employment because Kay would not renew his employment contract. Tr. 1866. Kay perceived that Mr. Cordaro was unhappy about the commencement of this hearing proceeding as well as Kay's unwillingness to renew his

employment contract. Tr. 1264.

146. At his deposition, Mr. Cordaro produced computer disks with files containing Lucky's customer information. Kay Ex. 10, Tr. 1863. According to Mr. Cordaro, the files were either given to him, or they were left on the network server for him to download. Tr. 1863-1864. Mr. Craig Sobel provided or gave Mr. Cordaro access to those files. Tr. 1864. Mr. Cordaro states he was using those files to try and make Lucky's customer information available to Southland technicians. Tr. 1864-1865. Mr. Cordaro was writing a program in "Q&A" to make that possible. Tr. 1865. He was always modifying the work order program in Q&A. Tr. 1866. Mr. Cordaro did not complete the project because he lost interest and had decided to find another job. *Id.* In performing this project, Mr. Cordaro placed the files on floppy disks, either in zipped or unzipped form. Tr. 1867. When Mr. Cordaro left Southland in May 1995, he cleaned out his desk and put certain materials in a box that he took home with him and placed in his garage. Tr. 1868-1869. When Kay sued Mr. Cordaro in 1997, Mr. Cordaro reviewed the contents of the box. Tr. 1869. Included in the box were computer disks, including disks that contained the information on Lucky's customers that came from the Southland computer system. Tr. 1872-1874. Mr. Cordaro was not aware he had those files in his possession until he reviewed the box in connection with Kay's lawsuit. Tr. 1875. When he emptied out his desk, he grabbed a floppy disk holder that included these disks. *Id.*

5. Jerry Gales

147. Kay has known Mr. Gales since some time in the 1980s. Tr. 1240. Kay and Gales have a written management agreement under which Kay will manage WFPF295, a station

licensed to Mr. Gales. WTB Ex. 326. The agreement is dated November 2, 1994. WTB Ex. 326, p. 1. The terms of the agreement are substantially identical to Kay's written agreement with Marc Sobel. *Compare* WTB Exs. 326 and 340. Kay believes he prepared the application that led to the issuance of the license and helped choose the frequency. Tr. 1242. Shortly after the license was granted, Kay and Mr. Gales entered into an oral agreement under which Kay would put customers on the station, market the station, and perform system maintenance. Tr. 1241. According to Kay, the oral agreement was entered into because Mr. Gales lacked the health needed to maintain repeaters. Tr. 1243. Mr. Gales has not received any money from the operation of that station. *Id.* From mid-1990 to 1996, Kay allowed Mr. Gales to use space in Kay's office to run his pager company. Tr. 1244. Kay provided the equipment needed to construct the station. Tr. 1245. If the license was terminated, Kay would take the equipment down and use it elsewhere. *Id.*

E. Effect of Transfer of Control Issue

1. Background of Sobel-Kay Relationship

148. Marc D. Sobel has been in the land mobile business since 1976. Tr. 1707-1709. Mr. Sobel sells two-way radios, services radios, operates repeaters, provides customers with repeater service, maintains and installs repeaters, and does consulting. Tr. 1708.

149. Mr. Sobel has known Kay since about 1975. Tr. 1712, WTB Ex. 328, p. 71, WTB Ex. 329, p. 326.⁶ They first met when Mr. Sobel was working at Sandy's Electronics and Kay

⁶ The references to WTB Exhibits 328 and 329, the transcripts of the Sobel hearing, are to the page

was a customer there. WTB Ex. 329, p. 326. Kay and Mr. Sobel were both active in Citizens Band radios in the 1970s (WTB Ex. 329, p. 326), and they have been friends since the 1970s. WTB Ex. 328, p. 71, WTB Ex. 329, pp. 326-327. They have repaired equipment, shared leases, and helped each other for more than a decade. WTB Ex. 329, p. 327. Since the mid-to-late 1980s, Mr. Sobel has installed, maintained and serviced Kay's repeaters as a contractor paid by Kay. WTB Ex. 328, p. 72, 106, WTB Ex. 329, p. 327. Mr. Sobel repairs and maintains approximately 350 stations that Kay currently owns or manages. WTB Ex. 328, p. 105. Mr. Sobel has had the first call to repair, maintain, and install Kay's stations (WTB Ex. 328, p. 105), except for three sites where another contractor is located much closer to the sites than Mr. Sobel. WTB Ex. 328, p. 105, WTB Ex. 329, p. 328. Kay generally turns to Mr. Sobel when there is a difficult and complicated technical problem that Kay will not handle personally. WTB Ex. 329, p. 328. Kay will also ask Mr. Sobel to contact a potential customer to solve a troubling problem that Kay's regular staff is unable to solve. WTB Ex. 329, p. 327. Mr. Sobel might perform that service as often as twice a month. WTB Ex. 328, p. 72, WTB Ex. 329, p. 328. On occasion, Mr. Sobel will also contact someone on Kay's behalf to determine whether they are still operating a station. WTB Ex. 328, p. 72. If they were not operating, Mr. Sobel will help Kay get the license cancelled. *Id.* If the licensee was operating, Mr. Sobel would attempt to convince the licensee to change over to Kay's system. WTB Ex. 328, pp. 72-73.

150. WTB Ex. 338 consists of invoices Mr. Sobel sent to Kay for work Mr. Sobel did on Kay's behalf. Tr. 1701, WTB Ex. 328, p. 114. The invoices cover the period October 1990 to

numbers contained in the transcripts, as opposed to the physical location of the pages within the exhibit.

April 1997. WTB Ex. 338, pp. 1, 80. The invoices reflect approximately 3,360 hours of work that Mr. Sobel performed for Kay and requested payment for that work. WTB Ex. 338, pp. 1-80. Over that six and a half-year period, Mr. Sobel charged Kay for an average of approximately ten hours per week of work.⁷ Mr. Sobel works at his business from 30 to 60 hours a week. WTB Ex. 328, p. 199. In July 1997, Mr. Sobel billed Kay \$30 per hour for work Mr. Sobel performs. WTB Ex. 329, p. 245, WTB Ex. 338, p. 1. At that time, Mr. Sobel charged end users \$75 per hour, and other dealers \$30 to \$50 per hour. WTB Ex. 329, p. 245. Kay receives the lowest rate Mr. Sobel charges. *Id.* In 1990, Mr. Sobel charged Kay \$18 per hour, but his standard rate was \$50 per hour. WTB Ex. 329, p. 246. Kay has always received a reduced rate because of the large amount of work Mr. Sobel performs for Kay. *Id.*

2. Background of the Management Agreement Stations

151. In the early 1990s, Mr. Sobel became interested in holding 800 MHz licenses himself. WTB Ex. 328, p. 73. Mr. Sobel asked Kay if he would help Mr. Sobel get involved in 800 MHz licenses. *Id.*, Tr. 1712. Mr. Sobel approached Kay for assistance because of their friendship and he knew Kay had been successful with 800 MHz stations. Tr. 1712-1713. Kay agreed to help. WTB Ex. 328, p. 73. While Mr. Sobel believes he could have prepared the applications himself, he relied on Kay to prepare the applications because Kay had the software and additional knowledge needed to prepare the applications, and because it was more convenient to have Kay prepare the applications. WTB Ex. 328, p. 184.

⁷ The figure of approximately ten hours a week is calculated by dividing 3,360 hours by 330 weeks, which represents 6 1/2 years times 50 weeks a year (assuming, for ease of calculation, that Sobel is on vacation or otherwise not working two weeks out of the year).

152. Around the time the first 800 MHz station in Mr. Sobel's name⁸ was being constructed in the early 1990s, Mr. Sobel and Kay reached an oral agreement under which Kay would provide the equipment and money needed to construct and to operate the Management Agreement stations, manage and market those stations, and pay all the operating expenses. WTB Ex. 328, p. 103-104. In return, Kay would receive the first \$600 of revenue each month from each station, and the revenue over and above that would be split equally between Kay and Mr. Sobel. WTB Ex. 328, p. 104. Mr. Sobel testified at this hearing that he “could have borrowed the money or used my credit” to purchase repeaters himself. Tr. 1724. Mr. Sobel did not have the disposable funds to invest in 800 MHz at the time he obtained the licenses. WTB Ex. 328, p. 187. Mr. Sobel admitted at the hearing proceeding involving the revocation of his station licenses (WTB Docket No. 97-56) that he did not have the option of going into 800 MHz on his own. *Id.* Mr. Sobel estimated that it would cost \$500 to \$600 a month to lease a repeater site and the equipment needed for the repeater, install, maintain and repair the equipment, and obtain insurance. WTB Ex. 328, p. 104.

153. Under the oral agreement, Mr. Sobel was to be the person responsible for constructing, maintaining, and repairing the Management Agreement stations in his name. *Id.*, Tr. 1724. Mr. Sobel performed most of the actual construction and installation. WTB Ex. 328, p. 107. Mr. Sobel performed that work as a contractor for Kay, and Kay paid him an hourly fee for that work. WTB Ex. 328, p. 106-108, Tr. 1724-1725. Sobel and Kay cannot tell, based upon Sobel's invoices, what work Sobel has done on the Management Agreement stations and what

⁸ For ease of reference, the 800 MHz stations licensed in Sobel's name and managed by Kay will be referred to as the Management Agreement stations.

work relates to Kay's stations. WTB Ex. 328, p. 116, 243. Kay selected and purchased the equipment needed to construct the stations. WTB Ex. 328, p. 107, WTB Ex. 329, pp. 351, 353. Kay did not keep track of which equipment went to stations licensed to him and which equipment went to the Management Agreement stations (or other stations he managed). WTB Ex. 329, p. 354.

154. At some point between the time Kay and Mr. Sobel entered into their original oral agreement and the time they entered into a written management agreement, they orally agreed that Kay would have an option to purchase the Management Agreement stations for \$500 each. WTB Ex. 328, p. 108. Kay asked for the option because he needed to protect himself since his customers were on Management Agreement stations. WTB Ex. 329, p. 365-366.

155. At some point in late September or October 1994, in response to a Freedom of Information Act (FOIA) request, Kay received a draft hearing designation order relating to his qualifications to be a Commission licensee. WTB Ex. 329, p. 261, Kay Ex. 5.⁹ Kay informed Mr. Sobel that the draft order contained the following language (or substantially similar language):¹⁰ "Information available to the Commission also indicates that James A. Kay, Jr. may have conducted business under a number of names. Kay could use multiple names to thwart our channel sharing and recovery provisions. We believe these names include . . . AirWave Communications and Marc Sobel, d/b/a AirWave Communications." Tr. 1751-1752.

156. Based on the language in the draft hearing designation order, and because of Kay's

⁹ The draft hearing designation order was apparently provided to Kay inadvertently in response to one of his FOIA requests.

¹⁰ The quoted language is from the actual order designating Kay's licenses for hearing. WTB Ex. 329, p. 258-259.

problems with the FCC and his knowledge that parties had complained about the relationship between Mr. Sobel and Kay, Mr. Sobel asked Kay to have their oral agreement reduced to writing. Tr. 1761-1762, WTB Ex. 328, p. 108-109, WTB Ex. 329, p. 262. On October 28, 1994, Kay and Mr. Sobel executed a "Radio System Management and Marketing Agreement." WTB Ex. 339, WTB Ex. 328, p. 108. Brown & Schwaninger, a law firm that represented both Kay and Mr. Sobel, prepared the agreement. Tr. 1762-1763, WTB Ex. 328, pp. 109-10. . When they entered into the written management agreement, Mr. Sobel was satisfied with Kay's performance. Tr. 1763. When asked whether the written agreement changed the way they operated, Mr. Sobel replied, "Nothing changed at all." Tr. 1764.

157. Under Paragraph VII A. of the management agreement, Kay was required to pay Mr. Sobel an option fee of \$100 as consideration for the option to purchase the Management Agreement stations. WTB Ex. 339, p. 4, Tr. 1774, WTB Ex. 328, p. 111. Kay initially forgot to pay the option fee. WTB Ex. 328, p. 111, Tr. 1774. In addition, the agreement had some clerical errors, and some stations were omitted from the agreement. WTB Ex. 328, p. 110-111, Tr. 1774. Kay and Mr. Sobel entered into a new written agreement to allow Kay to pay the \$100, thus making the option binding, and to make the corrections to the agreement. Tr. 1774. WTB Exs. 340 and 341, which are the December 30, 1994 agreement and an addendum, constituted (until recently) the written agreement between Kay and Mr. Sobel concerning the Management Agreement stations. WTB Ex. 328, p. 112. Prior to the Sobel hearing in WTB Docket No. 97-56, there were no other written agreements between Kay and Mr. Sobel concerning the Management Agreement stations. WTB Ex. 329, p. 361.

158. The agreement stated that it was effective for ten years. WTB Ex. 340, p. 6. The agreement automatically renews for five consecutive ten-year periods unless Kay alone gives notice to the contrary at least ninety days prior to the end of the term. *Id.* Mr. Sobel has no right to prevent the agreement from automatically renewing. *Id.*

3. Access to and Use of Equipment

159. Paragraph III of the Management Agreement provides:

Agent [Kay] shall be the sole and exclusive supplier of all equipment and labor required to maintain and repair the Stations' facilities, employing Agent's reasonable best efforts. Agent may either supply required labor and equipment and labor directly or may supply required equipment and labor through arrangements with other firms on behalf of Agent.

WTB Ex. 340, p. 3. Kay selected, purchased and provided all the equipment used in connection with the Management Agreement stations. WTB Ex. 328, p. 107, WTB Ex. 329, pp. 351, 353. Paragraph IV of the agreement provides that all equipment provided to Kay shall remain his sole and exclusive property. WTB Ex. 340, p. 3. The equipment was "leased" to Mr. Sobel for a term coterminous with the agreement, but Mr. Sobel was given no title, interest, or control over the equipment, except to the extent he was granted permission to use Kay's equipment. *Id.*

160. As discussed below in greater detail, Mr. Sobel currently works on maintaining and repairing the Management Agreement stations. WTB Ex. 328, p. 112. Nothing in the management agreement provides that Mr. Sobel will be the person who maintains and repairs the stations. WTB Ex. 328, p. 113, WTB Ex. 329, pp. 359-360. Paragraph XX of the management agreement provides that the agreement "is the entire agreement between the Parties with respect to the subject matter thereof, making void all previous negotiations and agreements" WTB

Ex. 340, p. 8. Mr. Sobel testified that it was not necessary to have a provision in the agreement stating that he would maintain and repair the facilities because he was already performing that work. WTB Ex. 328, p. 113. Kay testified that it was a "basic assumption" that Mr. Sobel would be performing the work. WTB Ex. 329, p. 360.

161. Most of the Management Agreement stations and Kay's stations are located high on mountaintops. WTB Ex. 328, p. 118. Generally, Mr. Sobel must drive through locked security gates to get to the sites. *Id.* The buildings at the sites, as well as the cabinets containing the equipment, are often locked. *Id.* For both the Management Agreement stations and the Kay stations, Mr. Sobel has in his personal possession the keys he needs to access the sites and the equipment. *Id.* Generally, the control points for the Management Agreement stations are located at Mr. Sobel's home office, Mr. Sobel's car, and Kay's office. WTB Ex. 328, p. 118-119.

162. Paragraph VIII of the Management Agreement, provides, *inter alia*:

Licensee shall retain ultimate supervision and control of the operation of the Stations. Licensee shall have unlimited access to all transmitting facilities of the Stations, shall be able to enter the transmitting facilities and discontinue any and all transmissions which are not in compliance with the 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.

WTB Ex. 340, p. 5.

4. Control over Daily Operations

163. Paragraph I of the management agreement provides that Kay shall be the sole and exclusive agent for the sale of all services provided by the Management Agreement stations.

WTB Ex. 340, p. 2, WTB Ex. 328, p. 119. Kay's duties include all administrative duties

associated with marketing the stations, including, but not limited to, bookkeeping, billing and collections. WTB Ex. 340, p. 2. Kay is given the "sole and exclusive discretion" to negotiate and execute contracts with customers, and Mr. Sobel is relieved of any liability under those contracts. *Id.* Paragraph II of the management agreement appoints Kay as the "sole and exclusive Agent for the management of the Stations' transmitting facilities and associated business." *Id.* Kay's duties under this provision include "all management functions associated with the operation of the Stations, including but not limited to the invoicing of users, collection of payments from users, bookkeeping and accounting processes, disbursement of payments to suppliers of goods and services, and control point operation." *Id.* Kay employs a staff to assist in these duties. WTB Ex. 329, pp. 339, *et seq.* Kay has the sole and exclusive right to negotiate and execute any contracts entered into under Paragraph II of the Management Agreement, and Mr. Sobel has no liability under those contracts. WTB Ex. 340, p. 2.

164. When a customer receives service on one of the Management Agreement stations, the customer signs a contract which is also signed by Kay. WTB Ex. 328, p. 119. The Management Agreement stations have several hundred customers. *Id.* Mr. Sobel does not know the number of customers per month who have signed up to be on the Management Agreement stations in 1997. WTB Ex. 328, p. 122. At this hearing, Mr. Sobel testified that he has a good sense of how many customers the stations have because "I do all the turn ons and turn offs of the systems on the programming." Tr. 1741. Only Mr. Sobel and Kay have the access codes needed to activate repeaters. WTB Ex. 328, p. 124. Kay's repeaters have computerized controllers, and each customer is assigned a specific code. *Id.* When the customer's code is activated, and the

customer's radio transmits that tone, the repeater will repeat that customer's signal. WTB Ex. 328, pp. 124-125. Mr. Sobel testified that he turns on "all" the codes for the Management Agreement stations, and he conducts the majority of the activations on Kay's stations. WTB Ex. 328, pp. 123-124. Kay testified that Mr. Sobel performs slightly more than two-thirds of the activations for both the Management Agreement stations and Kay's stations. WTB Ex. 329, pp. 347-348. When Mr. Sobel reviews frequency placement and activates customers on either the Management Agreement stations or Kay's stations, Kay pays Mr. Sobel an hourly fee for that work. WTB Ex. 328, p. 125.

165. Mr. Sobel recruits customers himself on his 470-512 MHz stations. WTB Ex. 328, p. 119. On occasion, Mr. Sobel will be approached by a customer who would be better placed on an 800 MHz system. *Id.* In that instance, Mr. Sobel will refer those customers either to Mr. Kay's stations or one of the Management Agreement stations. WTB Ex. 328, pp. 119-120. He has not placed more than a handful of customers on the Management Agreement stations. WTB Ex. 328, p. 120. Mr. Sobel analogizes this arrangement to a resale arrangement under which cellular or paging service is resold by entities that do not hold licenses in those services. Tr. 1736-1737.

166. Kay's employees deal with the customers. WTB Ex. 329, p. 343. Kay's salespeople sell radios. WTB Ex. 329, p. 344. The salespeople do not know whether they are selling time on a repeater Kay owns, a repeater Kay manages, or a community repeater. *Id.* Some of Kay's customers are on Kay's stations, some customers are on just managed stations, and some customers are on both types of stations. WTB Ex. 329, pp. 348-349. The important

consideration in determining where a customer is placed is the needs of the customer. WTB Ex. 329, pp. 344-345. Kay looks at factors such as where service is needed, how much airtime is needed, when the airtime is needed, and whether the customer is conventional or trunked. WTB Ex. 329, p. 345. Ownership of the repeaters is not an important factor in determining where to place a customer, and Kay does not prefer stations licensed in his name to stations licensed to Mr. Sobel. WTB Ex. 329, p. 346. When a salesperson has made a sale, the salesperson will go to Barbara Ashauer and request that a code and frequency be assigned. WTB Ex. 329, p. 344. About half the time, the salesperson will make the initial recommendation as to where to place the customer. WTB Ex. 329, p. 345. Sometimes, Ms. Ashauer can take care of assigning the codes herself. WTB Ex. 329, p. 347. If Ms. Ashauer needs specific frequencies assigned or needs further assistance for some other reason, she will ask either Mr. Sobel or Kay for assistance, regardless of who owns the repeater in question. *Id.* Mr. Sobel assigns "an awful lot" of frequencies for Kay's stations. *Id.* Once the frequency and code are assigned, Ms. Ashauer generates a request to activate the customer's radio system. *Id.*

167. Kay and his employees bill customers and collect fees from customers for the Management Agreement stations. WTB Ex. 328, p. 120. A lot of customers (about 500 to 700) use both Kay stations and Management Agreement stations. WTB Ex. 329, pp. 348-349. By and large, those customers receive one consolidated bill, unless the customer wishes to receive separate bills. WTB Ex. 329, p. 349. Kay or his employees perform the bookkeeping relating to the Management Agreement stations. WTB Ex. 328, p. 120. Kay or his employees make sure any obligations incurred with respect to the Management Agreement stations get paid. *Id.* Kay

or his employees keep and maintain the financial records for the Management Agreement stations. WTB Ex. 328, pp. 120-121, WTB Ex. 340, p. 6. Mr. Sobel reviews the revenue levels for the Management Agreement stations every few months or six months. WTB Ex. 328, pp. 121-122. He obtains the information from Kay's computer. WTB Ex. 328, p. 121.

168. Mr. Sobel can learn of the need to work on the Management Agreement stations either from Kay's office or by monitoring the stations himself. WTB Ex. 328, p. 116. Mr. Sobel monitors the Management Agreement stations possibly at least once a month. WTB Ex. 328, p. 117. Mr. Sobel monitors Kay's stations as often as he monitors his own stations. *Id.* Currently, Kay rarely monitors the stations, although he monitored the stations more regularly until a couple of years ago. *Id.* Some of Kay's employees also monitor the Management Agreement stations when a customer calls and says a station does not work. *Id.* While giving a time frame is difficult, Mr. Sobel estimates that he maintains or repairs Management Agreement stations as a whole several times a month. WTB Ex. 328, p. 114. Mr. Sobel cannot distinguish based upon his invoices what work he has done on the Management Agreement stations and what work relates to Kay's stations. WTB Ex. 328, p. 116. It did not make any difference to Kay whether Mr. Sobel was working on a Management Agreement station or a station licensed to Kay. WTB Ex. 329, p. 243. Whenever Mr. Sobel performs work relating to a Management Agreement station, he is working as a contract technician for Kay, and Kay pays Mr. Sobel an hourly fee for that work. Tr. 1729, WTB Ex. 328, p. 106.

169. Kay's technicians will check the repeaters and other equipment for stations Kay owns or manages. WTB Ex. 329, pp. 341-343. A technician working on a repeater would have

no reason to know who holds the license. WTB Ex. 329, p. 343. Similarly, a salesperson selling airtime to a customer would have no reason to know whether the station the customer will be using is licensed to or managed by Kay. WTB Ex. 329, p. 344. By and large, none of Kay's employees performing work on a station would have any reason to know to whom the station is licensed. WTB Ex. 329, p. 340.

5. Application Preparation and Policy Decisions

a. Preparing of Applications

170. Kay did the research needed to locate available frequencies for which Mr. Sobel could apply. WTB Ex. 328, p. 73. Kay would then tell Mr. Sobel of the frequency and review with Mr. Sobel information such as who else was on the channel, where the repeater would be located, and the need for the repeater. WTB Ex. 328, p. 73-74.

171. The Management Agreement stations are located at the following sites: Mount Lukens, Santiago Peak, Snow Peak, Hollywood Hills, Mount Wilson, Heaps Peak, and possibly Sunset Peak. WTB Ex. 328, p. 79-84. Mr. Sobel uses the Hollywood Hills site for his 470 MHz stations, and he leases that site from Louella McNeal. WTB Ex. 328, p. 78. Mr. Sobel, in turn, subleases that property to Kay, who pays Mr. Sobel \$7,000 to \$8,000 a year in rent. WTB Ex. 328, p. 78, 250-251. For each of the other sites, Kay made the arrangements with the property owners to make sure the Management Agreement stations could operate from those sites, and he has leases with the property owners for those sites. WTB Ex. 328, p. 85. Under the management agreement, a transmitter site may be relocated on sixty days notice to Kay only if the relocation is in the best interests of both parties. WTB Ex. 340, p. 5.

172. Mr. Sobel initially testified that Kay prepared "most" of the Management Agreement applications. WTB Ex. 328, p. 74. He claimed that there were times when he prepared the applications personally, but he could not recall which applications he prepared. *Id.* The applications were prepared using specialized software from Slattery Software that Kay had on his computer. WTB Ex. 328, p. 74-75. Kay had a template in his computer that showed the various locations and contained the technical information needed for the applications. WTB Ex. 328, p. 206. The majority of Mr. Sobel's applications contain handwritten information concerning emission designators. WTB Ex. 328, pp. 76-78. In every case, the handwriting is that of Kay. WTB Ex. 328, pp. 76-78. While Mr. Sobel believes he could have prepared the applications himself, he knew Kay had the software and additional knowledge needed to prepare the applications, and it was more convenient "that he did the applications for me." WTB Ex. 328, p. 184.

173. Mr. Sobel reviewed and signed each application for the Management Agreement stations. WTB Ex. 328, p. 75. The only edits Mr. Sobel can remember making to the applications occurred a couple of times when Kay misspelled Mr. Sobel's name. *Id.* At this hearing, Mr. Sobel claims that there were occasions where he asked that a different frequency be applied for because he did not wish to be on the same frequency as an "unfriendly competitor." Tr. 1714. He also testified that there were instances in which he decided not to apply for frequencies because only a very small number of mobiles could be licensed. *Id.*

b. Clearing of Channels and Acquisition and Disposition of Licenses

174. Unlike other services, land mobile frequencies are often shared with different

licensees on the same frequency in the same area (an encumbered channel). WTB Ex. 328, p. 193. Under certain circumstances, however, a licensee can get exclusive use of a channel in an area (a clear channel). *Id.* A clear channel has several advantages over an encumbered channel. With a clear channel, a licensee can operate in an enhanced mode, there is no need to monitor the frequency for other users, and clear channels are substantially more valuable than encumbered channels. WTB Ex. 328, p. 195. There are several actions that can be taken towards clearing channels. If a party finds that another licensee has not operated its station for a year, it can ask the Commission to cancel the license and, in some cases, give the party the first opportunity to apply for the cancelled license. WTB Ex. 328, pp. 196-197. If a co-channel station is operating, the licensee can attempt to persuade the co-channel licensee to cancel or to assign its license in return for new equipment or for favorable rates on repeater service on the licensee's repeaters. WTB Ex. 328, pp. 197-198.

175. All of the initial applications for the Management Agreement stations were for encumbered channels. Tr. 1747-1748, WTB Ex. 328, pp. 198-199. Mr. Sobel claims that he did not have the time or the money to do the work needed to clear the channels himself. WTB Ex. 328, p. 199. Kay and Mr. Sobel therefore agreed that Kay would do the work and spend the money needed to clear the channels used by the Management Agreement stations. *Id.* Mr. Sobel knew Kay had been successful in this activity in the past, and he believed Kay had the knowledge and staff needed to do this work. *Id.* Mr. Sobel works from 30 to 60 hours a week. *Id.* As a contractor, he has assisted Kay in doing the work needed to clear Kay's channels. WTB Ex. 328, pp. 72-73.

176. Kay made the arrangements for Mr. Sobel to acquire the licenses that Kay acquired through assignment. WTB Ex. 328, p. 101. Mr. Sobel paid nothing for those licenses, and he does not know whether money was paid for those licenses (or any of the other details on the assignments). WTB Ex. 328, p. 102.

177. Under Paragraph VII of the management agreement, Kay has the exclusive option to purchase any of the Management Agreement stations at any time for \$500 each. WTB Ex. 340, p. 4. The sale includes not only the license and the station assets but also any business created by operation of the station. WTB Ex. 340, p. 5. Paragraph VII E. requires Mr. Sobel to "maintain exclusive ownership and control of the license for the Stations" until and unless the licenses are assigned to Kay. *Id.* Therefore, Mr. Sobel cannot sell any of the Management Agreement stations without Kay's permission. WTB Ex. 328, pp. 125-126. In contrast, if Kay wished to sell any of the Management Agreement stations, he could exercise his option to purchase the station and then direct Mr. Sobel to assign the station to Kay's designee, even if Mr. Sobel objected.

178. There are three stations subject to the Management Agreement that have been sold. WTB Ex. 328, p. 126. One station was sold to William Matson for between \$70,000 and \$100,000. WTB Ex. 328, p. 126, 366. Kay arranged for the sale of that station. WTB Ex. 329, p. 366. Mr. Sobel received \$20,500 from that sale, and Kay received the balance of the money. WTB Ex. 328, pp. 126-127, WTB Ex. 329, pp. 366-367. Part of Kay's consideration for receiving the majority of the sales proceeds was expenses he incurred in clearing the channel. WTB Ex. 328, p. 127, WTB Ex. 329, p. 373. Mr. Sobel asked Kay for \$20,000, and Kay agreed.

WTB Ex. 329, p. 374. With respect to the second station that was sold, Mr. Sobel only received \$500; Mr. Sobel does not know how much money the second station was sold for. WTB Ex. 328, pp. 127-128. The third station was sold as part of a trade, so no money was exchanged. WTB Ex. 328, p. 127. The exchange appears to be part of Kay's work in clearing the Management Agreement channels because Mr. Sobel received a cancellation of a license on another frequency, which increased the value of one of his licenses. WTB Ex. 328, p. 128.

179. According to Mr. Sobel, a party approached Kay and offered \$1.5 million for the Management Agreement stations. Tr. 1749. Mr. Sobel testified that he thought the stations had potential to gain value and generate income, and he wanted to keep the stations. Tr. 1750. He claims that Kay was interested in selling the stations in order to get funds to meet his litigation costs, but Kay “really didn’t want to sell the stations earlier.” Tr. 1749-50. Mr. Sobel testified that he is not in the business of selling stations. Tr. 1749. If the fifteen stations each made \$1,000 a month, Mr. Sobel would receive \$3,000 a month under the management agreement.¹¹ If Kay exercised his option under the management agreement, Kay would have to pay Mr. Sobel \$500 for each station (\$7,500 for the fifteen stations). WTB Ex. 340, p. 4.

c. Setting of Prices

180. Paragraph I of the management agreement gives Kay the sole right to negotiate contracts with customers. WTB Ex. 340, p. 2, WTB Ex. 328, p. 128. Mr. Sobel's rights to influence the prices charged to customers on the Management Agreement stations are contained in Paragraph VIII of the Management Agreement. WTB Ex. 340, p. 5. That paragraph gives Mr.

¹¹ The first \$9,000 a month, or \$600 a month times fifteen stations, would go to Kay. The remaining \$6,000 would be split equally between Kay and Sobel.

Sobel the right to reject any end user contracts within five days after Kay presents the end user contract to him if the rejection is "reasonable and based on the mutual interests of the parties."

Id. Mr. Sobel reviews contracts with customers on the Management Agreement stations maybe once or twice a month. WTB Ex. 328, p. 122. Out of the several hundred customers on the Management Agreement stations, there have been two or three occasions on which Mr. Sobel changed a rate negotiated by Kay or his employees. WTB Ex. 328, p. 123. On one occasion, involving Sun West Materials, Mr. Sobel and Kay had discussed charging one rate, but Mr. Sobel decided to charge a higher rate. *Id.* The reason for the higher rate was that Sun West was going to receive exclusive use of the repeater. Tr. 1743.

181. The standard rate charged to customers of both the Management Agreement stations and Kay's stations is \$12.00 a month for each mobile unit. WTB Ex. 328, p. 129. Kay charges the same rate for use of the 800 MHz stations licensed in his name. *Id.* Since Kay's salespeople do not know whether they are selling time on a station owned by Kay or a station managed by Kay (WTB Ex. 329, p. 344), it follows that the rates for both types of stations would always be the same unless there were special negotiations. The last change in the standard rate was approximately three or four years ago. WTB Ex. 328, pp. 129-130. Mr. Sobel does not recall whose idea it was to make that change. WTB Ex. 328, p. 130. At times, discounts are negotiated with the larger customers. WTB Ex. 328, p. 129. According to Mr. Sobel, Kay or his employees do the majority of the negotiating with customers, but he also does some negotiating with customers. *Id.* Mr. Sobel only discusses rates with Kay or his employees a handful of times a year, if that. *Id.* Mr. Sobel also handles special problems involving Kay's customers. WTB